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LEGAL TERMINATION IN PREVENTIVE MEASURES

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Abstract

This study will present the institution the legal termination of the preventive measures in light of the new code of criminal procedure, which on the one hand expanded the scope of preventive measures that can be taken against a defendant, and on the other hand has introduced new regulations which we will refer at.

We will analyze the situation of each one of the preventive measures by the time the measure will be legally terminated, with reference to the issues that were not covered by the legislature and not least showing contradictions encountered in judicial practice.

Keywords: *preventative measures, custody, reasonable time, preventive arrest, prosecution.*

1. Introduction

The realities of juridical law from the period of the 1969 Criminal procedure code have revealed a lack of promptitude while carrying out criminal trials, overloading of prosecuting offices and courts, an excessive periods of time required by the procedures, unjustified delays of trials, suspension of cases because of procedural reasons and significant social and human costs that have thus generated a lack of trust in the ranks of the trial participants regarding the efficiency of the criminal justice act.

Out of these, aspects regarding preventive arrest, the length of the procedures, the arrangement of responsibilities and evidence in criminal matters have been the subject of a number of trials at the European Court of Human Rights in which Romania has participated as a party. Taking all these into consideration, the need to eliminate the deficiencies that have caused Romania's numerous convictions by the European Court of Human Rights has become evident1.

As such, there was a need for an urgent legislative intervention that would confer efficiency to the objectives that were taken into account by the initiators of the new codes, more precisely the acceleration of the criminal procedures, simplifying them and the creation of a unitary jurisprudence in agreement with the jurisprudence of the European Court of Human Rights.

The present modification of the Criminal procedure code are in the spirit of the new trends in international criminal politics preparing the juridical-criminal conditions for a pan-European unification in terms of criminal legislation. We thus observe that the explicit reglementation of the principle of proportionality is being carried out to each preventive measure in terms of the seriousness of the accusation brought upon an individual, as well as the principle of the crucialness of such a measure in order to carry out the legitimate purpose intended through its elaboration.

On the matter of preventive arrest measure, its exceptional character is regulated as well as its subsidiary character in relation to other preventive measures that do not deprive liberty. As such, preventive arrest can be carried out only if the adoption of another preventive measure is not sufficient in pursuing the intended legitimate purpose. As an absolute novelty for the Romanian procedural criminal legislation, a new preventive procedure has been implemented, more precisely the house arrest procedure, adopted from the Italian Criminal procedure code, that aims, by introducing this new institution, to widen the posibilities for individualization of preventive measures according to the particularities of each criminal case and according to the person that represents the accused of a criminal trial.

This study wishes to analyze the institution of right termination of preventive measures from the perspective of the new reglementations, in agreement with the European Convention of Human Rights and in the light of the criticism brought by the Constitutional Court regarding the analyzed subject. We believe that this paper is of special importance as preventive measures seek the limitation or even the deprivation of rights given to citizens that, on the other hand, are in conflict with criminal law at a given time, a situation which triggers the criminal procedure mechanism that allows these preventive measures.

Although a year has passed since the new codes were put into effect, by analyzing the judicial doctrine and practice we observe that many law problems arise when we discuss the matter of the preventative measures instutitution.

2. Content

Article 5 of the European convention, art. 9 of the Pact *(everyone has the right to liberty and security of*

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[1] For further details the Exposition of reasons for the law project regarding the criminal procedure code may be consulted, www.just.ro.

person; no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law) and art. 6 from the Charter (everyone has the right to liberty and security of person) regulates the right to liberty and security of person for the purpose of preventing arbitrary deprivations of liberty by the authorities towards a person, as well as limiting the length of the liberty deprivation[2]. Although most of the legislations protect citizens' right to liberty, it was necessary to regulate in what situations preventative or liberty depriving measures can be taken against individuals that come into conflict with criminal law.

As such, the legislator has regulated preventive measures and other procedural measures as part of the 5th Section of the General part of the New Criminal procedure code. The procedural measures have been defined[3] as procedural criminal law institutions put at the disposal of criminal judiciary bodies and consisting of certain deprivations and constrainments, personal or real, determined by the conditions and circumstances in which the criminal trial is being carried out. In matters of functionality intended by the legislator, these measures work as legal methods for prevention or elimination of circumstances or situations that are capable of endangering the efficient carrying out of the criminal trial by the obstacles, difficulties and misleading factors they may produce.

By regulating these institutions, the legislator intended to protect the proper development of a criminal trial, thus contributing to attaining the immediate objective of the criminal trial, which is to promptly and completely asses the criminal acts so that any person that has committed a crime will be punished according to their culpability and that no innocent person will be held criminally responsible. At the same time, the ability to guarantee compensations for the individuals who take part in the criminal trial as a civil party was taken into account, in the event they were materially or morally harmed by the committing of a crime.

The criminal procedural code regulates the following measures belonging to this institution: preventive measures, medical safety measures, insurance measures, returning of objects and reestablishing the status quo prior to the realization of the crime.

As this paper wishes to address the institution of right termination on the subject of preventive measures, we have identified in the specialized doctrine an extensive and complete definition that meets all demands. As such, preventive measures are criminal procedural law institutions with a restrictive character, by which the suspect or the accused is prevented from engaging in certain activities that would negatively affect the carrying out of the criminal trial and the fulfillment of its purpose[4].

In article 202 of the C.p.c. the legislator has regulated the fact that preventive measures can be taken if they are necessary for assuring the proper development of the criminal trial, for preventing the circumvention of the suspect or the accused from prosecution and, last but not least, for preventing the committing of another crime. Gradually, preventive measures have went through numerous modifications regarding the category of judiciary bodies that are able to carry them out, (until 2003 there was the possibility that the preventive arrest measure could be carried out directly by the prosecutor) the terms in which they can be put into effect and afterwards prolonged or maintained, the unconstitutionality of certain legal texts. As such, in the present regulation the legislator gives judiciary bodies the option between five preventive measures that can assure, depending on case, the proper development of the criminal trial. More precisely, the measures that can be taken against a physical person are retention, judiciary control, judiciary control on bail, house arrest and preventive arrest; and the ones that can be taken against a legal person are: banning the initiation or, depending on the case, suspending the dissolution or abolition of the juridical person, banning the initiation or, depending on the case, suspending the merger, the division or the reduction of the juridical person's social capital, commenced prior to or during the prosecution, the banning of property transactions that are susceptible to provoke the minimization of the juridical person's assets or insolvency, banning the closure of certain juridical documents, established by the judicial body.

Although the legislator has specifically mentioned what the conditions of taking, prolonging or maintaining preventive measures are, jurisprudential needs have determined him or her to regulate institutions through which direct intervention upon them is possible, more specifically legal termination, dismissal and replacement.

As this paper's objective is to analyse the institution of right termination, we will examine each preventive measure, exposing in which situation the discussed solution intervenes.

Legal termination in preventive measures represents that obstacle against the prolonging or maintain of a measure that the legislator has foreseen. By analyzing the provisions of art. 241 of the C.p.c we can see that the instances in which the preventive measures terminate, the instances for all the five measures and instances that can be applied only to the preventive measure of preventive arrest and house arrest have been regulated.

[2] M. Udroiu, O. Predescu, *Protecția europeană a drepturiloe omului si preocesul penal român,* Ed. C.H.Beck, București, 2008, p.388.

[3] V. Dongoroz, et alli, *Explicații teoretice ale Codului de procedură penală român. Partea generală,* vol. V, second edition, Ed. Academiei, Ed. All Beck, București, 2003, p. 308.

[4] Gh. Theodoru, *Drept procesual penal român. Partea specială*, Al. I Cuza University, Faculty of Law, Iași, 1974, Vol. II, p. 194.

As such, the preventive measure of retention[5] can be carried out by the criminal investigation body or by the prosecutor in accordance to the provisions of art. 209 of the C.p.c. in conjunction with art. 202 of the C.p.c if there are evidence or valid indicators from which reasonable suspicion that a person has committed a crime can arise and if this measure is necessary for the proper development of the criminal trial, for preventing the circumvention from prosecution or considering the possibility or preventing another crime.

According to art. 209, paragraph 3 of the C.p.c. this measure can be carried out over a period that cannot exceed 24 hours, this interval not including the time needed to take the suspect or the accused to the headquarters of the judicial body. We can observe that the constituent legislator her/himself has felt the need to regulate in art. 23 paragraph 3 of the Constitution what is the maximum time limit in which this measure can be put into effect. By analyzing the legislations of other countries we can observe that the period of retention can be for 24 hours in Luxemburg, Greece, Canada, Columbia or Germany, in Portugal, Russia or Poland the period is for 48 hours and in Brazil 5 days.

At the same time, the legislator felt the need to make the following, absolutely essential specification, which is that in the event that the suspect or the accused has been brought in front of a prosecution body by means of a summons, the 24 hour time limit does not include the period in which the suspect or the accused has been under the summons. The judiciary organ that emitted the summons has the obligation to immediately hear the person that the summons is addressed to and the accused cannot be present at the prosecutor's office for more than 8 hours. As such, in event that a summons has been emitted and the suspect is required to appear in front of the prosecuting bodies from Sibiu to Bucharest, the period in which he or she will be led there will not be subtracted from the period of retention if this preventive measure will be carried out. Continuing with the same example, if at the headquarters of the prosecuting body there would be more than one accused, there is the possibility that the suspect will be heard after 8 hours at most, thus this period as well will not be deducted from the 24 hours of retention. By drawing a comparison with the old regulation[6] we observe that the legislator in the current regulation has deemed fit that the administrative measure of the police headquarters management will not be deducted from the length of the retention measure.

In the Creangă v. Romania case[7], the European Court of Human Rights has established that the length must be set in the exact moment when the interested person had been brought at the headquarters of the criminal prosecution body and had been subjected to interrogation procedures, when the prosecutor had had enough grounded suspicions to justify measures that deprive liberty for reasons of criminal prosecution, and not from the moment when a formal retainment order had been emitted, which took place a full 10 hours after the initial moment; the Court has thus deemed that the deprivation of liberty of the interested person on the date of July the 16th 2003 from 12 pm to 10 am had no legal basis in the internal law and represented a breach of art.5 parag.1 of the Convention.

As such, the first instance in which the preventive measure of retention will be legally terminated is when the term, as stated by the law, will expire, more precisely at the end of the 24 hours, when the suspect or the accused will be released provided he or she is not retained or arrested because of other reasons. Provided that the prosecution bodies deem it is required for the accused person to be under retention for a shorter period of time, nothing prevents them from declaring this period to be, say, 15 hours. Because of this, the legislator has regulated in art. 241 paragraph 1 second point of thesis of the C.p.c. that the preventive measures are legally terminated when the terms established by the judiciary bodies will expire.

As a guarantee of the disposal of this measure over a certain period of time, retention will be disposed by means of an ordinance by the criminal investigation body or by the prosecutor, by means of an ordinance where it is required to mention the reasons that have brought the adoption of the measure, the date and time when the retention commences as well as the date and time when the retention ends. The precise establishment of the initial moment of the 24-hour term is of the utmost importance, considering the extremely strict approach of the European Court towards illegal deprivation of liberty by continued detention after the maximum duration in which a person can be deprived of liberty has ended[8]. Another guarantee provided by the legislator consists in the obligative character of informing the prosecutor about the adoption of the measure by any means possible and as soon as the measure has been taken by the criminal investigation body.

A problem that we wish to bring into attention is the prescribed solution for when the arrested defendant is taken in front of the rights and liberties judge to propose taking the measure of preventive arrest and the

[5] A parallel can be made with the French Code of procedure where retainment is defined in art. 62-2 parag. 1 as a constraining measure decided by a judiciary police officer, under the control of the judiciary authority, by which a person upon whom there are one or more plausible grounds for suspicion that she or he has commited or is about to commit a crime or offense punishable with prison is kept at the disposal of the investigators.

[6] Art. 144 paragraph 1 second point of thesis of the c.p.c. From the length of the retention period the time in which the person had been deprived of liberty as a result of the administrative measures of the police heaquarter's management, as defined in art. 31 paragraph 1, lit. B from Law no. 218/2002 regarding the organization and functioning of the Romanian Police, will be deduced.

[7] www.echr.coe.int.

[8] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului si procesul penal român,* ed. C.H.Beck, Bucharest, 2008, p.422.

judge reaches the decision before the 24 hours of retention have expired of rejecting the proposal to adopt the measure of preventive arrest or of ordering that the measure of judiciary control be taken. As such, two approaches have appeared in judiciary practice, the first in which the rights and liberties judge does not reach a decision regarding the retention measure, and thus it ceases at the end of the 24 hours, and the second approach in which the rights and liberties judge orders the immediate release of the retained accused[9]. We believe that the second approach represents the legal one and we offer a text argument, more specifically the provisions of art. 227 paragraph 1 of the C.p.c. known as the rejection of preventive arrest proposal during prosecution when the legislator regulates that in the event the rights and liberties judge deems that the legal conditions for the preventive arrest of the accused are not met, she or he rejects by canceling the prosecutor's proposal and facilitating the release of the retained accused. Thus, although the rights and liberties judge is not invested to pronounce anything regarding the preventive measure of retainment, despite that the legislator has offered him or her the possibility to order the immediate release of the retained person, as such the measure will cease before the expiration of the period stated by the law or ordered by the judiciary bodies.

The preventive measure of judiciary control or judiciary control on bail, newly introduced in the criminal procedure code by name but sharing numerous similarities with the measure of being obliged to not leave the country or the town from the 1969 code can be taken by the prosecutor, the preliminary hearing judge, the rights and liberties judge or the court if this measure is deemed necessary in order to assure the proper development of the criminal trial, to prevent the circumvention from prosecution or trial and, last but not least, to prevent another crime.

This preventive measure can be ordered during the criminal prosecution phase by the prosecutor or the rights and liberties judge for a period of 60 days that can be successively prolonged, its maximum duration cannot exceed one year, if the sentence according to the law is a fine or prison up to five years, and two years if the sentence according to the law is life imprisonment or prison for more than five years. At the same time, the preliminary hearing judge can order the carrying out of this measure for a period that cannot exceed 60 days, and the court can order the measure for the same time length, with the mention that in the preliminary hearing phase the total duration of judiciary control or on bail cannot exceed a reasonable length and, in all these cases, it cannot exceed 5 years from the moment of arraignment.

The institution of the length of judiciary control is regulated inside art. 215 of the C.p.c[1] as it was introduced through art. I point 3 of O.U.G. (emergency ordinance) NO. 82/2014 following the declaration of the unconstitutionality of art. 211-217 of the C.p.c., as the judiciary bodies were offered the possibility to order the preventative measure of judiciary control and judiciary control on bail for unlimited periods of time. As such, the Constitutional Court has deemed in decision 712/2014[10] that the interference generated by the judiciary control institution affects fundamental rights, more exactly the right to individual liberty, the right to free circulation, the right to a private life, the freedom of assembly, labor, the social protection of labor and economic liberty, is regulated by the law, more precisely by art. 211-215 from the Criminal procedure code, has the legitimate purpose of carrying out criminal instruction, as it is a judiciary measure applicable in the process of criminal prosecution and trial, imposes itself, as it is adequate in abstracto to the legitimate pursued purpose, it is undiscriminating and necessary in a democratic society in order to protect the values of the state law. Still, the analyzed interference is not proportional to the cause that has determined it. In this respect, the Court has deemed that it does not assure a suitable balance between public and individual interest, as it can be ordered for an unlimited period of time. The principle of proportionality, as it is regulated in the specific situation found in art.53 of the Constitution, assumes the exceptional character of restricting fundamental rights and liberties, which necessarily also implies their temporary character. Since public authorities can resort, in lack of another solution, to the restriction of practicing rights, in order to safeguard the values of the democratic state, it is logical for these grave measures to desist the moment the cause has ended. The Court also states that art.241 paragraph (1) letter a) from the Criminal procedure code regulates that the first method of legally terminating preventive measures is the expiration of the terms as stated by law, followed by the expiration of the terms as established by the judiciary bodies. By the systematic interpretation of the previously mentioned norm, in the context of the provisions of art.241 from the Criminal procedure code in its entirety, the need arises for the existence inside criminal procedural law of the length for which each preventive measure can be ordered, regardless if its depriving or non-depriving of

[9] Closure 270/2014 of the Suceava Court ordered in the criminal file no. 7655/86/2014: Rejection of the proposal of the prosecution office near the Suceava Court to take the measure of preventive arrest for a period of 21 days of the accused VORNICU IONUȚ ANDREI, as unfounded. On the grounds of art. 227 paragraph 2 from the Criminal procedure code reported to art. 202 paragraph 4 letter b from the Criminal procedure code, orders taking the measure of judiciary control against the accused Vornicu Ionuț Andrei, prosecuted for the crime of perjury as stated in art. 273 paragraph 1 and 2 letter. d Criminal code, with aplication in art. 35 paragraph 1 Criminal code. Is ordered the immediate release of the retained accused Vornicu Ionuț Andrei provided he is not retained or arrested by other reasons. 2. Rejects the proposal of the Prosecuting office near the Suceava Court to take to measure of preventive arrest for a period of 21 days of the accused BALAN DENISIA, as unfounded. Is ordered the immediate release of the retained accused BALAN DENISIA provided she is not retained or arrested by other reasons.

[10] To be consulted https://www.ccr.ro/files/products/ Decizie_712_2014.pdf.

liberty character, for which the legislator has not specified in the case of the preventive measure of judiciary control and judiciary control on bail. If in the case of liberty depriving measures the legislator has specified both the lengths for which they can be ordered as well as the maximum period of time for which they can be ordered, in the case of the preventive measure of judiciary control, the provisions of art.211-215 and 241 from the Criminal procedure case do not specify neither the length for which it can be ordered nor its maximum period. As such, the right of judiciary bodies to order judiciary control as a preventive measure for unlimited periods of time appears as evident, such a right presupposing the temporally unlimited restriction of the fundamental rights and liberties that are addressed in the content of this measure. And, according to the previously shown standards for constitutionality, such a restriction is unconstitutional, as the principle of proportionality affects the normative content of the addressed fundamental rights, in other words their substance, as it does not limit itself to the restriction of exercising them.

In the same O.U.G. 82/2014 was it established that the preventive measure of judiciary control and that of judiciary control on bail, which were currently running when the decree was put into effect, are to be continued and maintained until the carrying out of the next control: for a term of maximum 60 days after the decree was put into effect, the prosecutor, in cases that were on the preliminary hearing stage, and the court, in the trial stage, verified by default if the grounds for which the preventive measure of judiciary control and judiciary control by bail were taken still stand, or if new grounds have appeared does justify one of these preventative measure, ordered, according to the situation, the prolonging or the dismissal of the preventive measure. Provided that the judicial bodies have not complied and have not verified the grounding of the preventive measure's claims in a period of 60 days since the discussed decree had been put into effect, the preventive measure of judiciary control or judiciary control on bail will be legally terminated.

The legislator's intervention on the issue of judiciary control length was absolutely necessary, taking into account that art. 241 parag. 1 letter a of the C.p.c was lacking applicability on this issue since the preventive measure could not be considered legally terminated on the expiration of the terms as stated by law or established by judiciary control because these could be ordered for an unlimited period of time due to the legislative void. In the present context, after the conforming of the procedural texts according to the considerations of the Constitutional Court's decisions, the preventive measure will be legally terminated at the moment of expiration of the terms as stated by law (60 days) if an extension or maintenance will not be placed into effect or if the maximum length has been reached, more specifically one, two or five years according to the procedural stage we are at. We thus observe that the prosecutor, the preliminary hearing judge and the court have the obligation to verify if the grounds that have been taken into consideration when deciding to adopt the preventive measure of judiciary control still stand, ordering accordingly either the extension or maintenance, if not, the preventive measure will be legally terminated.

At the same time, the preventive measure of judicial control will also be legally terminated if near the end of the criminal prosecution, the prosecutor will order the solution of halting or putting an end to the prosecution or in the event that the court will pronounce a decision of acquittal, of putting an end to the criminal trial, to not offer a sentence, to postpone putting the sentence into effect or to suspend the carrying out of the sentence under supervision, even if not permanently. The measure will also be legally terminated when the decision to sentence the accused has been declared as permanent. It is common-sense that the preventive measure is to be brought to an end when the criminal prosecution phase is over as the purpose of the measure is no longer available at that procedural moment.

As far as the preventive measures of house arrest and preventive arrest are concerned, the legislator has understood to regulate both the general and the particular cases of legal termination. These two preventive measures can be ordered by the rights and liberties judge, the preliminary hearing judge or by the court if the evidence lead to the reasonable suspicion that the accused has committed a crime and that one or some of the following situations are present:

- the accused has fled or has gone into hiding in order to circumvent him or herself from trial or has made any type of preparations to achieve these purposes;
- the accused has attempted to influence another participant in committing the crime, a witness or an expert, or to destroy, tamper with, hide or circumvent material evidence or to determine another person to carry out this behavior;
- the accused is putting pressure on the aggrieved party or is trying to reach a fraudulent agreement with them;
- there is a reasonable suspicion that, following the commencement of criminal actions against her or him, the accused has willfully committed a new crime or is preparing to commit a new crime;
- it can also be taken if from the evidence there arises the reasonable suspicion that he or she has committed a crime against life, by which the bodily harm or the death of a person has been provoked, a crime against national security etc., or any other crime for which the law states a prison sentence of five years or more and, on the basis of the seriousness of the act, the way and the means by which it was committed, the entourage and environment of the accused, the criminal history and other circumstances surrounding her or his person, it can be affirmed that deprivation of liberty is necessary in order to eliminate a state of danger that targets public order.

The preventive measure of house arrest as well as that of preventive arrest can be ordered with a maximum period of 30 days in the criminal prosecution phase and can be extended only in case of necessity, if the grounds on which the decision was taken are maintained or if new aspects have appeared, the maximum duration being that of 180 days. An absolutely vital aspect is that the duration of liberty deprivation ordered by the measure of house arrest is not taken into consideration in calculating the maximum duration of the preventive arrest measure of the accused in the prosecution phase. As such, a prosecuted accused can be arrested for 360 days, 180 days in house arrest and another 180 in preventive arrest.

In the trial phase, the legislator has understood to regulate in art. 239 C.p.c what the maximum duration of the preventive arrest of the accused is during the initial trials. As such, the total duration of the preventive arrest of the accused cannot exceed a reasonable length and cannot be longer than half of the special maximum as stated by law for the crime that the court has been notified of, but it cannot exceed 5 years. As such, provided that the accused is sent to trial for the crime of homicide which is to be punishable by 10-20 years in prison, although half of the special maximum would be 10 years, the maximum duration of preventive arrest will be 5 years. This term begins either when the court is notified, in the event that the accused is sent to trial while being under preventive arrest, or when the warrant is put into effect in the event the arrest was ordered in the preliminary hearing, the trial phase or of lack thereof.

We can observe that in the criminal procedure code the institution of the maximum duration of house arrest in the trial phase is not regulated, we believe that this is solely an omission from the part of the legislator and that the provisions of art. 239 of the C.p.c will apply *mutatis mutandis* for this preventive measure as well. In the specialized doctrine[11] it is affirmed that in the preliminary hearing phase and in the trial phase the preventive measure can be ordered for an indefinite duration, intervened by the obligation the preliminary hearing judge or the court has to periodically check its legality and groundedness. Such an interpretation lies in contradiction to the considerations of the Constitutional Court's decision that has pronounced itself regarding the unconstitutionality of judiciary control, in the sense that the legislator had not regulated the maximum duration for which this measure could be ordered.

The first situation when these two discussed preventive measures are legally terminated is on the expiration of the terms as stated by law or established by the judiciary bodies or on the expiration of the 30 day term, if the preliminary hearing judge or the rights and liberties judge has not acted towards the verification of the legality and groundedness of the house arrest in this time, respectively on the expiration of the 60 day term, if the court has not acted towards the verification of the legality and groundedness of the house arrest in this time.

In the event it has been ordered for the case to return to the prosecutor, the house arrest measure and the preventive arrest respectively of the defendant can be maintained even after the case has been returned to the prosecutor, for a period of maximum 30 days which cannot be greater than the difference between the maximum term of 180 days and the time the defendant spent under house arrest, respectively under preventive arrest in the same case, prior to the notification of the court by indictment; provided that throughout the duration of the prosecution the accused's house arrest was 180 days long, after ordering the return of the case to the prosecuting office the preliminary hearing judge cannot maintain the house arrest measure, because otherwise the maximum limit of house arrest during the prosecution, as states in the C.p.c. [12] would be exceeded.

Another situation in which the preventive measures of house arrest and preventive arrest are legally terminated find their applicability towards the end of prosecution when the prosecutor orders the solution of halting or giving up on the prosecution, the criminal trial being thus brought to an end in this this instance and thus a preventive measure cannot exist beyond these barriers. As such, through the ordinance by which the solution of halting or giving up on the prosecution is ordered, the prosecutor will also pronounce in regards to the legal termination of the preventive measure, even in the event that the measure was taken or extended by the rights and liberties judge.

The third situation when the institution of legal termination intervenes is when the court orders one of the following solutions: acquittal, putting an end to the criminal trial, postpone putting the sentence into effect or suspending the carrying out of the sentence under supervision, even if not permanently. The preventive measure will also be legally terminated in the appeal phase if the length of the measure has reached the length of the condemned sentence.

The fourth situation when the preventive measure will be deemed legally terminated refers to when a sentence decision is deemed permanent, as such the person that is deprived of liberty will remain incarcerated, but not because the preventive measure is being maintained, but because it has been converted to a sentence that is about to be carried out.

The legal termination of the preventive arrest measure is also put into effect if the court of appeal allows an appeal requested solely by the accused and sends the case to the first court in order for it to be rejudged, if the length of the sentence pronounced in the first court is equal to the measure of preventive

[11] N. Volonciu, ș.a. *Noul Cod de procedură penală comentat*, ed. Hamangiu, 2014. P. 533.
[12] M.Udroiu, *Procedura penala.Partea generală*, ed. C.H.Beck, Bucharest, 2014, p.528.

arrest; in this case, as a consequence of applying the *non reformation in peius* principal, the court will not be able to pronounce a sentence longer than the initially pronounced sentence. [13]

We observe that in art. 241 paragr. 1 letter d from the C.p.c. the legislator regulates that preventive measures legally terminated only in other cases as stated by law. By analyzing the provisions of the C.p.c., we believe that by other cases as stated by law we can also consider to be the following situations:

- when the court pronounces a decision to sentence to prison for a duration that is equal to that of the retention and the preventive arrest (art. 399 paragr. 3 letter a from the C.p.c.); we deem that the legislator out of error has not mentioned here the house arrest measure as well and for identity of reason I believe it is necessary for the law to be modified. In such an event, even if the sentence is not definitive, the house arrest or preventive arrest measure will be immediately put to an end as soon as the duration of retention and arrest become equal to the duration of the pronounced sentence.
- when the court pronounces a fine sentence that does not accompany the prison sentence or when it pronounces an educational measure (art. 399 paragr. 3 letters c and d of the C.p.c.);
- also, another case is the one included in the provisions of art. 43 paragr. 7 from Law 302/2004 regarding international judiciary cooperation on criminal matters, which shows that the measure of arrest for rendition is legally terminated if the rendered person is not taken by the competent authorities of the solicited state in a period of 30 days since the agreed upon date for rendition, with the exception of instances of *force majeure* that obstruct the rendition or the collection or the rendered person, an event in which the Romanian authorities and those of the soliciting state will agree upon a new date for rendition;[14]
- considering art. 493 of the C.p.c. legal termination of preventive measures also intervenes regarding measures taken against legal persons; preventive measures towards legal persons can be ordered for a period of maximum 60 days, with the possibility to extend it during prosecution and to maintain it during the preliminary hearing or trial phase if the grounds on which the measure was taken still stand, each extension cannot exceed 60 days.

The procedure through which a preventive measure is declared legally terminated

The ones entitled to pronounce a preventive measure as being legally terminated are the judiciary bodies that have ordered the measure, or the prosecutor, the rights and freedoms judge, the preliminary hearing judge or the court that has adopted the case. The judiciary bodies will pronounce themselves through an ordinance (the prosecutor) or through a closure/sentence/decision by default, upon request or at the demand of the administration of the detention place[15].

The judiciary organs will order the solution of legal termination of the preventive measure by ordering, in the case of the retained or preventively arrested, her or his immediate release, providing that he or she is not retained or arrested by other reasons. We thus observe another inconsistency of the legislator that does also mention the situation of the person under house arrest where for the same conditions there must be the same solution.

The rights and liberties judge, the preliminary hearing judge and, last but not least, the court will pronounce themselves by an argued closing statement made in the presence of the accused which will be mandatorily assisted by the prosecutor. It is possible for the judiciary bodies to pronounce while not being in the presence of the accused but it is necessary for him or her to be represented by a chosen or default attorney, no harm will be produced in such a situation but it aims for the prompt solving of the demand or appeal. The judiciary bodies hold the responsibility of immediately notifying[16] the person against which the preventive

[13] M.Udroiu, *Procedura penala.Partea generală*, ed. C.H.Beck, Bucharest, 2014, p.493.

[14] B. Micu, A.G.Păun. R. Slăvoiu, *Procedura penală. Curs pentru admiterea în magistratură și avocatură. Teste – grilă,* ed. Hamangiu, Bucharest, 2014, p. 146.

[15] To be consulted decision 206/2015 of the ICCJ (High Court of Cassation and Justice) file nr. 1054/2/2014/a18: Accepts the appeal declared by the accused Chiriță Mihai Gustin against the closure from the date of February the 3rd 2015 pronounced by the Bucharest Court of Appeal, Second Criminal Division in file no. 1054/2/2014. It completely renders the attacked closure useless and, by rejudging: Accepts the ANP notification and deemes the measure of preventive arrest taken against the accused Chiriță Mihai Gusti as legally halted. Orders the release of the accused from the under the preventive arrest warrant no. 17/UP/25.11.2013, emitted by the Bucharest Court of Appeal, First Criminal Division. The judiciary expenses remain the responsibility of the state. The partial fee addressed to the defendant named by default until the chosen defendant had been prezented, namely 50 lei, will be suported from the funds of the Ministry of Justice. Permanent.

[16] To be consulted the Ogică v. Romania case (the decision from May 27th 2010): Friday, January the 31st 2003, immediately after the permanent decision that the pronounced sentence will expire at midnight had been pronounced (supra, point 8), the registry of the Bucharest Court of Appeal had written a letter to inform the Bucharest-Jilaba penitentiary about the conditions of the decision for the administration the take necesarry measures. A proceeding elaborated on the same day at 15:10 by the court of appeal registry had referenced the previously carried out procedures on the bases of the previously cited decision. In it it was mentioned that, on the phone, the commander of the Bucharest-Jilava Penitentiary had informed the registry that the secretariat was closed and nobody was there to receive the fax that pertained to the conditions of the decision. According to this proceeding, the commander had directed the call to the prison's on guard officer who had mentioned that a release of the claimant could not be carried out merely on the basis of a phone call, without any written document. After they had received by fax on Monday, February the 2nd 2003, at 07:52, the conditions of the decision from January the 31st 2003, the administration of the Bucharest-Jilava penitentiary had begun to partake in the necesarry procesures and, at 10:40, had released the claimant. In the case, the Court had observed that the definitive decision from January 31st 2003 had sentenced the claimant to a punishment that had the same length to that of the detention he had already executed until that date and that, immediately after pronouncing the decision, the register of the court of appeals had contacted

measure was taken as well as the institutions with the attributes to execute the measure a copy each of the ordinance or the closure/sentence/decision by which the legal termination of the preventive measure had been deemed.

An appeal can be made against the closure by the prosecutor or the accused for 48 hours after the pronouncement for those who were present, respectively from the notification for the prosecutor or accused who were not present at the pronouncement. The appeal made against the closure by which the legal termination of this measure is not suspended from enforcement, the closure being enforceable.

3. Conclusions

We believe that we have reached our main objectives stated at the beginning of the present study and we have analyzed in depth the institution of legal termination of preventive measures, praising the legislator when he or she succeeded in regulating the discussed legislation in better conditions compared to the old regulation, but also criticizing the encountered legal inconsistencies, making *lege ferenda* proposals for this purpose.

The institution of legal termination of preventive measures, through its crucial importance, we believe will constitute a subject that shall be tackled in the future by criminal procedural law experts and the judiciary practice, through the numerous encountered situations, will offer us new elements that will help draw attention to the signaled aspects.

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the Bucharest-Jilava penitentiary to take the necesarry measures to foresee the release of the interested party; the Court mentiones that the recording of the failuire of these measure in the proceeding. The Court reminds that, upon the examination of the term for executing the decisions for releasing the claimants in cases in which the requested conditions for release were met at a time were the prison employee that was tasked with the neccesary operations was not present by reasons of work schedule, this did not exclude periods such as evening or night time. It cannot even moreso adopt another approach especially since, unlike the *Calmanovici* case, the registry of the court of appeal had contacter the Bucharest-Jilava penitentiary in the daytime in order to inform the definitive pronounced decision and the necessity to take the necesarry measures for the release of the claimant. The Court cannot accept that, because of the secretariat's work schedule, the administration of a prison did not take measures for receiving, on Friday, at early evening, a fax-sent document that was necessary that the release of a prisoner, being aware that the closing of the secretariat would lead to maintaing the interested party in confinement for a period of over forty-eight hours. In the opinion of the Court, such a delay cannot qualify as „a minimal inevitable delay" for the execution of a definitive decision that had the effect of releasing a person. As such, said detention is not grounded in one of the paragraphs of art. 5 from the Convention. As such, it concludes that art. 5 § 1 had been violated.

THE ENFORCEMENT OF EDUCATIONAL MEASURES WITHOUT DEPRIVATION OF LIBERTY. DIFFICULTIES ENCOUNTERED IN PRACTICE

Gabriela-Nicoleta CHIHAIA*

Abstract

Since it's entry into force in February 2014, the new criminal legislation has brought many new institutions in the field of criminal procedure. One of the most important changes is found in the matter of sanctioning of minors, which, as of this date, cannot receive imprisonment, but only educational measure, custodial or non-custodial.

This article focuses on the first category of educational measures applicable to minors that purpotrate a crime, the ones that do not require a deprivation of personal freedoms under Art. 115 para. 1 pt. 1 of the Criminal Code, namely: civic training course, supervision, home arrest on weekends and daily assistance and everything needed in enforcing them.

The study aims to highlight, on the one hand, how the procedural enforcement of non-custodial educational measures that are applied to minors is achieved, and on the other hand, the institutions involved in this activity, namely the judge and the Probation Service.

We present the method of execution, and the modification of obligations which minors must comply during non-custodial educational measures, mainly aimed at forming a spirit of responsibility and respect for the rights and freedoms of others to juvenile offenders .

In the last part, the study presents the difficulties that courts faced in the first year after the entry into force of these laws, in particular the situation in which the non-custodial educational measures could not be enforced by the court in cases in which the court was not liable. A special mention is given on the exact timing at which the execution of non-custodial educational measures commences, also presenting the disparities in legislation, which led to different solutions in the practice of courts. In light of these difficulties, the study tries to identify possible solutions, including the amendment of legislation, formulating proposals for new laws in this regard.

Keywords: *non-custodial educational measures, juvenile prosecution, enforcement, Judge, Probation Service.*

Introduction

This study aims to present in a comprehensive manner, without wishing to be exhaustive, the non-custodial educational measures, the penalties that can be applied to juveniles who commit crimes as governed by the New Code of Criminal Procedure, in accordance to the degree of limiting the rights and freedoms of the minor, namely: a civic training course, supervision, supervision on weekends and daily assistance. Moreover, after a presentation of these measures, the study focuses on how to enforce them, and the means of actual performance, presenting the institutions involved in this stage, based more on enforcement coordinator, the service probation before the Court within whose jurisdiction the minor resides.

In connection with the implementation of the non-custodial educational measures, the study seeks to bring to light certain issues that the courts, and bodies involved in this stage have experienced in the past year after the entry into force of these legal provisions. Since the time period starting from the educational measure imposed by the court and to the point of registration of minors by the probation service, certain legal provisions have raised questions among practitioners, which they had to respond to able to perform these steps.

The novelty of the four non-custodial educational measures in our legislation have created difficulties in their practical application, being showed only the main directions of legal regulation, the new Code of Criminal Procedure governing only their purpose and making a definition for each of the measures. Content and manner of execution is regulated for each of the non-custodial educational measures by Law no. 253 of 2013 on the enforcement of sentences, educational measures and other non-custodial measures ordered by the court during the trial1. Although therein laws should have a place to find the details of each and every of the four non-custodial educational measures, the legislature chose to present only within their overall activities without detail that which can be set for minors offenders. It is expected that there has to be a plan to determine the specific activities that convicted juveniles must follow during the execution of the non-custodial, and this plan is established by the educational adviser case worker within the probation service. In carrying out this plan, this counselor must consider the purpose of educational measures for the juvenile who committed the crimes and raise awareness of the consequences of his actions, and his or hers accountability for future behavior.

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[1] Law no. 253 of 19 July 2013 published in the Official Gazette no. 513 of August 14, 2013.

The lack of clear rules, at least an example of activities that minors may carry out during the execution of non-custodial educational measures already created various problems in practice, creating differences in the mode of execution.

Also in connection with the execution of these measures, an important issue is the practice linked to the duration of execution of non-custodial educational measures, taking into account the disparities between the New Code of Criminal Procedure and the Law. 253 of 2013 on these issues, there is currently no even practice in the courts, and probation services.

The issues that this study has identified are not only dependent but are also determined by the lack of legal regulations presented, and the lack of doctrinal works on issues related to non-custodial educational measures, especially in terms of implementation and enforcement thereof. Except of the analysis in the Chapters regulating the institution of educational measures intended for the criminal liability of minors in thwork that presents new Criminal Code, there are no detailed analyses of these educational measures. And from this point of view, this study shows that a work that draws attention to the practical difficulties raised by the legal regulations in this field, with the desire to start a discussion doctrinal level to determine finally a unitary practice. And why not the complement of the legal provisions that best respond to the aspirations of the legislature when choosing the main sanctions applied to juveniles educational measures as a rule of the non-custodial, and, by way of exception, the deprivation of liberty.

1. General considerations regarding sanctions applied to minors

Preventing and combating juvenile delinquency has raised in criminal legislation, special problems, different from those on combating crime committed by adult individuals. For this reason, the legislature has established a special sanctioning for juvenile offenders, given on the one hand, that they did not have adequate time required to assimilate moral norms, civic and legal regulations, their behavior is in training, they can easily fall into error, and on the other hand, the fact that juvenile offenders can be easier retrained and set back in the family and society.

The doctrine has mentioned that specific crime among juveniles raises special problems to prevent and combat because its casuality interacts with a multitude of factors such as: lack of social life experience of the child, with the effect of misunderstanding to the full the dangerous social behavior and the social values, as well as the penalties they would receive, and the deficiencies in the educational process that took place in the family, school, exercised by some major negative influences that attracted minors on the path of crime etc[2].

The Criminal Code of 2009 (the current Criminal Code) has replaced the mixed sanction system, formed primarily out of educational measures, and the punishment, governed by the Criminal Code of 1969, with a system consisting only of educational measures. The explanatory memorandum to the new Criminal Code mention this as a major change, as a complete overhaul of penalties applicable to minors who are criminally responsible, for educational measures, showing that the model that inspired the current regulation is the Organic Law no. 5/2000 regulating the criminal liability of minors in Spain (as amended by Organic Law no. 8/2006), but there were considered the rules of French law (Order of February 2, 1945 as amended), German law (Law of juvenile courts since 1953 as amended) and Austrian law (Law on Juvenile Justice 1988).

The legislator had to consider the establishment of the sanctioning of minor offenders that satisfies their psychophysical features and to ensure their education and rehabilitation, not reiterate future criminal behavior, and to determine the most effective measures of social defense and meet these goals as educational measures.

Thus, art. 115 of the Criminal Code regulates the general legal framework of educational measures that can be taken against juveniles who commit crimes (noting that only criminally responsible minors aged between 14 and 18, according to Art. 114 para. 1 of the Criminal Code) providing educational measures that are non-custodial, in ascending order of their severity: civic training course, supervision, supervision on weekends and daily assistance and educational measures involving deprivation of liberty: internment in an educational center and internment in a detention center.

Educational measures can be applied to a defendant that committed a crime between minority and criminal responsibility (i.e. aged 14 to 18 years), even if at the moment of judgment he became an adult (aged 18 years).

According to the Criminal Code, rule, in case of juvenile offenders the implementation of non-custodial educational measures (Art. 116 para. 1), custodial measures are the exception and used for serious crimes or minors that committed multiple offenses (Art. 116 para. 2).

The interpretation of these laws, that non-custodial educational measures can be taken virtually against any minor that committed an offense. Instead, custodial educational measures may be taken only if the minor has committed a crime for which an educational measure has been executed or the execution of which began before committing the crime for which he or she is judged (similar to relapse) or when the punishment provided by law for the crime committed is 7 years or greater or life imprisonment. Even in these cases, the court is not required to take

[2] Mitrache Constantin, Mitrache Cristian, *Romanian Criminal Law. General part*, Universul Juridic Publishing House, Bucharest, 2014, p. 417.

the minor to an educational measure involving deprivation of liberty, as the legislature used the words "may", which means that the application of such measures is optional and not mandatory.

2. The non-custodial educational measures

The current Criminal Code regulates in art. 115 parag. 1 pt. 1, four non-custodial educational measures, in order of their severity, from easiest to hardest, namely: civic training course, supervision, supervision on weekends and daily assistance.

The doctrine shown, that the legislature should have maintained educational measures maintained in the Criminal Code of 1969, namely reprimand and supervised freedom, thus allowing it to diversify non-custodial educational measures that better fits the need for individualization thereof[3]. We agree with this point of view, as for example, the educational measure of reprimand, could be held to apply to minor offenses, in those instances where the Criminal Code of 1969 you had to acquit a defendant or give an administrative penalty, under art. 181, in reference to art. 91 and according to the current Criminal Code you are ordered to waive the penalty, under the provisions of art. 80 of Criminal Code, whenever the offence is not sever, given the nature and extent of the consequences produced, the means used, the manner and circumstances in which it was committed and purpose, according to the person of the criminal, previous conduct, efforts done by she or he to remove or mitigate the consequences of the offense and ones means of reformation.

The Institution of Cancellation penalty cannot be imposed to juvenile offenders since, as I mentioned, because they do not suffer penalties and it creates an unjustified distinction between the two categories of major and minor offenders. As long as in the case of minors we can waive penalty and implement a warning (previously mandatory 81 Criminal Code), which has the same role, warning of the defendant on his future conduct and the consequences if they will commit more crimes, as the old educational measure of reprimand, the impossibility of applying a measure to minor defendants will create a lower legal situation. This is because as we shall see, the non-custodial educational measures covered by the current Criminal Code require the execution of juvenile offenders obligations under the supervision of the Probation Service.

Not even the measure of supervised freedom was not mentioned from the old criminal code, the new measure of supervision being totally different, whereas in the old regulation, the supervision was done by parents or tutors, whilst in the new regulation, the supervision is done solely by the Probation Service functioning under the Tribunal in the area where the minor resides.

The easiest of the non-custodial educational measures in the Criminal Code, is regulated in art. 117, "civic training course" that requires the minor to participate in a program with a duration of 4 months. The program aims to help the minor to understand the legal and social consequences they expose themselves in the case of committing crimes and they can be held accountable for their future behavior. It is the only non-custodial educational measure that does not have a minimum and so the judge may sentence a period lasting between one day and four months.

The second non-custodial educational measure, regulated by art. 118 of the Criminal Code named "supervision", consists in controlling and guiding the minor in his daily program for a period of between two and six months, under the supervision of the probation service, so as to ensure the participation of minors to attend school or training, and at the same time preventing the carrying out of activities or in connection with certain individuals that may affect the education process.

"The supervision on weekend" is the third non-custodial educational measure, regulated by art. 119 of the Criminal Code, and requires minor not to leave the house on Saturday and Sunday, for a period ranging from four to twelve weeks, unless that, on these days, the minor is required to participate in certain programs or to carry out certain tasks imposed by the court. This measure aims to avoid contact with certain persons or other juveniles, or the ensure that he or she is not present in certain places that predispose to the manifestation of criminal behavior.

The last custodial educational measure, "daily assistance" is the worst of them being provided by art. 120 of the Criminal Code, and is the obligation to comply with a schedule set forth by the probation service for a period of three to six months. The program contains the schedule of activities and conditions set out to the minor and some prohibitions.

The individualization of educational deprivation measure that will take in account the defendant, the court will consider, according to art. 115 parag. 2 of the Criminal Code, the general criteria of individualization provided by art. 74 Penal Code, it will take into account the circumstances and manner of committing the offense and the means employed, the state that created danger to the protected value, the nature and seriousness of the result produced, the nature and frequency of offenses that constitute criminal history of the offender's conduct after committing the crime and the criminal trial, education level, age, health, family and social situation of the defendant. The Criminal Code gives the court, the power in determining the actual content of educational measures that do not restrict freedom, and the content of its execution in a concrete way by the possibility of establishing obligations for the minor they must follow during the action. And their establishment, the court

[3] Voicu Corina, Uzlău Andreea, Morosanu Raluca, Ghigheci Cristinel, *New Criminal Code. Application guide for practitioners*, Hamangiu Publishing, Bucharest, 2014, p. 196.

must relate to age, personality, health of the minor, and the family situation and its social consequences.

Mentioned legal provisions are similar to those contained in Recommendation No. 2008/11 regarding European Rules for juvenile criminals that in principle no. 5[4] provides for the imposition and implementation of a non-custodial sanctions or measures that must respect the interests of the minor, limited, on the one hand, by the severity of the crimes committed, and which is expressed by the principle of proportionality, and on the other hand, age, mental and physical health, development, abilities and personal circumstances, expressed by the principle of individualization, and, whenever necessary, reports psychiatric, psychological or social.

3. Execution of non-custodial educati-onal measures, bodies and institutions involved

Non-custodial educational measures run under the supervision of the probation service functioning under the tribunal in whose jurisdiction the convicted minor lives. In this way the minor liaise with the community of origin, the developmental relations with it and with his family. The minor is involved in a number of activities, age-specific, but his skills, developed under the guidance of specialists: social workers, teachers, priests, psychologists.

Art. 63 of Law no. 253/2013 on the execution of sentences, educational measures and other non-custodial measures ordered by the court in criminal proceedings provides that non-custodial measures educational runs during their execution ensuring minor maintenance and strengthening links with family and community, free development of the child's personality and involvement in their programs, in order to form its spirit of responsibility and respect for the rights and freedoms of others. Thus, the juvenile to perform a non-custodial educational measures shall, according to the principle of the best interests of the child, develop respect for the fundamental rights and freedoms under the Constitution, international treaties to which Romania is a party and special legislation, to the extent that their exercise is not incompatible with the nature and content of the measure.

Organization, supervision and execution of carrying out of non-custodial measures are done by institutions in the community, under the supervision of the probation service. Probation Service supervision may entrust the execution of non-custodial educational measures provided for in Law no. 286/2009, as amended and supplemented, to community institutions

Law no. 253/2013 defines community institutions and public authorities, NGOs and other legal entities participating in the execution of sentences and non-custodial measures in the local community through collaboration with the authorities directly responsible for ensuring the execution of such penalty or measure.

Both the Probation Service that performs specific activities to supervisory and other authorities responsible for the enforcement of educational measures and community institutions act under the direction and control of the execution judge of the court of enforcement.

Law no. 253/2013 stipulates in detail how to execute each of the four non-custodial educational measures.

Thus, if the educational measure "of training civic" provided that it is organized in the form of continuous or periodic sessions, conducted over a period of 4 months, and one or more modules include theoretical or applied, adapted to the age and personality of minors included in that stage and taking into account as far as possible, the nature of the offense committed. In the internship set by the court there will consider a number of 8 hours per month of civic training.

Choosing where classes will be held is up to the probation officer responsible for the case (case manager) who decide, based on the initial assessment of the juvenile, the institution in the community in which it is to take place, communicating this institution a copy of the judgment and decision. This should adapt the actual content of the internship, according to the framework program approved by order of the Minister of Justice and the Minister of Education in accordance with the minimum standards for institutions working in the community probation, depending on the particular juvenile counselor approval. Conducting civic training course is conducted by a representative of the institution in the community.

According to art. 66 para. 4 of Law no. 253/2013, including the minor in a civic training course is carried out within 60 days after the putting into execution of the judgment, according to art. 511 of Law no. 135/2010.

Observing the legal regulation we note that it does not detail the types of activities the minor must conduct during civic training that must help him understand the legal consequences, but also social, they are exposed to when committing crimes.

In literature[5], it was shown that these activities must be more than just civic education classes, purely theoretical, proposing practical activities to persuade a minor to realize the seriousness of his criminal behavior, such as visits to prisons, educational or detention centers, involvement in programs to assist persons, assisted institutional involvement in cultural programs etc.

In the second execution of non-custodial educational measures, "supervision", the legislature intended to involve parents of the convicted juvenile

[4] Cited by Udroiu Mihail, Criminal Law. *The general part. The new Criminal Code*, CH Beck, Bucharest, 2014, p. 334.

[5] Voicu Corina, Uzlău Andreea, Morosanu Raluca, Ghigheci Cristinel, *New Criminal Code. Application guide for practitioners*, Hamangiu Publishing, Bucharest, 2014, p. 118

stipulating that supervision and guidance of the minor shall be performed by his parents, who have adopted or legal guardian, and in the situation where they cannot provide satisfactory supervision, the court may order surveillance in the custody to someone that can be trusted, preferably a close relative of the minor upon request.

In this situation, the probation officer has a role to control the execution of the execution of educational supervision and perform the duties of the person exercising supervision.

In particular, this measure is achieved through daily supervision and guidance of the minor in its program or by checking how it meets its obligations arising from its family status, school or work (if attending school, no absences, falls on persons who might influence him negatively, minimizing his or hers criminal sphere not going to places or premises where drugs or other similar substances are consumed, etc.).

The role of the probation service, the implementation of the measure does not involve a direct intervention in the minors program or activities, but monitoring of how the minor respects the program or attends school, other educational, cultural or sporting activities.

Non-custodial educational measure of "supervisions on the weekends" starting at 00:00 hours on Saturday and until 2400 on Sunday (times on other days of rest if the minor belong to other religious denominations have legal rest days other than Saturday and Sunday). Typically, weekends are consecutive, unless the court or the execution judge or the proposed probation officer, orders otherwise. Supervision of compliance with the measures imposed by the court is a major responsibility of the person who lives with minor or other person designated by the court, under the control of the probation officer or, where applicable, the person designated by him in an institution of the community.

To verify the compliance of the measure recording the weekends, the minor who lives alone or person exercising supervision, shall give the person designated the control of execution and supervision of the execution of scheduled or unscheduled visits to the home of the minor, in the days when the child must be in that space according to the court ruling. Failure to respect by the minors can extend the maximum duration of such measures or replacement with another worse measure. If the fault is with the person appointed to supervise minors, the court will fine them.

This measure aims at facilitating the contribution of parents or other adults with whom the child lives, improving their behavior, the involvement in housework, exercise by adults to a selection of people in contact with the minor, as they are forced to come "visit"[6].

Execution of non - custodial educational measure of "assisting daily" is achieved by setting a daily schedule for the minor with which he must comply and the activities that he or she has to do jointly decided by the probation counselor and parents, guardian or other person in whose care the minor is,. If they do not reach an agreement, the program is determined by the execution judge, by means of a motivated decision, after hearing those interested.

In establishing the program, art. 69 para. 3 of Law no. 253/2013 provides that there have to be taken into account the identified needs of the minor, the social situation and, where appropriate, professional and its obligations and prohibitions imposed in the execution. It should be pursued harmonious development of the child's personality through its involvement in activities involving social networking, organizing leisure mode and its capitalization skills.

In this last non-custodial measure, the role of the probation service is the most prominent, he determines the daily schedule, the program and activities he or she must carry out, certain prohibitions to what the minor must comply. Undoubtedly the service should work with parents or other persons to whom the minor is entrusted to, to integrate these activities into the program desired by the minor.

In all four non-custodial educational measures, if the court orders the juvenile to participate in a school or training course, and the minor is enrolled in such a form of education, the probation officer decides on the evaluation minor initial course to be followed and the institution of the community to take place, communicating to this institution a copy of the judgment and decision.

Law no. 253/2013 provides that the child should begin no later than 6 months from the date of the first meeting with the probation officer, and if they follow a school preparation, it will be within the next school year.

From the analysis of the performance of non-custodial educational measures, that supervision is realized by the probation service, but collaborating with both public institutions and NGOs, as if the measure of training civic and national police or local police, as if the measure of supervision.

4. The enforcement of non-custodial educational measures

The new Code of Criminal Procedure provides in Chapter III entitled "Procedure in cases involving juvenile offenders" from Title IV - Special Procedures, in a marginal one paragraph article titled "The enforcement of non-custodial educational measures" (art. 511), the rules on which when against a minor there is to be take such action, after the judgment becomes final, setting a deadline for bringing the minor when ordered, calling his legal representative, a representative of the probation service in order to enforce the measure taken and the persons designated for supervision.

[6] Voicu Corina, Uzlău Andreea, Morosanu Raluca, Ghigheci Cristinel, *New Criminal Code. Application guide for practitioners*, Hamangiu Publishing, Bucharest, 2014, p. 119

The provisions of art. 511 of the Criminal Procedure Code is supported by Art. 65 of Law no. 253/2013 according to which, after a final decision has been taken against a minor to execute a non-custodial educational measure, the court hearing the execution of the procedure provided for in art. 511 of Law no. 135/2010, has to set a deadline, having brought the minor and legally subpoenaed the representative, a representative of the probation service for the enforcement of the measure and the persons designated for supervision. Together with the summons, they shall notify the probation service with a copy of the court's decision. During the meeting, the probation officer will set a date for the child and the parent, guardian or person designated by the juvenile court for supervision or an enforcement judge, as appropriate, and to report to the probation service.

We believe that the doctrine rightly appreciated that although the legal text refers to "bringing minor", the judge shall summon him and his parents, guardian or person in whose care he is, for the deadline, and may issue even a mandatory bringing summons, according to art. 265 Criminal Procedure Code[7].

At this meeting, the judge shall provide the person designated to the juvenile and supervision of the purpose and content of the penalty and consequences of failure or improper observance of it. All these issues are recorded in a document will be registered in the enforcement of criminal judgments by the judge. This act shall be in duplicate (one to be attached to the case file, and the second attached to the register of enforcement of criminal judgments – jurisprudence, a folder set up for this purpose) and will be signed by the judge, delegated to the office of the clerk of criminal enforcement, the minor, the legal representative and the probation service.

The first issue raised in practice if the participation of the representative of the probation service is mandatory or not. Some courts holding that it is not mandatory, as long as there is a notice thereof. We appreciate that participation is mandatory, the more that the signing of the document of enforcement of non-custodial educational measures. On this occasion, the counselor on juvenile probation may communicate in writing, the date on which the juvenile must be present at the probation service to start surveillance activities.

Also, according to Law no. 253/2013, in carrying out the guidance and control of non-custodial educational measures, the judge ensures the enforcement execution by communicating, to the probation service and other institutions provided for by law, subject to the execution of non-custodial measures, the copies of the judgment or, as appropriate, its device by which these measures were ordered.

Thus, art. 15 para. 1 letter b) of Law no. 253/2013 provides that the judge ensures the enforcement of non-custodial educational measures, exercising jurisdiction under this law.

In practice, the question that must enforce the non-custodial educational measures exactly has given birth to two views. In a first opinion it is appreciated that the judge who must carry out the execution is the judge in criminal enforcement office (a single arbitrator appointed by Order no. 1 of the President of the court, at the beginning of each year or if there more judges appointed, to one which is on duty on the final decision). In the second opinion[8], the competent judge is the one who delivered the judgment to be enforced. The doctrine has considered that there is a difference between criminal enforcement of judgments judge and the court which delivered the judgment, the first being the one to enforce the measure applied.

We consider that the second opinion may be allowed only if the court judges are all tied to criminal enforcement office, making sense in the term of Judge mentioned in the Criminal Procedure Code. We believe, however, that the best thing would be for the judge who delivered the judgment to be the one who puts it into execution, which is best able to explain to the convicted minor the obligations that have been set, and the consequences to which him or her is exposed by their infringement.

Law no. 253/2013 provides the maximum period we should start exercising each of the four non-custodial preventive measures, by reference to the time of enforcement provided by art. 511 Criminal Procedure Code. The inclusion of the minor in a civic training course must be done within 60 days, supervision must begin within 30 days, weekends supervision within 15 days, and setting daily program must be implemented within not more than 30 days, all these terms are calculated at the time of the minor and the person designated by the judge supervising the execution, as provided by art. 511 of Law no. 135/2010. When daily assist measure changes another educational measure involving deprivation of liberty, establishing daily schedule must be made within 15 days of the release of the minor.

In connection with the date on which it calculates the non-custodial educational measure in practice, met different solutions. Thus, some courts have held that the measure begins to run from the date the judgment becomes final, while others felt that the start date is the date of execution of non-custodial educational measures, according to art. 511 Criminal Procedure Code.

We consider that the second opinion expressed is closest to the current legal texts, and forms the time of execution and the time at which to calculate the term educational measure.

Also regarding this aspect, the doctrine held that, where the judgment is not the date from which execution of non-custodial educational measure commences, the judge must determine such term or starting with the day of presentation to enforce the

[7] Volonciu Nicholas coordinator., *The new Code of Criminal Procedure commented*, Hamangiu, Bucharest, 2014, p. 1255.
[8] Volonciu Nicholas coordinator., *The new Code of Criminal Procedure commented*, Hamangiu, Bucharest, 2014, p. 1255.

measure, or a later date to be recorded in the court document.

We believe that the execution of non-custodial educational measures can even start on the date in which the putting into execution of the measure in the presence of the minor, accompanied by his legal representative, the judge delegate, and in the presence of the probation service without the need to establish another data from which to begin the flow of execution.

Another issue raised in practice, also related to the enforcement of non-custodial educational measure refers to the situation where the child is not present at the deadline set by the judge, according to art. 511 Criminal Procedure Code. Neither the Criminal Procedure Code and Law no. 253/2013 on the execution of penalties, educational measures and other non-custodial measures does not cover such a situation. The only reference to the situation where the child is not present at the convocation of the probation counselor and case manager as is required by Law. 252/2013 on the organization and operation of probation[9]. This law provides that if the child is absent from the conference, the probation officer will reiterate convening and can call the police for help in identifying and contacting minors and persons in whose care he is. If the person is found or resides in another state and an assessment meeting cannot be achieved, the probation officer is obliged to inform the enforcement court about the impossibility of enforcing the judgment. No mention, however, about the measures an execution judge can order.

We consider that this lack of legal provisions is a gap in the law to be covered with the utmost emergency. In practice, the judge has brought the minor and his legal representative for a new term, making efforts to identify the calling in this regard the police or gendarme (issuing a summons for the actual execution). If there were no minor at the second summons, the judge can not only find the impossibility of enforcing the non-custodial educational measures. You cannot have any increase of the extent to which it was ordered to be executed or replace it with another measure hardest, since we are not in the situation provided by art. 123 of the Criminal Code, when the child does not comply or with the bad faith performance conditions or obligations imposed as educational measure, whereas the non-custodial educational measure has not been enforced. These issues lead in fact to a lack of legal effects of the judgment.

Another impediment related to enforcement, this time to the measure of civic education training sessions, which were are confronted in the probation services, with the absence of this type of program in the community or in institutions.

It was estimated at the Department of Probation, that until the adoption of minimum standards in probation work and empowerment of community institutions will be concerned as to develop a specific program within the probation service, civic traineeships can be carried out by the probation service by probation counselors specializing in teaching or pedagogy or those with experience in this field[10]. Another way to achieve this has been identified in collaboration with school inspectorates through civic education classes, or the Palace of children or other community institutions, such as churches.

Conclusions

This study aimed to present first non-custodial educational measures, and on the other hand, their enforcement and practical difficulties in this regard.

Educational measures are the main non-custodial penalties that can be applied from the 1st of February 2014, minors who commit crimes, as per the current Penal Code that expressed states that these minors can not suffer penalties, only educational measures and the rule being the non-custodial: civic training course, supervision, recording on weekends and daily assistance, exceptional and educational measures to be imposed with deprivation of liberty: confinement in an educational center and internment in a detention center.

The novelty of this legislation has created an uneven practice in the courts, determined by the absence of a comprehensive legislative framework, the current practice not covering all the situations that may occur during the execution and enforcement of custodial educational measures.

The work presented was intended to bring to the attention of practitioners and theorists, some of the problems already identified regarding these issues, and in the future, after detailed consideration of the non-custodial institution educational measures to stabilize a unitary practice in the courts. We are also convinced that the work can open a wide range of debates, points achieved in this study, is only part of the problems that may arise so that they can certainly be extended to other aspects of non-custodial educational measures freedom and their execution.

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IMPACT OF ENACTMENT OF THE NEW PENAL CODE ON THE OFFENCE OF INTERNATIONAL HIGH RISK DRUG TRAFFICKING

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Abstract

The entry into force of the new Penal code has brought some changes on the offence of international high-risk drug trafficking. This study aims to analyze the impact of the new Penal Code, by changing the limits of punishment in the case of the international high-risk drug trafficking, had on this offence, in relation to other existing criminal provisions reffering to the high-risk drugs or very hihg-risk drugs.

Keywords: *drugs, high-risk drugs, very high risk drugs, smuggling, drugs for personal consumption.*

1. Romania's Constitutional Court declared[1] that the new Penal Code is the law more favorable compared to the previous Penal Code, repealed in February 2014. The main reason cited was the fact that the lawmaker of the new Penal Code decreased the punishment limits for the offences set out in the Penal Code and for the offences under some special non-criminal laws.

The rationale for which the lawmaker of the new Penal Code decreased the punishment limits of different offences was to impose a future easier punitive treatment for defendants who are at their first violation of the criminal law and, irrespective of guilt, commit a single offence and not a plurality of offences. For defendants persisting in their antisocial behavior by committing more offences, the lawmaker sought to introduce a harsher punitive treatment; its preventive role is to dissuade those tempted to break repeatedly the social values protected by criminal law.[2]

On the same line of thought is Law No.187/2012 implementing the new Penal Code[3], which reduced the punishment limits for the international drug trafficking offences provided by Article 3 of Law No. 143/2000 for the preventing and combating illicit drug trafficking and consumption.[4]

2. Law No.143/2000 republished[5], includes a number of nine offences concerning the regime of drugs subject to national and international control. The material object of eight offences of nine consists of high-risk and very high risk drugs. The impact mentioned in the title of this scientific paper relates to Article 3 of Law No.143/2000, republished.

Article 3 has the following legal content:

(1) Bringing into or removing from the country, and import or export of high-risk drugs by breaking the law is punishable with imprisonment from 3 to 10 years and removal of rights;

(2) If the deeds provided in paragraph (1) concern very high risk drugs, the punishment is imprisonment from 7 to 15 years and deprivation of certain rights.

Please note that before the amendment of Law No.143/2000 by Law No.187/2012, the punishment provided for in Article 3 para. (1) was imprisonment from 10 to 20 years and deprivation of certain rights, and for the deeds provided in para. (2), the punishment was imprisonment from 15 to 25 years and removal of rights.

Changing of the punishment in case of international high-risk drug trafficking provided by Article 3 paragraph (1) of Law No. 143/2000, republished, makes debatable the correlation of this law text with the existing incriminations in other pieces of legislation covering high-risk or very high risk drugs.

In this regard, Article 271 of Law No. 86/2006[6] concerning the customs regime criminalizes the act of aggravated smuggling. According to this text, "bringing into or removal from the country, by breaking the law, of weapons, ammunition, explosives, drugs, precursors, nuclear or other radioactive substances, toxic substances, waste, hazardous chemical residues or materials constitutes the offence of aggravated smuggling and is punishable by imprisonment from 3 to 12 years and removal of rights, unless criminal law provides for a more severe punishment."

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[1] To see Decision no.265/06.05.2014, of the Constitutional Court of Romania, published in Official Journal of Romania nr. 372/20.05.2014.

[2] Decision no.265/2014 of the Constitutional Court of Romania, p.6.

[3] Law no.187/2012 establishing Law nr.286/2009, regarding New Penal Code, published in Of.Journal of Romania nr.757/12 November 2012;

[4] This law has been published for the first time in the Official Journal of Romania, 1st Part, nr. 362/3 of August 2000, being modified several times until entering into force the Law no. 187/2012, that decreased the punishments for some acts so, Law no.143/2000 has been republished.

[5] Law no.143/2000 on combating illicit drug trafficking and published in the Official Journal, Part I no. 362/03.08.2000;

[6] This law has been published in the Official Journal of Romania, 1st Part, no. 350/19.04.2006

From the regulation of Article 271 of Law No. 86/2006, in the matter of our concern, we see two aspects:

a) That the law text makes no distinction between aggravated smuggling of "high-risk drugs" and aggravated smuggling of "very high-risk drugs" using only the terms "drugs" and "precursors". Therefore, in the concept of Law No. 86/2006, which is consequent to Law No.143/2000 which distinguishes between "high-risk drugs" and "very high-risk drugs", crossing of such drug categories across borders without authorization is considered aggravated smuggling and is punishable by imprisonment from 3 months to 12 years;[7]

b) That aggravated smuggling is subsidiary to the existence of any other piece of criminal legislation, which disciplines the same social defense relationships concerning narcotic and psychotropic substances, but provides sanctions of more than 12 years of imprisonment. In terms of subsidiarity of smuggling, amendment of the old sanctions provided for in Article 3 of Law No. 143/2000, by Law No.187/2012, calls into question the proper legal classification of the act of bringing into or removal from the country, by breaking the law, of high-risk or very high-risk drugs.

Thus, in terms of the facts of bringing into or removal from the country, by breaking the law, of very high-risk drugs for which Article 3 para. (2) of Law No. 143/2000, republished, stipulates the sanction of imprisonment from 7 to 15 years, the aggravated smuggling crime is subsidiary, since it provides for a punishment of 3 months to 12 years in prison (which is lower than that prescribed in Article 3 para. 2). Specifically, it means that always bringing into or removal from the country, by breaking the law, of very high-risk drugs will constitute international illicit drug trafficking provided by Article 3 para. (2) of Law No. 143/2000, republished, and will not be considered aggravated smuggling.

On the contrary, always, bringing into or removal from the country, by breaking the law, of high-risk drugs, following the amendment of old sanctions stated in Article 3 of Law No. 143/2000 republished by Law No. 187/2012, will constitute aggravated smuggling and not international illicit drug trafficking provided by Article 3 para. (1) of Law No. 143/2000, republished, as the punishment provided by the lawmaker for the offence of smuggling, specifically imprisonment from 3 months to 12 years is greater than the punishment provided by Article 3 para. (1) of Law No. 143/2000, republished, specifically imprisonment from 3 to 10 years.

By modifying the sanctions provided for in Article 3 para. (1) and (2) of Law No. 143/2000 by Law No. 187/2012, Article 3 para. (1) of this law will no longer find applicability to the illicit international trafficking of high-risk drugs. Changing of the punishment and inapplicability of Article 3 para. (1) of Law No.143/2000, republished, cannot lead to the conclusion that it would be repealed by the effect of Law No. 187/2012, because this paragraph provides the objective side of the offence of international illicit trafficking of very high-risk drugs, provided in para. (2) thereof.

3. The decreased punishment for the offence of illicit international trafficking with high-risk drugs, attracts notable consequences for the current judicial practice compared to that existing in the past.

The first consequence would be that currently we can no longer talk of international illicit trafficking of high-risk drugs [Article 3 para. (1) of Law No. 143/2000 republished] but of aggravated high-risk drug smuggling. Thus, if a person brings into Romania, by breaking the law, high-risk drugs and very high-risk drugs at the same time (on the same occasion), we will have a formal concurrence between the offence of illicit high-risk drug trafficking, provided by Article 3 of Law No. 143/2000, republished, and the offence of aggravated high-risk drug smuggling, provided by Article 271 of Law No. 86/2006. No one could argue that the legal classification of the offence, as described above, would be only in accordance with Article 3 para. (2) of Law No. 143/2000, republished – the more severe offence - which would absorb the least severe one (aggravated high-risk drug smuggling) and therefore would not constitute multiple offences.

The solution of multiple offences is required, on the one hand, because the text of Article 271 of Law No. 86/2006 sends for punishment to a more severe incriminating regulation, so that the act of bringing very high-risk drugs into the country, with its dangerous consequences for public health is provided for in Article 3 para. (2) of Law No.143/2000, republished, with a heavier punishment, while the same act of introducing high-risk drugs into the country with its consequences and another special legal object is deemed aggravated smuggling as provided by Article 271 of Law No. 86/2006, because it provides a harsher punishment than that prescribed by Article 3 para. (1) of Law No.143/2000, republished. Please note also that by criminalizing the act of smuggling in general, the lawmaker sought to protect mainly the social relationships settled by the State concerning customs duties and the procedure for bringing into or removal from the country of goods.

Moreover, because the action of bringing into or removal from the country of "high-risk drugs" or "very high-risk drugs", by breaking the law, takes place at borders, results that such actions violate not only the drug regime, but also the customs procedures of Romania.

[7] In our opinion, there is an omission of the legislator regarding that the Law no.86/2006 subsequently emerged Law no.143/2000 distinguishes between drug risk and high-risk drugs, didn't make this classification within qualified contraband.

Listing in Article 271 of Law No. 86/2006 of certain categories of dangerous goods, which require special authorization to be carried across border, the lawmaker has changed the simple smuggling into aggravated smuggling in the event that such goods would be removed from or brought into the country without such authorization and provided a harsher punishment.

As the legal object of the offence of smuggling consists in the social relations settled on the customs regime, removing from or bringing into the country of high-risk drugs without authorization, does not change this legal object, even if subsidiary they are put into risk the relations regarding the public health.

This specification enables us to say that by in removing from or bringing into the country of high-risk or very high-risk drugs, by breaking the law, the perpetrator violates two distinct categories of social relationships primarily protected by the lawmaker, specifically the social relations concerning public health, in case of high-risk drugs, which is why they must be liable for both international illicit trafficking provided by Article 3 para. (2) of Law No. 143/2000 and for the offence of aggravated high-risk drug smuggling, provided by Article 271 of Law No. 86/2006 (multiple offences).

It is true that removing from or bringing into the country, by breaking the law, of high-risk drugs endangers the public health, but following the amendment brought by Law No. 187/2012, the lawmaker has protected mainly the customs regime and in the alternative the public health.

Because of this new situation created by Law No. 187/2012, the act of bringing or removing high-risk drugs by breaking the law remains within the aggravated smuggling with the adequate legal object, being removed from the scope of offences against public health.

Another example of judicial practice could be that a person consumer of cannabis (high-risk drug) goes to Turkey and acquires 200 grams of cannabis for personal consumption.

After crossing the border, it is found with those 200 grams of cannabis. In connection with this drug, the person in question says it brought it into the country for own consumption, being actually a consumer.

And in this case, we can question the fact whether the person concerned is liable for only one offence, specifically possession of high-risk drugs for personal consumption provided by Article 4 of Law No. 143/2000, republished, the crime of aggravated high-risk drug smuggling provided by Article 271 of Law No. 86/2006, being absorbed by it, or multiple offences between aggravated high-risk drug smuggling and possession of high-risk drugs for own consumption.

In judicial practice, it was considered that in case of crossing drugs across border exclusively for own consumption and not for illicit drug trafficking, the act falls within the offences provided by Article 4 para. (1) of Law No. 143/2000, absorbing in its content the deed of crossing drugs across border.[8]

The solution is objectionable because, in case of aggravated smuggling, this offence subsists even if the drug passed across border without authorization is used for own consumption.

The solution of the multiple offences is correct because the same action includes the content of two separate offences, specifically that provided by Article 271 of Law No. 86/2006 and that provided by Article 4 of Law No. 143/2000, republished.

Thus, the offence of aggravated smuggling occurs instantaneously when crossing the border of high-risk drugs without authorization. After this moment of the first offence, occurs the second offence that is continued possession by breaking the law of the 200 grams of cannabis for personal consumption.

If a person holds at home for illicit trafficking both high-risk drugs and very high-risk drugs, we have a single offence of possession of very high-risk drugs and legal classification is only according to Article 2 of Law No.143/2000, republished.

In conclusion, along with decreased sanctions for the offence of illicit high-risk drug trafficking provided by Article 3 para. (1) of Law No.143/2000, republished, the main impact will be changing the legal classification of Article 3 para. (1) in Article 271 of Law No. 86/2006, which criminalizes the act of aggravated smuggling.

Of course, we expect the future judicial practice to reveal other situations where decreased punishments for the offence provided by Article 3 of Law No. 143/2000, republished, give rise to controversial solutions.

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[8] In this sense, see decision no.3619/25 of June 2005, of High Court of Justice, unpublished;

EXTENDED CONFISCATION – SAFETY MEASURE REGULATED IN THE NEW CRIMINAL CODE

Mihai Adrian HOTCA*

Abstract

Extended confiscation is a safety measure introduced in Romanian criminal law in 2012. Romania's Constitutional Court has ruled several decisions in which a question has been raised of whether the legal provisions on extended confiscation are constitutional or not. In the present paper we analyze the extended confiscation in relation to the decisions of the Constitutional Court.

Keywords: *safety measure, criminal sanction, constitutionality, retroactivity, no retroactivity.*

1. Introduction

By means of Law no. 63/2012, art. 112^1 which regulates the safety measure of the extended confiscation[1] was introduced in the Criminal Code of 2014. According to art. 112^1 of the Criminal Code in force:

„(1) Other assets than those referred to in art. 112^2 are also subject to confiscation if the person is convicted for committing any of the following offenses, if the offense is likely to grant the respective person any material benefit and the penalty provided by the law is the imprisonment for 4 years or more:

a) offenses of drugs and drug precursors trafficking;

b) offenses on trafficking and exploitation of vulnerable persons;

c) offenses on the state border of Romania;

d) the offense of money laundering;

e) offenses of the legislation on preventing and fighting pornography;

f) offenses of the legislation on fighting terrorism;

g) the establishing of an organized crime group;

h) offenses against the patrimony;

i) the failure to comply with the regime of arms, ammunition, nuclear and explosive materials;

j) the counterfeit of coins, stamps or other values;

k) the disclosure of the economic secret, unfair competition, the failure to comply with the provisions on the import or export operations, embezzlement, offenses on the import and export regime, and on the waste insertion in and removal from the country;

l) offences on the games of chance;

m) corruption offenses and assimilated offenses, as well as offenses on the financial interests of the European Union;

n) offenses of tax evasion;

o) offenses related to customs regime;

p) offenses of fraud committed by means of computer systems and electronic payment means;

q) organs, tissues or human cells trafficking.

(2) The extended confiscation shall be ordered if the following conditions are met in the same time:

a) the value of the assets acquired by the convicted person 5 years in advance, and as the case may be, following the moment of the offense, until the date of issue of the document which initiates the proceedings, clearly exceeds the lawful income;

b) the court ascertains that the respective assets were gained from criminal activities of the kind of those referred to in par. (1).

(3) In order for the provisions of par. (2) to be applicable, the value of the assets transferred by the convicted person or by a third party to a member of the family or to a legal entity the convicted person controls, shall be taken into account.

(4) According to this article, *assets*, shall also mean amounts of money.

(5) When establishing the balance between the legal income and the value of the acquired assets, the value of the assets on the date of their acquiring and the expenses borne by the convicted person and by the family members, shall be taken into account.

(6) If the assets subject to confiscation are not found, other assets and money shall be confiscated up to the value thereof.

(7) The assets and money obtained from the operation or use of the assets subject to confiscation, as well as the goods produced by them, shall also be confiscated.

(8) The value of the confiscated assets shall not exceed the value of the assets acquired throughout the term provided for by par. (2), which exceeds the lawful income of the convicted person".

Please note that the provisions of art. 112^1 of the new Criminal Code have a content which is similar to

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[1] Published in Official Journal no. 258 of April 19th, 2012.

[2] Art. 112 of the Criminal Code regulates special confiscation.

that of the provisions of art. 118^2 of the previous Criminal Code (1969), therefore, the application and construction of the new provisions in the field of the extended confiscation, shall be similarly construed and applied.

Following the enforcement of the provisions on the extended confiscation, the judicial practice had to solve several law issues on the enforcement on due time of the new regulations in the field of the extended confiscation.

One of the law issues which emerged in practice, concerns the possibility of applying the measure of the extended confiscation in what concerns the offenses committed prior to the enforcement of Law no. 63/2012.

The settlement of several unconstitutionality exceptions were referred to the Constitutional Court, and the constitutional court pronounced several decisions, 3 of them being more important, respectively Decision no. 78/2014[3], Decision no. 356/2014[4] and Decision no. 11/2015[5].

By means of Decision no. 1.470 of November 8th, 2011[6], the Constitutional Court, by reference to the criteria for the distinction between the criminal law regulations and the criminal procedure regulations, showed that the subject, the scope and the result of the regulation in question, are those which prevail in establishing this difference and not the placement of these regulations in the Criminal Code or in the Code of Criminal procedure, placement which does not represent a criteria for their distinction.

2. The provisions on the extended confiscation shall not be applied to the offenses committed prior to the enforcement of Law no. 63/2012

By means of Decision no. 78/2014, the Constitutional Court ruled on the question whether the provisions of Law no. 63/2012 apply to the offenses committed prior to the enforcement of this law.

According to the provisions of Decision no. 78/2014: „the provisions of art. 118^1 par. 2 letter a) of the Criminal Code of 1969 shall be constitutional if they allow a more favorable criminal law".

In what concerns this decision, the Constitutional Court noted the following: „*the review of the Constitutional Court shall take as its starting point the claims of the authors of the exception according to whom the provisions of art. 1182 par. 2 letter a) of the Criminal Code of 1969 affects the principle of application of a more favorable criminal law and the equality of the citizens before the law by being retroactive, namely they are applicable in a discriminatory way to the offenses committed under the old law.*

Therefore, the Court notes that the extended confiscation, by means of its effects, as shown above, although it is not conditioned by the criminal liability, involves an indissoluble connection with the offense. Therefore, it appears as a reason of removing the state of danger and preventing the committing of another criminal offense.

By reviewing the content of the entire regulation on the extended confiscation of the Criminal Code, the Court notes that the principle of a more favorable criminal law is applicable to this institution.

In what concerns the principle of equality of citizens before the law, the Court notes that it is possible that a co perpetrator to be judged under the rule of the old law and consequently, the safety measure of the extended confiscation not to be ruled, while such a measure is ruled for the other co perpetrator who is still under the court proceedings. Therefore, if the more favorable criminal law were not enforceable, the latter, compared to the first, would be discriminated under the legal treatment without any objection and reasonable justification.

In other words, the provisions on the extended confiscation are constitutional if they are applied only to the offenses committed under the influence of the new legislative solution which occurred on the enforcement of Law no. 63/2012, respectively, April 22nd, 2012".

Under the grounds of this resolution of the Constitutional Court, it may be concluded that the provisions on the extended confiscation cannot be enforced against the persons who committed offenses prior to the enforcement of Law no. 63/2012.

In other words, the measure of the extended confiscation shall be applicable if the offense leads to conviction, and if the previous actions which resulted in the obtaining of the assets contemplated by the extended confiscation were committed following the enforcement of Law no. 63/2012.

Indeed, if the contrary had been admitted, the provisions of art. 15 of the Constitution would have been seriously disregarded, due to the fact that the rules governing the extended confiscation are subject to the substantive criminal law.

According to the provisions of Decision no. 356/2014: „*It is absurd to claim a subject of law to be held liable for a conduct that it had prior to the enforcement of a law regulating such a conduct. The subject of law could not foresee what the legislator would regulate, and its behavior is normal and natural if conducted within the legal order in force*".

[3] Published in Official Journal no. 273 of April 14th, 2014.
[4] Published in Official Journal no. 691 of September 22nd, 2014.
[5] Published in Official Journal no. 102 of February 9th, 2015.
[6] Published in Official Journal no. 853 of December 2nd, 2011

1. The provisions on the extended confiscation shall not apply to the assets acquired prior to the enforcement of Law no. 63/2012

Another question of law which the Constitutional Court was invested to rule on was whether the measure of the extended confiscation may be applied on the assets acquired prior to the enforcement of Law. 63/2012.

Therefore, by means of Decision no. 356/2014, the Constitutional Court ruled the following: „*the provisions of art. 118[2] par. 2 letter a) of the Criminal Code of 1969 shall be constitutional unless the extended confiscation applies to the assets acquired prior to the enforcement of Law no. 63/2012, for the amendment and supplementation of the Criminal Code of Romania and of Law no . 286/2009 on the Criminal Code*".

Furthermore, by means of Decision no. 11/2015, the Constitutional Court ruled the following: „*the provisions of art. 112[2] par (2) letter a) of the Criminal Code shall be constitutional unless the extended confiscation applies to the assets acquired prior to the enforcement of Law no. 63/2012, for the amendment and supplementation of the Criminal Code of Romania and of Law no . 286/2009 on the Criminal Code*".

By means of the aforementioned decisions, the Constitutional Court provided a fair application of the provisions of the fundamental law, ruling that the rules on the extended confiscation cannot be retroactive in what concerns the assets acquired prior to their enforcement, even if the offenses for which the conviction is pronounced are committed following the respective date.

If the law provided otherwise, the principle of the non-retroactive law referred to in art. 15 par. (2) of the Constitution would be disregarded.

Conclusions

By reviewing the content of art. 112[1] of the Criminal Code, the legal nature of the extended confiscation may be established[7]. These legal provisions and the provisions of art. 107 of the Criminal Code lead to the conclusion that the assessed safety measure is deemed by the legislator as a criminal law penalty, which also contemplates educational penalties and measures.

The regulations which establish this criminal legal institution, by means of belonging to the category of the criminal law penalties, also belong to the material (substantive) criminal law branch, the implementation of which is governed by the *tempus regit actum* principle.

The substantive criminal law consists of the total legal rules which establish the actions representing offenses, the penalties to be applied or taken in case of committing an offense, the conditions based on which the state can hold criminally liable the offenders, as well as the conditions under which the penalties are to be fulfilled and the measures are to be taken in case of committing criminal offenses. Criminal law means a substantive (material) rule of law with an actual legal content, namely a regulation establishing conducts or deeds (actions or non-actions) of the subject within a legal relation, while the criminal proceedings law or the procedural law includes the category of legal regulations of which content consists of procedures, ways or means by which the regulations of the substantive law are applied.

Under the principle of the non-retroactive criminal law, it is concluded that the regulations on the extended confiscation cannot be retroactive in what concerns the offenses committed and the assets acquired prior to their enforcement. In this case, the aforementioned criminal provisions shall not be applicable even if the offenses for which the conviction is ruled are committed following the respective date.

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OPINIONS ON THE UNCONSTITUTIONALITY ASPECTS RELATED TO THE CYBERSECURITY LAW

Maxim DOBRINOIU[*]

Abstract

Nowadays, on a rise of Cybersecurity incidents, with even more ferocious and sophisticated methods and tools of performing online attacks, the governments should struggle to create effective counter-measures, both in terms of technical endeavours and strong legal provisions. Following a successful Cybersecurity Strategy, the Romanian government's Cybersecurity Law proposal was expected to bring the much needed safety measures in the national component of the cyberspace, but was dropped for unconstitutional reasons, reopening the debate on national security versus the protection of citizens' constitutional rights to privacy.

Keywords: *Cybersecurity, cyber-attacks, cyber-infrastructures, national security, privacy, personal data, constitutional rights.*

1. Introduction

In a very complex virtual environment, Romania is one of the few European countries that drafted and put in place a good and comprehensive Cybersecurity Strategy[1], assumed and endorsed, at the time of its creation, by state authorities, private IT&C companies and various non-governmental organizations. All of them agreed on the necessity of the existence of such a strategy, as a first legal commitment towards assuring the security of the national component of the cyberspace (Internet) and the protection of networks and information (critical) infrastructures against the high level threats posed by cyber-offenders, criminal organized groups, cyber-terrorists, and even state(sponsored)-entities.

2. The Cybersecurity Law - CSL

In pursuing the guidelines and main ideas of the Strategy, the Romanian government issued, by the end of year 2014, a draft Cybersecurity Law that was adopted by the Parliament as the first legislative bill of its kind.[2]

But, the Cybersecurity Law did not have the chance to come into force, due to a broad wave of criticism from various NGOs, social media and citizens, being even disproved by 69 members of Parliament in a legal appeal to the Constitutional Court based on assumptions of unconstitutionality of the provisions, interference with the constitutional rights of people and lack of realistic safeguards to protect personal data and privacy against the security-based operations run by the competent state authorities.

The Cybersecurity Law was created with the aim to establish the general framework for regulation in the Cybersecurity area, with the obligations for the legal persons, with both public and private liability, to protect the cyber-infrastructures they own, hold, operate or use. CSL also provided the concept of "Cybersecurity" as a component of national security that can be, basically, realized through acknowledgement, prevention and countering the threats and attacks in cyberspace, as well as through reducing the vulnerabilities of the cyber-infrastructures, in order to mitigate the risks to their security.

3. The Criticism formulated by the Constitutional Court

One of the first accusations brought to CSL was the lack of harmonization with the well-known and much-discussed European Directive concerning measures to ensure a high common level of network and information security across the Union (known as the Network and Information Security Directive or NIS Directive)[3].

But this bill has not yet been adopted and has no effect on the Member States national legislations, with serious doubts regarding its final form.

For this, we appreciate as questionable the manner in which the Constitutional Court of Romania – CCR was quick to highlight, within its decision upon the unconstitutionality of the CSL, that the "competent authorities" and the single contact points in the area of Cybersecurity should only be "civilian bodies",

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[1] Approved by Government Decision no.271/2013, published in the Official Gazette no.296/23.05.2013

[2] The Cybersecurity Law bill was adopted by the Romanian Senate, as decisional chamber, on 19.12.2014, and was further sent to promulgation to the President of Romania. Meantime, the bill was contested to the Constitutional Court of Romania by 69 deputies and various NGOs.

[3] Legislative initiative of the European Commission, unfinished and currently still on debate (in the first reading) in the European Parliament, where has been adopted with modifications on 13.03.2014. On this form, the CE only expressed a partial approval

"subject of full democratic oversight", that "should not fulfil any intelligence, public safety or defence-led activities", and, moreover, that "should not be linked in any organizational way with any institutions of this kind" – as provided by Article 6 of the proposed NIS Directive.

In this way, CCR threw a doubt shadow on the defence, public safety and national security institutions, including in terms of the democratic control of their activity, issue that was not quite appropriate to be analyzed in that Decision.

Another problem of the CSL was the scope of the bill. In the section named "definitions", the CSL provided the explanations for two expressions, namely "cyber-infrastructure" and "cyber-infrastructure of national interest" – CINI, that were, then, balanced among different provisions (articles), with a high contribution towards the creation of a feeling of unpredictability and lack of clarity to those legal persons CSL should have applied to.

In this context, we consider that CSL should have been more accurate, more explicit, and should have restricted its scope only to those infrastructures that are essential for maintaining the vital economic and societal activities in the field of energy, transports, financial services, telecommunications and information society, food and health supply chains, and also in defence, public order and national security, whose disruption and destruction of might have a significant impact within a EU Member State (as also provided by Article 3 of the proposed NIS Directive). With other words, a new CSL should address just the protection of cyber-infrastructures of national interest, because only this activity could be comprised into the general concept of *national security*.[4]

The CCR support for the idea of a "civil body" as a national authority in Cybersecurity seems to have the origins only in the NIS Directive project, and less in the realities of the cyberspace, where, daily, show up new forms of menace against citizens (users), businesses and even states, and the protection of essential cyber-infrastructures has become a real component of national security.

Also surprisingly, the Constitutional Court placed in a certain doubt the principles of legality based on which the defence, public order and national security institutions guide their activities (principles that are comprised in their specific law of organization and functioning), assigning them the unreal intention to use CSL to collect intelligence through infringement of constitutional rights to personal, family and private life and the confidentiality of correspondence, even if CSL was only meant to legal persons with both private or public liability[5].

In the same logical stream, the CCR could even deny the legality of the electronic communications' interceptions performed by the National Technical Centre – a military structure within the Romanian Intelligence Service, nowadays the only legal authority in the area of electronic eavesdropping, on the same grounds of "not being reliable" or "being a threat to the constitutional rights to personal, family and private life, or the confidentiality of communications.

So, it is not very clear if CCR objected against the "military structure" of the competent authorities mentioned by the CSL or just acknowledged their lack of generic legal powers or the absence of the necessary safeguards for the protection of constitutional rights to privacy and confidentiality of communications. CCR's idea may very well be appreciated as a dangerous turning point for the legal base of those authorities, with possible repercussions on their further operations in cyberspace.

Far from other aspects, one of the most controversial issues identified by the CCR on CSL was "the access to the data held by the holders of cyber-infrastructures", while the constitutional court suggested a double-analysis: one from the perspective of the *type of data* to which the access is granted, and the second one from the perspective of *the way the access is fulfilled*.

In the first hypothesis, CCR considered that, although CSL bill has not provided for, the access to the data held by the persons subject to the law does not exclude the access to, the processing or the usage of personal data.[6] This opinion is relevant and fair, and we fully agree with it. Yes, technically, it is possible that among all the data stored about security incidents or cyber-attacks to also be found information related to a natural person. But, CCR forced the interpretation of CSL, pointing-out that "it is obvious that the type of data contained in these systems and networks include data relating to private life of the users", and that "the authorities designated by the law must be allowed an access to any data stored on these cyber-infrastructures", thus "a discretionary access also to data related to private life of the users".

This CCR observation is also correct. The new CSL bill should adopt a much clearer provision on the data on security incidents or cyber-attacks that the cyber-infrastructure holders need to retain/record, and what is the data they may disseminate/communicate to the competent authorities. Content of messages or other data related to a person's private communication should not be processed whatsoever.

From another point of view, based on the logic of the CCR's opinion, one could very well interpret that the persons subject to CSL usually store or hold personal data on their systems. This means that either those persons are *personal data operators* and comply

[4] Currently, in what regards the protection of the critical information infrastructures, there is in force the Government Emergency Ordinance no.98/2010, published in the Official Gazette no.757, part I, of 12.11.2010, and approved by Law no.18/2011

[5] Paragraph 51 of the Decision no.17/2015 of the Romanian Constitutional Court

[6] Paragraph 59 of the Decision no.17/2015 of the Romanian Constitutional Court

with the legal provisions of Law no.677/2001[7], or they are providers of electronic commerce services and comply with the provisions of Law no.365/2002[8]. But, in both situations, whatever motivation the competent authorities may invoke for their data requests, any eventual personal data could be easily refused by the holders of cyber-infrastructures for the reason of no consent from the natural person who actually owns that data.

In Paragraph 62 of its Decision, CCR put the sign equal between the terms "access to data concerning a cyber-infrastructure" (in CSL) and "access to a computer system" – as provided for by Article 138 Para 1 point b) and Para 3 of the Criminal Procedure Code. The latter is defined by the Code as "entering a computer system or a computer data storage medium, either directly or remotely through specialized software or through a network, in order to identify evidence". According to the Criminal Procedure Code, this legal measure could only be ordered by a judge (under Article 140) or a prosecutor, for 48 hours (under Article 141).

This idea of "equality" between the two terms is at least questionable; it seems that CCR did not take into consideration the technical aspects comprised in the phrase "entering a computer system or a computer data storage medium", as intrusive acts which do not have anything in common with making available or communicating data – as activities fulfilled by the holder of cyber-infrastructures following the requests from the competent authorities (see CSL).

The second aspect related to "data access", criticized by CCR, refers to the lack of a regulation on the ways the competent authorities effectively realize the access to the data stored by the holder of cyber-infrastructures, and also refers to the lack of any objective criteria to restrict/limit to the minimum the number of employees that may have access to or could further use that data, and especially refers to the absence of a prior control from a court of justice. All these aspects were seen by CCR as "an interference with the fundamental rights to personal, family and private life, and the confidentiality of correspondence".[9]

We consider this CCR opinion as insufficiently substantiated, because, again, it does not reflect at all the technical realities of the cyberspace, not the judicial practice. The IT specialists know that not just any security incident or any cyber-attack (as they have been defined by CSL) is automatically an offence for which a criminal prosecution may begin, *in rem* or *in personam*.

Usually, for the investigation of the causes that determined such events related to a cyber-infrastructure, gathering relevant information may not be subject of a judicial control or of a formal approval from a prosecutor or a judge. In the majority of such cases, administrative measures are sufficient. But this should apply strictly for technical data necessary in a Cybersecurity investigation of the reported event.

In all security incidents or cyber-attacks cases, the most important for the investigation is the information generated by the event, computer data that may lead to relevant conclusions on the source of the incident, means of exploiting vulnerabilities, possible real targets and future developments. The bad feature of this kind of data is its volatility – data could be easily lost, altered, modified or deleted, accidentally or on purpose, automatically or due to human intervention/error.

A possible legal solution able to meet both CCR requirements and the technical needs for reliable computer data (for investigation), would be a specific and clear provision in the new CSL, that may offer the competent authorities the power to order (by an administrative act/request) the holder of a cyber-infrastructure to expeditiously preserve stored computer data in connection with a security incident or a cyber-attack, following the model of Article 154 of the Criminal Procedure Code. And only then, based on an authorization issued by a judge of freedoms and liberties, would further be possible the access to the respective data. In such way, the authorities could be able to obtain unaltered data relevant in the context of their investigations, in conditions of full safeguarding the protection of constitutional rights of individuals.

In what regards CCR observations on the subject of "cyber-infrastructures of national interest", we fully agree with the ideas comprised in Paragraphs 71 and 73 of the Decision.

Another controversial issue, insufficiently approached, neither in doctrine, nor in judicial practice, is CCR joining the opinion that "IP addresses are personal data", meaning that are data by which a natural person is identified or identifiable (as specified by Law no.677/2001).[10]

Similar ideas have been circulated in the EU[11], and among local non-governmental organizations active in the area of privacy in IT&C, and are in compliance with certain points of view expressed by the European Court of Justice on specific cases[12].

We consider such conclusion as an error of interpretation, at least from the following considerations:

a) An IP address is just a simple technical information, based on which the relevant protocol[13] routes data packets in a network (internet);

[7] Law on the protection of persons regarding the processing of their personal data and for the free circulation of such data
[8] Law on electronic commerce
[9] Paragraph 63 of the Decision no.17/2015 of the Romanian Constitutional Court
[10] Paragraph 75 of Decision no.17 of 2015 of the Romanian Constitutional Court
[11] https://www.huntonprivacyblog.com/2014/11/articles/german-court-asks-european-court-justice-ip-addresses-personal-data/
[12] See European Court of Justice Decision in case no. C-70/10 Scarlet Extended vs. SABAM
[13] Transmission Control Protocol

b) In the absence of other relevant information, an IP address is not able to effectively identify a natural person;

c) An IP address only points to connected electronic devices or equipment, active or passive network elements, internet resources, but not the users;

d) An IP address is similar to a cellular number provided by a Prepay SIM card: it cannot offer significant elements based on which a natural person to be identified (could be, somehow, possible but only in connection with other data). Therefore, neither a cellular number provided by a Prepay SIM card may be regarded as "personal data";

e) An IP address is similar to a vehicle registration number, when the vehicle belongs to a legal person (institution, organization, company etc.) and is registered on its name. Therefore, neither a vehicle registration number may be automatically considered as "personal data".

In logic theory, if a given situation (p) implies another situation (q), then the second situation denied (non q) implies the first situation denied (non p). Applying this theory formula to the definition of "personal data" as it is in the specific law, we come to the conclusion that:

if ("the information is personal data") -> ("the information is able to identify a natural person"), then ("the information is not able to identify a natural person") -> ("the information is not personal data"). In other words, if an IP address is not able, by itself, to identify a natural person, then that IP address is not a personal data.

Last but not least, in Paragraph 89, CCR raised up critics on a certain provision of CSL concerning the right of the representatives of the competent authorities "to request statements or any document needed in order to carry out the control, to conduct inspections, even unannounced inspections, at any facilities, premises or infrastructures intended for national interest".

In CCR's opinion, the permission to conduct inspection granted to the representatives of the competent authorities requires access to a specific location, with respect to certain objects, computer systems for data storage, processing and transmission of data, including personal data, access that call into question the protection of the users' constitutional rights, with no safeguards provided by CSL against the risks of abuse.

Moreover, surprisingly, CCR regards the term "facility" (mentioned in Article 27 Para 2 point b.) as "a computer system or a network or an electronic communications service, while "the access to them would not be permitted without an authorization from a judge". In such case, especially when dealing with *premises*, CCR considered that would be applicable the provisions of Articles 157-167 of the Criminal Procedure Code related to *home search and seizure* activity, measure ordered only by a judge.

CCR observations seem to be correct, but, once again, they simply ignore specific realities: no one can eliminate *a priori* the possibility for an authority to conduct a control in the field of a certain activity. In other words, any of the competent authorities mentioned by CSL may perform the controls provided by the law, but only in what regards the security (physical, logical, procedural) of the objectives, facilities or infrastructure-based elements.

CCR wrongfully considers that by "facility" one may understand a "computer system or network". CSL only defines the "cyber-infrastructure", in the details of which could be found the term "computer system". In the view of CSL, the facility refers to a building element, which acts as a shelter (location) for the respective cyber-infrastructures, and this kind of element may be very well be inspected, controlled from its security perspective, even without prior announcement.

In what regards the "premises" CCR refers to in its Decision, the constitutional court missed the fact that, currently, in real life there are numerous situations when various state authorities (both central or local) are empowered by different laws to conduct controls (announced or not) in premises, without any authorization issued by a judge and even without to consider these activities as "home search and seizure" operations. For example, the controls and inquiries performed by the public health authorities in restaurants, the controls of the National Authority for Consumer Protection in commercial places or businesses, the controls of the State Inspection for Constructions in the premises where there are suspicions related to building activities with no clearance or approval or the controls of the emergency situations inspectorates on fire prevention in all the places where this kind of events may occur.

4. Final remarks

The conclusions and opinions formulated by the Romanian Constitutional Court in the case of Cybersecurity Law, by Decision no.17/2015, constitute a strong incentive for the creation of a better legislation in the field of protecting the national component of cyberspace and the critical information infrastructures against the threats posed by bad individuals or other interested state or private entities, local or foreign.

The present study only brings some technical and legal observations on the analyzed subject, with the aim to contribute to a good understanding of the mixture between legislation and the technical realities of the cyberspace, and to the creation and adoption of a strong new Cybersecurity Law, as a perfect guide for public and private organizations to contribute to the general safety of our nation's cyber-infrastructures.

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RELEASE OF MINORS

Edgar Laurenţiu DUMBRAVĂ*

Abstract

The sanctioning of minors provided in a whole new Criminal Code is kinder to those applying to one category of criminal penalties, namely educational measures. This change occurred after finding the need to recover and straightening of juvenile offenders with their age-specific means and without coming into contact with major people that could adversely affect behavior.

Keywords: *minor, release, parole, jail, prison.*

1. Introduction

The sanctioning regime applicable to minors, provided by The New Criminal Code, is overall milder than the previous one[1], because to them there will be applied only one category of criminal law sanctions, namely the seducational measures. This change occurred after finding the need to recover and redress the juvenile offenders by specific means for their age, without coming into contact with adults, that could affect their behavior in a negative way.

Custodial educational measures can be taken against a minor in the two cases provided by art. 114 para. (2) of The Criminal Code:

a) if he has committed a crime for which it was taken an educational measure that has been executed or he began executing an educational measure before committing the offense for which he is judged;

b) when the punishment provided for the offense is imprisonment for 7 years or more or life imprisonment.

Also, custodial educational measures will be applied to the minor in the following cases:

- If the minor does not comply, in bad faith, the execution conditions of the educational measure or the obligations imposed, the court decides to replace the measure with internment in an educational center, where, initially, it was taken the most severe non-custodial educational measure, for it's maximum duration provided by the law (situation provided by art. 123 para. (1) c) of The Criminal Code);
- If the minor does not comply with bad faith performance conditions or obligations imposed educational measure, even after it has been done in accordance with paragraph 123. (1) a) and b), the court has to replace the measure with internment in an educational center (situation provided by art. 123 para. (2) Criminal Code.);
- If the minor serving a non-custodial educational measure commits a new crime or he is beeing triled for a concurrent crime previously committed, the court decides to replace the initial measure with a custodial educational measure (situation provided by art. 123 para. (3) c) of The Criminal Code.).

The two custodial educational measures that can be applied to the minor are:

- Internment in an educational center for a period of 1 to 3 years;
- Internment in a detention center for a period of 2 to 5 years, and if the punishment provided by the law for the offense committed by the minor is 20 years imprisonment or more or life imprisonment, for a peroiud of 5 to 15 years.

Minors are not sentenced to imprisonment, therefore the institution of release on licence does not apply to them, not even if at the age of 18 years it is required a change of the enforcement regime, according to art. 126 of The Criminal Code, and the court decides for them to continue the execution of the educational measure in a prison.

The release on licence institution becomes applicable only if a person has committed two crimes, one during the minority and the other after turning 18 years, and, according to art. 129 para. (2) b) of The Criminal Code, he was sentenced with imprisonment, but in this case, it applies to the adult.

However, given that they are subject to a deprivation of liberty as a result of their internment into an educational center or a detention center, minors also have the opportunity to be set free before executing the whole period of the educational measure, if they have provided proves that the educational measure has achieved its purpose and the offender can reintegrate into the society.

In the previous Penal Code there were two types of custodial educational measures: the internment in a rehabilitation center and the internment in a medical-educational institute, which were being taken for an indefinite period of time, but only until the aperson turned 18 years old and could be extended for up to two years if it was necessary to accomplish the purpose

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[1] Exceptiong the situation provided by the previous criminal code, when the minor was sentenced to a term of imprisonment with conditional suspension on supervision or control, which in terms of maintaining the minor in liberty was more favorable than an educational measure involving deprivation of liberty under the new code.

of the internment[2]. After passing at least one year from the date of the internment, the minor could have been released if he had given strong evidence of improvement, of diligently into his education and of the acquisition of a professional training[3].

Unlike in the previous code's rules, currently the release from executing a custodial educational measure is ordered for the person who has reached the age of 18, so to the adult. The release posibility is no longer apreciated after a fixed period of one year, but after a fraction of at least half (1/2) of the internement duration.

Also, unlike the previous legislation, The New Criminal Code requires compliance of some obligations until the expiration of the internement's time.

2. Content

In order to obtain release, both the person interned in an educational center and the person interned in a detention center, must accomplish the following conditions:

1. They have reached the age of 18 years;

2. By the age of 18 they have executed at least half (1/2) of the length of the internment measure.

The person interned in an educational center can be released after serving a minimum period of between 6 months and 1 year and 6 months and the person interned in a detention center can be released after serving a minimum period of 1 year to 2 years and 6 months, if the punishment provided for the offense is imprisonment up to 20 years, and of 2 years and 6 months to 7 years and 6 months, if the punishment provided for the offence is imprisonment for 20 years or more or life imprisonment.

According to art. 127 of The Criminal Code, for the custodial educational measures, the provisions of art. 71-73 shall apply accordingly. Therefore, the duration of the educational measure of internment shall start from the day the final decision of the court was enforced. If during the criminal trial, against the minor was taken a custodial preventive measure, the duration for which the minor was deprived of liberty shall be deducted from the period of the internement, considering that he has already served a part of the internment measure.

3. During the internement, the minor has shown constant interest in acquiring academic and professional knowledge.

According to art. 90 para. (1) of The Law no. 254/2013[4], "in the prison system there are organized educational courses for general compulsory education and there can be organized courses for other forms of education provided by the law of education". These courses are organized and conducted under the conditions set by the Ministry of National Education and the Ministry of Justice, with teaching staff insured and paid by the school inspectorate[5], and the expenses of educational attainment are supported by the Ministry of National Education and the National Administration of Penitentiaries[6].

Art. 92 of The Law no. 254/2013 shows that the professional training is provided according to the options and abilities of the interned persons, through initiating, qualification, training and specialization programs established by the prison administration, in collaboration with specialized personnel from employment agencies, and with other accredited training providers[7]. The courses are organized in spaces specifically designed in the educational or detention centers or of the accredited training providers, under the conditions set by the agreements between the prison administration and each supplier.

Expenses related to professional training are supported by the Ministry of Education, by The Ministry of Labor, Family, and Social Protection, by The National Penitentiary Administration or by other persons or institutions[8].

The interned persons that serve the measure in an open regime can participate outside the educational or detention center, on request and with the approval of the center's director, at other types of professional training than those provided in par. (1), and the expenses related thereto shall be incurred by the interned person or by other persons or instituions[9].

As we see, the executional law provides all guarantees of providing a favorable climate for the assimilations of the academic and professional knowledge by the minor, him having just the task to show interest in participation in these and in obtaining positive results.

4. The minor made obvious progress in his social reintegration.

After finisshing the quarantine period referred to in art. 44 para. (1) of Law no. 254/2013, for the minor admitted in an educational center or a detention center, the executing regime of the educational measure will be established according to art. 152 of Law no. 254/2013. Among with this it is developed The

[2] See art. 104-106 of The Criminal Code 1968.

[3] See art. 107 of The Criminal Code 1968.

[4] Art. 166 para. (1) of Law no. 254/2013 disposes that the provisions of art. 90-92 of the same Act shall apply accordingly to minors interned in an educational center or in a detention center.

[5] See art. 90 para. (2) of The Law no. 254/2013.

[6] See art. 90 para. (3) of Law no. 254/2013. Art. 141 para. (4) of Law no. 254/2013 provides that "the Ministry of National Education, through the county school inspectorates, provides qualified personnel for training activities in schools, in detention centers and in educational centers."

[7] See also art. 141 para. (5) of The Law no. 254/2013.

[8] See art. 92 para. (4) of The Law no. 254/2013.

[9] See art. 92 para. (5) and (6) of The Law no. 254/2013.

intervention plan, based on a multidisciplinary evaluation from an educational, psychological and social perspective[10].

Art. 169 para. (3) of Law no. 254/2013 provides that "The intervention plan establishes, based on the development needs of the interned person, the duration and mode of execution of the custodial educational measures, activities and programs for education and professional training, cultural, moral-religious, psychological and social assistance in which the interned person is included, with its consultation". The educational, psychological and social assistance has the following components: school education, vocational guidance and professional training, educational activities, psychological and social assistance, individual or group moral-religious activity, and activities for maintaining an active life, with the main purpose of social reintegration and responsabilisation of the interned persons[11].

Also the interned persons may perform work, under the conditions of the employment laws, according to their physical development, skills and knowledge, unless they endanger their health, development, their educational and professional training[12]. Work is organized by taking into account only the interest of social reintegration of the interned persons, as the article 163 para. (3) of Law no. 254/2013 states.

Progress made in the interest of social reintegration may reflect from the educational process and from the participation at the activities organized in the center, from the fact that the minor had an appropriate behavior towards other interned persons and the staff of the Centre, from situations where the minor can receive rewards[13], because he did not commit misconduct[14] or crimes during internment.

Even if to the minor it is applied certain regimes for the execution of the educational measure (closed and open regime regime)[15], unlike the release on licence, in the case of release from the educational center or from the detention center, the Criminal Code does not require that the minor had been placed in a certain regime at the age of 18, when granting the release from the center can be taken in consideration.

Although the minor who may be criminally responsible may also be obliged to repair the damages by civil law, art. 1366 par. (2) of The Civil Code provides that "a minor under the age of 14 is responsible for the damage, unless he proves that he was deprived of discernment at the time of the deed", the Criminal Code does not require the complete fulfillment of civil obligations established by the decision that imposes the educative measure for the minor[16].

As in the case of release on licence, there are two stages of the procedure of release from a detention or educational center: the administrative stage and the judicial stage.

Most provisions relating to the procedure for granting release can be found in The Law no. 254/2013, The Code of Criminal Procedure coming to specify only the court that will review if the conditions are accomplished.

In the administrative stage, in accordance with art. 180 para. (2) of The Law no. 254/2013, The Educational Board[17] or The Commission for establishing, individualization and change of the enforcement regime of internment measure[18], with the participation of the judge charged with the surveillance of the deprivation of liberty, as president, and a probation officer from the probation service responsible under the law, from the center's surrounding district, analyzes the situation of the interned person, in its presence.

Similar to the procedure that takes place in prison for release on licence, in the case of the release of the interned persons, The Educational Council or The Committee, meets weekly[19]. Art. 314 para. (3) of The Project of Regulation Implementing The Law no. 254/2013 shows that by care of The Service of inmates accounts, it is written the pre-constituted part of the minutes to be submitted to the court[20].

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[10] See art. 169 para. (1) and (2) of The Law no. 254/2013.

[11] See art. 165 para. (1) and (3) of The Law no. 254/2013.

[12] See art. 163 para. (1) of The Law no. 254/2013.

[13] See art. 170 of The Law no. 254/2013.

[14] See art. 173 and art. 100 of The Law no. 254/2013.

[15] About the enforcement regimes of custodial educational measures, see art. 149 and art. 150 of The Law no. 254/2013.

[16] However, in the case of persons interned in an educational or detention center, where they were obliged to pay civil damages, which were not paid until the begining date of internement in the center, a 50% share from the percentage of 50% of the income realised by the interned person, will be used for the compensation given to the civil party for damages, as has art. 163 para. (8) of The Law no. 254/2013 provides.

[17] According to art. 145 para. (2) of The Law no. 254/2013, "The Education Council is composed of the center's director, who is also chairman of the board, the deputy director for education and the psychosocial educator in charge of the case, the teacher or head teacher, a psychologist, a social worker and the chief of supervision, registration and granting rights to interned persons ".

[18] According to art. 146 para. (1) of The Law no. 254/2013, The Commission for establishing, individualization and change of the enforcement regime of internment measure consists of the center's director, who is also chairman of the committee, the deputy director for education and psychosocial assistance, the deputy director for safety possession, the chief doctor, the teacher responsible for case, a psychologist and a social worker.

[19] See art. 314 para. (1) of The Project of Regulation Implementing The Law no. 254/2013.

[20] The pre-constituted of the minute shall contain the following mentions about the inmate:

a) civil status data;

b) conviction and crime;

c) brief description of the offense;

e) criminal records;

f) the existence of any arrest warrant or court of first instance.

According to art. 110 of The Law no. 252/2013, inside of The Board organized at the educational center's level, respectively The Commission of the detention center, at the works regarding the proposal for the release of a minor who has reached 18 years, from the educational or detention center, attends a probation officer appointed of the probation service responsible in whose territorial jurisdiction the center is situated. He presents the assessment report containing proposals concerning the obligations provided by art. 121 para. (1) of The Criminal Code, that the court may impose on the individual case. In compiling this report, the educational center or the detention center is obliged to inform the probation service at least 14 days before the date on which the person's situation will be reviewed by The Educational Board or The Commission from the detention center[21]. The probation officer has access to the documents of the minor's file from the educational center or detention center and at the request of counsel, the center has to forward copies of the documents contained in the individual file within 5 days of their request[22].

The Education Council or The Commission shall determine whether the person has shown constant interest in acquiring school and professional knowledge, has made progress in social reintegration, taking into account the previous periods of internement. Also, the prison authorities may consider the person's involvement in work, given that the work is not mandatory and it is not required by law to fulfill any requirements relating to work performed for granting release[23].

If it is established that the person serving the educational measure fulfills the requirements of art. 124 para. (4) or art. 125 para. (4) of The Criminal Code, the council or the commission proposes the release from detention center or education, which is contained in a motivated minute, that includes the opinion of the members of the council or commission regarding the opportunity of the release, along with documents proving the dates recorded in the minute[24]. The release proposal is submitted to the competent court according to art. 516 para. (2) and 517 para. (2) of The Criminal Procedure Code[25], namely the court in whose territorial jurisdiction it is placed the educational center or the detention center, with the same rank as the enforcement court. At the minute of the educative counsil or of the commission it is also attached the assessment report prepared by the probation officer[26].

If it is found that the interned person does not meet the legal requirements, the educational councilton or the commission establish a term for reviewing it's situation, which may not be longer than 6 months, according to art. 180 para. (5) of The Law no. 254/2013. The minute stating that the interned person does not qualify for release is communicated immediately to her, and it is being signed by her. The person serving the educational measure has the option, within 30 days from recieving the minute under signature, to address the request for release directly to the court in whose jurisdiction the detention center is located[27].

Art. 180 para. (5) of The Law no. 254/2013 indicates that the provisions of art. 97 para. (4) - (8) and (10) - (13) of the same Act, relating to release on licence, shall apply accordingly.

In the jurisdictional stage, the court may be seised with the request of the educative council or the commission.

The jurisdiction belongs, according to art. 516 para. (2) and 517 para. (2) of The Criminal Procedure Code, to the court in whose territorial jurisdiction is located the educational center or detention, of the same degree as the court of enforcement proceedings[28]. According to the executional legislation, the proposal will be submitted to the court[29] in whose territorial jurisdiction is located the educational or detention center.

The court may admit the proposal or the request and decide to release the person who has turned 18 years from the center, and with it the court may impose one or more of the obligations referred to in art. 121 of The Criminal Code[30], or it may overrule it, setting a time after which the proposal or request may be renewed[31]. The term shall not be less than 6 months and runs from the final decision of overrule.

According to art. 181 para. (3) of Law no. 254/2013, the decision of the can be challenged by appeal to the court within whose territorial circumscription is located the center, corresponding in rank with the court that would have jurisdiction to hear the appeal against the decision imposing the educational measure, within 3 days from the communication, and the appeal made by the prosecutor

[21] See art. 110 para. (4) of The Law no. 252/2013.
[22] See art. 110 para. (5) of The Law no. 252/2013.
[23] See art. 180 para. (3) of The Law no. 254/2013.
[24] See art. 180 para. (2) - (4) of The Law no. 254/2013 and art. 314 para. (4) and (5) of The Project of Regulation implementing The Law no. 254/2013.
[25] See art. 180 para. (4) of The Law no. 254/2013.
[26] See art. 110 para. (3) of The Law no. 252/2013.
[27] See art. 97 para. (11) reported to art. 180 para. (5) of The Law no. 254/2013 and art. 314 para. (6) of Project of Regulation Implementing The Law no. 254/2013.
[28] Art. 181 para. (1) of The Law no. 254/2013 incorrectly uses the phrase "court of territorial jurisdiction in which the center is located" because the center is in the territorial jurisdiction of a court, and not both institutions in the jurisdiction of a third institution.
[29] See art. 97 para. (10) reported to art. 180 para. (5) of The Law no. 254/2013.
[30] See art. 124 para. (5) of The Criminal Code.
[31] See art. 181 para. (2) of The Law no. 254/2013.

shall suspend the execution, so the interned person is not liberated until the appeal is judged.

With the release of the educational center or the detention center the court imposes one or more of the obligations referred to in art. 121 of The Criminal Code for minors who serve the non-custodial educational measures, until the final moment of the internment measure, regardless of its size.

In the case of this release, the Criminal Code did not mention that the remainder of the term would be a surveillance period, as in the case of release on licence.

These obligations are:

a) to follow a course of educational or professional training;

b) not to exceed, without the probation service, the territorial limit determined by the court;

c) not to be in certain places or at certain sports events, cultural or other public gatherings, determined by the court;

d) not to approach and not to communicate with the victim or members of it's family, the participants in the crime or other persons determined by the court;

e) to report to the probation service at the term fixed by it;

f) to accept examination, treatment or medical care measures.

The obligations provided by art. 121 para. (1) a), c) and d) have an identical content to the obligations provided by art. 101 para. (2) a), d) and e) of The Criminal Code, where the remainder of the sentence to serve from the release on licence to the end of the sentence is of 2 years or more. The obligation from art. 121 para. (1) e) has the same content as the supervision measure provided by art. 101 para. (1) a) of The Criminal Code for release on licence.

Considering the provisions of art. 71 para. (1) reported to art. 70 para. (5) of Law no. 253/2013, the enforcement of the obligations referred to in the subparagraphs b) -d) begins on the date of the final decision in which they have been established and for those provided by letters a), e) and f) begins on the date at which the minor has been informed of their content by the probation counselor.

According to art. 99 para. (1) of The Law no. 252/2013, the liberated person for which the court imposed one or more of the obligations referred to in art. 121 of The Criminal Code, is obliged to report to the probation service within 10 days from the time of release.

Although the code does not specify, observing the provisions of art. 99 of The Law no. 252/2013, which refer to the supervision of the liberated person by the probation service on and the competence of the surveillance councelor in these cases, we consider that the rules referring to supervising the execution of obligations provided in the other paragraphs of art. 121 of The Criminal Code are applicable. Alin. (3) art. 121 of The Criminal Code provides that "the monitoring the obligations imposed by the court is coordinated by the probation service."

According to art. 71 of The Law no. 253/2013, to the liberated person from serving the custodial educational measures at the age of 18 years, are applicable, in relation to the obligations established by the court, the provisions of art. 70 of the same law. Thus, if the court has imposed for released person to follow a course of educational or professional training, provided by the art. 121 para. (1) a) of The Criminal Code, the probation officer from the probation service in whose jurisdiction the person resides, receiving a copy of the judgment, decides, based on the initial assessment of the person, the course to be followed and the institution of community where it will take place. The councillor communicates its decision to this institution, together with a copy of the judgment. The supervision and enforcement of the obligations set out in art. 121 para. (1) a) of The Criminal Code, both regarding the surveilled person as well as the institution established by the probation service is performed by the competent probation service[32]. The community institution established ensures the effective follow of the course and its finalisation until the date of the internment measure, and at the end of the course, it will issue a document certifying its completion. This document is attached, in copy, to probation file[33].

If the liberated person is required not to exceed, without the probation service's permission, the territorial limits set by the court (art. 121 para. (1) b) of TheCriminal Code), the judge shall send a copy of the execution part of the decision to the County Police Inspectorate in whose jurisdiction the person lives[34].

According to art. 121 para. (2) of The Criminal Code, "when determining the obligation in para. (1) d), the court establishes, in particular, the content of this obligation, given the circumstances of the case".

When imposing the obligations provided by art. 121 para. (1) letters c) or d) of The Criminal Code (not to be in certain places or at certain sports events, cultural or other public gatherings, not to approach and not to communicate with the victim or members of it's family, the participants in the crime or other persons determined by court), the judge shall send a copy of the execution part of the decision, if appropriate, also to the persons or institutions referred to in art. 29 para. (1) letters m) and n)[35] of The Law no. 253/2013,

[32] See art. 50 para. (1) and (2) of The Law no. 253/2013, referred to in art. 70 para. (1), and art. 99 para. (2) in relation to art. 94 para. (1) and (4) of The Law no. 252/2013.

[33] See art. 99 para. (2) in relation to art. 94 para. (3) and (5) of The Law no. 252/2013.

[34] See art. 70 para. (2) the second sentence of The Law. 253/2013.

[35] Art. 29 lit. m) for the prohibition of the right to be in certain places or at certain sports events, cultural or other public gatherings, established by the court, the communication is beaing made to the county police inspectorate in whose jurisdiction he resides or to the one from the place of the sentenced person lives, in cases where the ban was ordered for places, events or gatherings outside this constituency, to The General Inspectorate of Romanian Police;

competent to supervise the fulfillment of these obligations[36].

According to art. 99 related to art. 97 of The Law no. 252/2013, where the court has imposed the inforcement of the obligation provided by art. 121 para. (1) e) of The Criminal Code, the probation counselor manager of the case determines the dates on which liberated person is required to report to the probation service.

According to art. 99 para. (1) in relation to art. 98 and art. 63 of The Law no. 252/2013, in order to enforce the obligation provided by art. 121 para. (1) letter f) of The Criminal Code, to submit to the examination, treatment or medical care measures, the case manager probation counselor shall proceed as follows:

a) if the court has determined, in the decision, the institution of examination, treatment or medical care, the counselor verifies if the liberated person is taken into the accounts of the established institution, the enforcement of the obligation by the liberated person and monitors the implementation of the examination, treatment or medical care activity[37];

b) if the court has determined, in the decision, the institution of examination, treatment or medical care, the counselor, depending on the particular case, established the institution and will communicated to it the copy of the court decision and his decision, proceeding in accordance with the provisions of letter a). The decision shall be communicated to the supervised person[38].

According to par. (4) art. 70 of Law no. 253/2013, the cost of the examination, treatment or medical care covered by the state budget.

The person released from detention center or education at the age of 18 years may be granted permissions in the execution of the obligation by the probation counselor[39]. Art. 72 para. (1) of The Law no. 253/2013 states that at the request of the liberated person, if justified, the probation councelor may, by decision, grant permissions in the execution of the obligations stipulated in art. 121 para. (1) letters c) and d) of The Criminal Code. In this case, permissions may not be granted for a period longer than 5 days, and its duration is included in the term of supervision.

According to para. (3) art. 72 of The Law no. 253/2013, where the court imposed on the liberated person the execution of the obligation provided by art. 121 para. (1) letter b) of The Criminal Code, at his request, for objective reasons, the probation counselor may grant, by decision, permission to exceed the territorial limit set by the court. If the request concerns leaving the territory of the country, the duration of the permission may not exceed 30 days in an year.

About granting permissions, the probation counselor shall inform, as appropriate, the persons or institutions listed in art. 29 lit. m) and n) of The Law no. 253/2013 and judge delegated with enforcement[40].

Although the Criminal Code does not refer to art. 121 para. (4), we believe that this text is applicable, as part of activities related to supervision held by the probation service. The latter is obliged to notify the court if:

a) there have intervened motifs for modifying the obligations imposed by the court or the ending of some of them;

b) the person does not comply with the educational measure's enforcement conditions or does not execute, in the established conditions, its obligations.

Art. 71 para. (2) of Law no. 253/2013 states that the execution of all obligations imposed stops by law at the final date of the period of the interment measure.

According to art. 124 para. (6) and art. 125 para. (6) of The Criminal Code, if the released person does not comply, in bad faith, the obligations imposed, the court reviews the release and orders the enforcement of the remaining of the custodial educational measure duration.

The legislature used the term "reviews the release", not interfering the revocation institution, as for the release on licence.

According to art. 516 para. (2) of The Criminal Procedure Code, the review of the release of the educational center is being made ex officio or after the notification from the probation service, by the court which heard the case at first instance. In the case of the release from the detention center, art. 517 para. (2) of The Criminal Procedure Code also shows that ex officio or after the notification from the Probation Service, it will be competent the court of first instance which judged the minor. In fact, the two texts indicate the same category of courts using different terminology.

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lit. n) for the prohibition of the right to communicate with the victim or with members of it's family, the people who committed the crime or others, determined by the court, or to approach them, the communication is being made to the persons with who the sentenced person does not have the right to connect or is not entitled to approach, to the county police inspectorate in whose jurisdiction he resides and, if applicable, is the place where the convict lives and, for cases where the victim or persons determined by the court do not live in the same district, to county police inspectorates from their homes.

[36] See art. 70 para. (2) sentence I of the The Law no. 253/2013.

[37] See also art. 70 para. (3) sentence I of The Law no. 253/2013, which states that "if the disposition of the obligation referred to in art. 121 para. (1) f) of Law no. 286/2009, as amended and supplemented (The Criminal Code), a copy of the judgment shall be communicated by the probation counselor to the institution in which it will be held the examination, treatment or medical care referred to in the judgment. "

[38] See also art. 70 para. (3) second sentence of The Law. 253/2013, which provides: "If the institution is not mentioned in the judgment, the probation officer shall establish, by decision, the institution in which will be held the examination, treatment or medical care and communicate the copy of the judgment and the decision to it ".

[39] See art. 99 related to art. 96 para. (1) of The Law no. 252/2013.

[40] Art. 99 in relation to art. 96 para. (2) of The Law no. 252/2013 provides that "permission is granted by decision of the case manager probation counselor, communicated to the competent territorial police".

The law does not stipulate that commiting a crime until the ending of the internment perioud would determine the revocation of the release, but we note that the provisions of art. 129 para. (2) of The Criminal Code are applicable. Thus, if the sentence established for the new offense committed is imprisonment or life imprisonment, the latter shall apply in accordance with letters b) and c), and if the penalty is a fine, it will countinue to be enforced only the educational measure of which the offender was released, but it's duration shall be increased by up to 6 months without exceeding the statutory maximum for that measure.

The Criminal Code does not provide the cancellation of the release from the educational center or from detention center if it is discovered that the liberated person has commited an offense before being granted release at the age of 18 years.

3. Conclusions

With the coming into force of The New Criminal Code, the enforcement regime applicable to minors became more gentle, because for them the law does not provide punishments anymore, but only educational measures, whose role is to reeducate and reintegrate the minor into the society without suffering the harms of the sanctions served by the adults.

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- The Law no. 254 of 2013 on the execution of sentences and custodial measures ordered by the court during the trial;
- The Project of Regulations Implementing The Law no. 254/2013 - www.just.ro;
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THE RIGHT TO VOTE AND BREACH OF VOTING SECRECY

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Abstract

The article is meant to be a brief overview of the legal provisions concerning the right to vote, encompassing both the national provisions and the international standards.

The scientific approach also includes the fixation of the standards in the field of the right to vote, as defined in the European Court of Human Rights case-law.

Due attention will be granted to the provisions on the breach of voting secrecy, provided for in the current Criminal Code, which entered into force on the 1st of February 2014, as this piece of legislation regulates in a unified way the offence, applicable for any type of elections performed in Romania.

The paper will focus, also, on the legislation of some European states, in order to assess the compatibility of the offence of breach of voting secrecy with similar offences in the legislation of other countries.

To close with, the study will give some conclusions regarding the importance of the criminal punishment of the offence of breach of voting secrecy, as well as the conformity of this particular offence with the internationals standards.

Keywords: *elections, right to vote, breach of voting secrecy, Criminal Code, (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*.

1. Introduction

The principles underlying Europe's electoral heritage set down in The Code of Good Practice in Electoral Matters (universal, equal, free, secret and direct suffrage) require the necessity of a scientific approach to assess the national framework in the field of the right to vote by comparison with these fundamental European principles.

The development of the European standards for the protection of the right to vote in the case-law of the European Court of Human Rights requires the distinct approach of the evolution of the contents of the right to free elections, provided for in Article 3 from The (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

We think that the analysis of the offence of breach of voting secrecy is especially important, taking into consideration the fact that electoral offences were grouped in a distinct title in the current Criminal Code, which entered into force on the 1st of February 2014, in order to ensure a higher stability of these texts, but also in order to eliminate the parallel incriminations which existed in the previous legal framework.

Such an endeavour is even more necessary taking into consideration that ensuring the voting secrecy is an important leverage for securing the possibility of the citizens to freely and unrestrictedly express their will concerning the exercise of the right to vote.

The brief overview of the legislation of some European countries in the field of the offence of the breach of voting secrecy is indicative of the fact that the national legislation is consistent with the European standards, having regard to the fact that the incrimination of such a behaviour is a truly European standard of protection of the freedom of the exercise of the right to vote.

The importance of the study also resides in the fact that this topic has been timidly approached in specialized literature despite the fact that the importance of ensuring a coherent and complete framework in the field of electoral law, including the matters of electoral offences, is likely to ensure a stability and trust of the society in the legality and fairness of the electoral process. From this perspective an in-depth examination by the specialized literature can bring an added value to the legal framework and can recommend some directions of action for the evolution of the electoral system as a whole.

2. Content

2.1. Introductory remarks concerning the right to vote

The regulation of elective rights and their exercise as such are instruments which allow the people to participate in leading a country by electing its representatives.

As specialized literature[1] has put it, the fundamental rules concerning the exercise of the elective rights are non-discrimination, access to vote and the right to vote, equal and universal ballot, *secret ballot* and the guarantee that the results of the ballot will reflect the free will of the citizens.

At international level, provisions and standards regarding the organisation of the electoral process and

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[1] G. S. Goodwin-Gill, *Elections libres et régulières*. Nouvelle edition, Union Interparlamentaire, Geneva, 2006, p. 171.

the right to vote can be found in: Article 21 from *The Universal Declaration of Human Rights*[2], Article 25 from *The International Covenant on Civil and Political Rights*[3], Article 3 from *The (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*[4] and in *The Code of Good Practice in Electoral Matters*[5], a landmark document in the field of electoral law, representing the core of a code of good practice in electoral matters, which enumerates the five principles underlying Europe's electoral heritage: universal, equal, free, secret and direct suffrage; of course, elections must be held at regular intervals.

Unfortunately, not all the European States follow those basic principles when organizing elections. For example, The European Network of Election Monitoring Organizations (ENEMO) international observation mission to the early Parliamentary elections in the Republic of Moldova in 2009 refused to monitor the elections as the conditions that were set by the authorities of the country made it impossible to perform a comprehensive monitoring effort. In addition to overt interference from the authorities, the observers from ENEMO were threatened by unknown persons of a criminal appearance. Thus, ENEMO concluded that entities at the highest levels of Moldovan authority (the Ministry of Interior, the Central Election Commission, the immigration police) exceeded their authority and violated national legislation, as well as international norms and standards for democratic elections. Also, the authorities of the Republic of Moldova purposefully created conditions to discredit the electoral process and undermine public confidence in the voting results.[6]

At national level, according to the provisions of Article 2 from the Constitution of Romania[7] the national sovereignty shall reside within the Romanian people, that shall exercise it by means of their representative bodies, resulting from free, periodical and fair elections, as well as by referendum. No group or person may exercise sovereignty in one's own name.

In other words, the electorate is the only original power on which the state power and authority is justified and grounded[8], whereas the elections are the democratic traditional way in which the people, holder of the national sovereignty, designates its representative authorities. In this way of exercising power, the state authorities are designated by elections, gaining directly from the people offices of utmost importance.[9]

The general principles contained in Articles 1 and 2 of the Romanian Constitution provided for the prevalence of the rule of law and democracy, but also the fact that the people is the only one entitled to exercise national sovereignty by its representative bodies emerged through free, regular and fair elections, as well as through referendum.

As a natural consequence of the general principles enshrined, Chapter II – Fundamental rights and freedoms within Title II, provide in Articles 36 and 38 the right to vote and the right to vote for the European Parliament, taken over and developed by a series of special organic acts.[10]

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[2] The Universal Declaration of Human Rights (UDHR) was proclaimed by the United Nations General Assembly in Paris on 10 December 1948, available at: **http://www.un.org/en/documents/udhr/index.shtml#atop**, accessed on 15.01.2015.

"Article 21. (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

[3] International Covenant on Civil and Political Rights, was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976, available at: **http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx**, accessed on 15.01.2015.

"Article 25 – "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country."

[4] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20.III.1952, available at: **http://www.echr.coe.int/Documents/Convention_ENG.pdf**, accessed on 15.01.2015.

"Article 3. Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

[5] *Code of Good Practice in Electoral Matters. Guidelines on Elections*, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002), para. 4, p. 9, available at: **http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282002%29023-e**, accessed on 15.01.2015.

[6] *The Statement of the European Network of Election Monitoring Organizations on the cancellation of its observation mission to the July 29, 2009 early parliamentary elections in the Republic of Moldova*, available at: **http://www.enemo.eu./press/Moldova%202009%20-%20Final%20report%20-%20ENG.pdf**, accessed on 15.01.2015.

[7] The Constitution of Romania of 1991 was amended and completed by the Law No. 429/2003 on the revision of the Constitution of Romania, republished in the Official Gazette of Romania No. 758 of 29 October 2003.

[8] I. Muraru, *Alegerile şi corpul electoral [The elections and the electoral body]*, in I. Muraru, E. S. Tănăsescu, A. Muraru, K. Benke, M.-C. Eremia, Gh. Iancu, C.-L. Popescu, Şt. Deaconu, *Alegerile şi corpul electoral [The elections and the electoral body]*, All Beck Publishing House, Bucharest, 2005, p. 3.

[9] I. Muraru, *Alegerile şi corpul electoral [The elections and the electoral body]*, in I. Muraru, E. S. Tănăsescu, *op. cit.*, p. 1.

[10] Law No. 3/2000 on the organization and performance of the referendum; Law No. 67/2004 on the election of the authorities of the local public administration; Law No. 370/2004 on the election of Romania's President; Law No. 33/2007 on the organization and performance of

2.2. The right to vote

In a state based on the principles of the rule of law and democracy the people has to have the last word and this becomes reality by the exercise of elective rights by its citizens. The exclusively political nature[11] of the right to vote and the right to be elected has several legal consequences: on the one side, they are used only for the participation to the government, that is for the exercise of power directly by the people and, on the other side, they usually only belong to the citizens, not to other categories of persons as well.[12]

According with the provisions of Article 36 of the Fundamental Law, every citizen having turned eighteen up to or on the election day shall have the *right to vote*. The mentally deficient or alienated persons, laid under interdiction, as well as the persons disenfranchised by a final decision of the court cannot vote.

In order for a person to be allowed to cast a vote it has to meet the following *conditions* cummulatively:

a) To be a Romanian citizen. According with the applicable legal provisions, the Romanian citizenship is the connection and affiliation of a natural person to the Romanian state and it can be aquired by birth, adoption or it can be granted on request. The Romanian citizenship can be lost: by withdrawal of the citizenship, approval of renouncing the citizenship or other cases provided for by law[13].

Concerning the existence of a citizenship related condition in the context of *local elections* it was stated that, although the national law which makes the right to vote and to stand for election (*in local elections*) subject to the requirements of citizenship and residence is not in violation of any imperative rule of international or European law concerning universal suffrage, however, a tendency is emerging to grant local political rights to long-standing foreign residents, in accordance with the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level. Furthermore, the Venice Commission recommends, in its Code of Good Practice in Electoral Matters, that the right to vote in local elections be granted also to noncitizens, after a certain period of residence.[14]

b) To be at least 18 years of age on the date of the elections, that is to have reached the *political maturity*;

c) To not be mentally deficient or alienated persons, laid under interdiction. According with the provisions of Article 164 of Law No. 287/2009 concerning the Civil Code, the person who lacks the necessary power of judgment in order to take care of its own interests, following its mental alienation or disturbance, shall be placed under interdiction. Also underaged persons who have diminished power of judgment can be placed under interdiction.

d) To not have lost its right to vote by having been sentenced to loss of elective rights based on a final court decision. The moral capacity, also called *electoral dignity*, is meant to show the elector's minimum attachment to the state; lacking it will cause the impossibility to vote and is ascertained by sentencing the citizen for perpetration of certain offences.[15]

As regards its *characteristics*, the vote has to be *universal, equal, secret and freely expressed*[16], its exercise being optional so that each citizen who has the right to vote has the freedom to go or to not go to the polls in order to express an electoral option.[17]

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the elections to the European Parliament; Law No. 35/2008 on the election of the Chamber of Deputies and of the Senate and for amendment and supplementing of Law No. 67/2004 on the election of the authorities of the local public administration, of the Law No. 215/2001 on the local public administration and of the Law No. 393/2004 on the Status of locally elected representatives.

[11] Concerning the right to vote and the right to be elected the *French literature* considered that these rights are civil rights, alongside all rights whose interdiction can be ordered by the court based on the provisions of Article 34 of the French Criminal Code (which provides for the sanction of civil degradation by the interdiction of the exercise of some rights and aptitudes attached to the quality of a citizen). See F. Luchaire, in F. Luchaire, G. Conac, *La constitution de la République française*, Economica, 2e edition, 1987, p. 757.

[12] Şt. Deaconu, E. S. Tănăsescu, in I. Muraru, E. S. Tănăsescu – coordonatori, *Constituţia României. Comentariu pe articole [Romania's Constitution. Article comments]*, C.H. Beck Publishing House, Bucharest, 2008, p. 331-332.

[13] Articles 1, 4 and 24 of the Law on the Romanian citizenship No. 21/1991, republished in the Official Gazette of Romania No. 576 from 13 August 2010, with subsequent amendments and supplements.

[14] Venice Commission, Opinion on the law for the election of local public administration authorities in Romania (*comments by U. Mifsud Bonnici, P. van Dijk*), Opinion No. 300/2004, Strasbourg, 4 janvier 2005, p. 3, available at: **http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282004%29040-e,** accessed on 15.01.2015.

[15] E. M. Nica, *Drept electoral [Electoral law]*, Sitech Publishing House, Craiova, 2010, p. 86.

[16] See Şt. Deaconu, E. S. Tănăsescu, respectively I. Vida, in I. Muraru, E. S. Tănăsescu – coordinatori, *Constituţia României. Comentariu pe articole [Romania's Constitution. Article comments],* C.H. Beck Publishing House, Bucharest, 2008, p. 338-340 and p. 604-608.

[17] However, there are also states in which the exercise of the right to vote is mandatory.The majority of countries in Western Europe which still use compulsory voting in some form have done so for between 50 and 100 years: *Belgium* [Fines for not voting are up to 50 euros for a first offence and 125 euros for a second offence], *Luxembourg* [According to electoral legislation sanctions include fines and imprisonment but none have ever been enforced], *Liechtenstein* [Non-voters may be fined if they do not give an approved reason for not voting.], *Switzerland* [more specifically, the Swiss canton of Schaffhausen - a small fine is payable by non-voters to the police who come to re-collect each citizen's voter legitimation card. Sanctions are enforced against everyone who has not voted, unless they are exempt], *Cyprus* [The punitive sanctions are fines of up to £200 and/or a prison sentence of up to six months for failing to vote or register. There have been very few prosecutions and none since the 2001 general election.] and Greece [There are no specified sanctions enforcing the compulsory system – the relevant passage was omitted from the 2001 revision of the constitution.]. See The Electoral Commission UK, *Compulsory voting around the world. Research report*, June 2006, p. 7-8, 13, available at: **http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0020/16157/ECCompVotingfinal_22225-16484__E__N__S__W__.pdf**, accessed on 15.01.2015.

Some European countries once had compulsory voting before abolishing it. Austria had compulsory voting in all regions from 1949–1982 and the Netherlands used it from 1917–1967. [See *Voter turnout in Western Europe*, International Institute for Democracy and Electoral

a) the freely expressed character of the vote indicates the fact that the participation to the suffrage is not mandatory though it represents one of the highest and civil responsibilities in terms of maniphestation of the citizenship connection between an individual and a state.[18] In other words, the law does not forces the voter to vote and does not sanction its electoral passivity.[19]

In any case the participation to the elections only assumes the presence in the polling station and does not also mean the provision of an obligation concerning what the vote should contain. Even in case of the mandatory vote citizens continue to have the possibility to cast a vote in blank or a null vote, according with their own consciousness.[20]

b) As regards the *universal character of the vote* – the right to participate in an election as a voter (the "active" electoral right) and the right to stand as a candidate for election (the "passive" electoral right) – it has been asserted that this characteristic is a core element of modern democracy. It is of utmost importance that these fundamental rights are neither formally nor practically restricted without sufficient justification.[21]

Exclusion of some citizens from among the citizens who can exercise their right to vote is not decided based on discretionary or discriminating conditions, but rather having regard to practical issues which have to do with the voters' maturity of thinking, as well as with possible psychological or moral incapacities.[22]

c) Equality of vote is the expression of the principle of equality of rights of the citizens, provided for at a general level in Articles 4 and 16 of the Constitution. The equality of vote is reflected both in the number of votes a citizens is entitled to and in the weight of each vote in the designation of the nation's representatives. Legally, each citizen has the right to one single vote and this vote has the same weight as all other votes in designation of the same state authority, no matter the person who exercised the right to vote.[23]

d) The *voting secrecy* guarantees the possibility of the citizens to maniphest freely and unrestrained the will concerning the designation of one person or the other in elective public functions and offices.[24]

The voting secrecy is that guarantee of the free expression of the vote based on which the voter's opinion is expressed as individual option - personal, anonymous, in an autonomous, independent manner, not subject to any constraint and pressure. The secrecy thus assumes that the voter cannot be forced or put under pressure in order to reveal its option, neither at the moment of exercising its right to vote, nor subsequently.[25]

For the protection of the voting secrecy the national lawmaker introduced the offence of breach of voting secrecy performed by any means and sanctioned according with the provisions of Article 389 of the Criminal Code.

At the level of the European Union, the elections are provided for in the Act of 20 September 1976[26], which lays down principles common to all Member States (e.g. members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote; elections must be held on a date falling within the same period starting on a Thursday morning and ending on the following Sunday).

The regulation of the *right to vote for the European Parliament* is effected by the Council Directive 93/109/EC of 6 December 1993[27] laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

Assistance, Publications Office International IDEA, Stockholm, 2004, p. 28-29, available at: **http://www.idea.int/publications/voter_turnout_weurope/upload/Full_Reprot.pdf**, accessed on 15.01.2015]

[18] E. S. Tănăsescu, Legile electorale. Comentarii şi explicaţii *[Electoral Laws, Comments and explanations]*, All Beck Publishing House, Bucharest, 2004, p. 3.

[19] C. Ionescu, *Legile electorale pe înţelesul tuturor [Electoral laws made easy]*, All Beck Publishing House, Bucharest, 2004, p. 38.

[20] E. S. Tănăsescu, *op. cit.*, p. 71.

[21] F. Grotz, *Recurrent challenges and problematic issues of electoral law, în Venice Commission, European electoral heritage – 10 years of the Code of Good Practice în Electoral Matters*, Conference, Tirana, Albania, 2-3 July 2013, Science and technique of democracy, No. 50, Council of Europe Publishing, Strasbourg, 2012, p. 8.

[22] E. S. Tănăsescu, *op. cit.*, p. 70.

[23] Şt. Deaconu, E. S. Tănăsescu, in I. Muraru, E. S. Tănăsescu – coordinatori, *op. cit.*, p. 338.

Since "one person one vote" is a hallmark of a democratic system, why would we encounter any variation here? The reason is simple: giving people more than one vote does not violate democratic principles provided everyone still has the same number of votes. Having just one vote is very much the norm, but in most cases within the family term "mixed" systems everyone has two votes. For example, when voters in Germany or New Zealand go to the polling station on the election day they are confronted with a ballot paper that invites them to cast one vote for a candidate to represent their local single-member constituency, and another vote for a party in contest for seats awarded at the national level. See M. Gallagher, P. Mitchell (editors), *The Politics of Electoral Systems*, Oxford University Press, Oxford, 2006, p. 7.

[24] Şt. Deaconu, E. S. Tănăsescu, in I. Muraru, E. S. Tănăsescu – coordinatori, *op. cit.*, p. 339.

[25] E. M. Nica, *op. cit.*, p. 91.

[26] Act of 20 September 1976, annexed to Decision 76/787/ECSC, EEC, Euratom, concerning the election of the representatives of the European Parliament by direct universal suffrage, amended by the Council Decision of 25 June 2002 and 23 September 2002.

[27] Amended by the Council Directive 2013/1/EU of 20 December 2012 as regards certain detailed arrangements for the exercise of the right to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

At national level, the Law No. 429/2003 on the revision of the Constitution of Romania[28] introduced in the Constitution Article 38 which provides for the right to be elected to the European Parliament: after Romania's accession to the European Union (1 January 2007), Romanian citizens have *the right to elect* and *be elected to the European Parliament*.

2.3. European Court of Human Rights case-law regarding Article 3 from the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

According to Article 3 (right to free elections) from the (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.*

Analysing the content of Article 3 (right to free elections) from the (First) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms a difference of wording from the other substantive clauses in the Convention and in the First Protocol can be observed. Article 3 does not state that "everyone has the right" or "no one can refuse the right to free elections", but rather it states that the "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot".[29]

The European Court of Human Rights [ECtHR], in the case of *Mathieu-Mohin and Clerfayt v. Belgium*[30], ruled that the "right to vote" and the "right to stand for election to the legislature" are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations. In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart "the free expression of the opinion of the people in the choice of the legislature".

The real test which is employed by the Court in recent cases[31] dealing with the alleged violations of Article 3 of Protocol No. 1 is, first, whether, there is legitimate aim for disenfranchisement or another restriction of the electoral rights in question, and, second, whether this restrictions would be proportionate in the case at hand.[32]

Regarding the aplicability of Article 3, both the Commission and, later, the Court, in its case law, defined the notion of "legislature" („*corps législatif*") used in the text.

In *Mathieu-Mohin and Clerfayt* Case[33] the Court took the position that the word "legislature" does not necessarily mean the national parliament only. According to the Court its meaning has to be interpreted in the light of the constitutional structure of the State in question. On that basis the Court held that, further to the 1980 constitutional reform, the Flemish Council in Belgium was vested with competences and powers wide enough to make it, alongside the French Community Council and the Wallon Regional Council, a constituent part of the Belgian "legislature" in addition to the House of Representatives and the Senate.[34]

Since *Mathieu-Mohin and Clerfayt v. Belgium*, the Strasbourg Court has consistently held that Article 3 of protocol No. 1 not only imposes obligations on the Convention States, but also grants rights to individuals, namely, the right to vote and the right to stand for elections.[35]

ECtHR, in the case of *Ahmed v. The United Kingdom*[36], did not rule on the application of the provisions of Article 3 of Protocol No. 1 in the

[28] The Law No. 429/2003 on the revision of the Constitution of Romania was approved by the national referendum of 18-19 October 2003, and came into force on the date of the publication in the Official Gazette of Romania: No. 758 of 29 October 2003.

[29] C. Bîrsan, *Convenţia europeană a drepturilor omului. Comentariu pe articole. Vol. I Drepturi şi libertăţi [The European Convention on Human Rights. Article Comments. Volume I - Rights and Liberties]*, Ed. All Beck Publishing House, Bucharest, 2005, p. 1079.

[30] The European Court of Human Rights [ECtHR], case of *Mathieu-Mohin and Clerfayt v. Belgium*, Application No. 9267/81, Judgment from 2 March 1987, para. 52. All the ECtHR judgements mentioned in this study are available on the website of the ECtHR **http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/** and were accessed in February 4, 2014.

[31] ECtHR, case of *Py v. France*, Application No. 66289/01, Judgment from 11 January 2005; ECtHR, case of *Gitonas* others v. Greece, Application No. 18747/91; 19376/92; 19379/92, Judgment from 1 July 1997.

[32] S. Golubok, *Right to free elections: case-law of the European Court of Human Rights*, University of Essex, Law Department, 2007, p. 35.

[33] ECtHR, case of *Mathieu-Mohin and Clerfayt v. Belgium*, Application No. 9267/81, Judgment from 2 March 1987, para. 53.

[34] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak, *Theory and practice on the European Convention on Human Rights*, 4th edition, Intersentia, Antwerpen-Oxford, 2006, p. 930; ECtHR, case of *Mathieu-Mohin and Clerfayt v. Belgium*, Application 9267/81, Judgment from 2 March 1987, para. 53.

[35] L. López Guerra, *The spill-over effect of Article 3 of Protocol No. 1: from parliamentary to local elections*, in L. Berg, M. Enrich Mas, P. Kempees (editors), *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme, Liber amicorum Vincent Berger*, Wolf Legal Publishers (WLP), Oisterwijk, p. 269-270.

[36] ECtHR, case of *Ahmed and others v. The United Kingdom*, Application No. 65/1997/849/1056, Judgment from 2 September 1998. In the words of the Court, without taking a stand on whether local authority elections or elections to the European Parliament are covered by Article 3 of Protocol No. 1, as was also disputed by the Government, the Court concludes that there has been no breach of that provision in this case *(para. 76).*

elections organized for local councils, although it was said[37] that this was regrettable as those local authorities which exercise significant governmental powers (including the enacting of bylaws) ought, as a matter of principle, to have their elections subject to the requirements of this Article. Such a development of the jurisprudence would be in conformity with the above judgement in *Mathieu-Mohin* case[38].

The right to free elections enshrined in Article 3 *is not an absolute right*, so that the Court allowed to the states the possibility to regulate some limitations of the right to vote or to be elected, their margin of appreciation being very generous. Obviously, any restrictions imposed should not affect the very substance of the right, they have to have a legitimate scope and to be proportional with this scope.

In this sense, the deprivation of certain persons of the right to vote in their own country is not *per se* contrary to the *Convention*, on condition that it is not performed arbitrarily or as a form of discrimination.

In the case of *Aziz v. Cyprus*[39], the applicant complained that he was deprived of the right to vote because of his Turkish-Cypriot ethnicity. Cypriot law as it stood allowed Turkish-Cypriots and Greek-Cypriots only to vote for candidates from their own ethnic communities in the parliamentary elections. However, since the Turkish occupation of Northern Cyprus, the vast majority of the Turkish community had left the territory and their participation in parliament was suspended. Consequently, there was no longer any list of candidates for whom the complainant could vote. While the government argued that the inability to vote was due to the fact that there were no candidates available for whom the complainant could vote, the ECtHR was of the view that the close link between the election rules and membership of the Turkish-Cypriot community, together with the government's failure to adjust the electoral rules in light of the situation, meant this amounted to direct discrimination on the basis of ethnicity.[40]

In the case of *Hirst v. The United Kingdom* (No. 2)[41], the Court observed that the applicant, sentenced to life imprisonment for manslaughter, was disenfranchised during his period of detention by section 3 of the 1983 Act which applied to persons convicted and serving a custodial sentence.

While the Court reiterated that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.[42]

The Court concluded that there has been a breach of Article 3 of Protocol No. 1 in the case of *Frodl v. Austria*[43]. Under the *Hirst test*, besides ruling out automatic and blanket restrictions it is an essential element that the decision on disenfranchisement should be taken by a judge, taking into account the particular circumstances, and that there must be a link between the offence committed and issues relating to elections and democratic institutions.

The essential purpose of these criteria (provided by the *Hirst* case) is to establish disenfranchisement as an exception even in the case of convicted prisoners, ensuring that such a measure is accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary, taking the above elements into account. The principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned; no such link existed under the provisions of law which led to the applicant's disenfranchisement.

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[37] A. Mowbray, *Cases and materials on the European Convention on Human Rights*, Oxford University Press, Oxford, 2007, p. 982.

[38] ECtHR, case of *Matthews v. The United Kingdom*, Application No. 24833/94, Judgment from 18 February 1999.

[39] ECtHR, case of *Aziz v. Cyprus*, Application No. 69949/01, Judgment from 22 June 2004.

[40] European Union Agency for Fundamental Rights, European Court of Human Rights - Council of Europe, *Handbook on European non-discrimination law*, Publications Office of the European Union, Luxembourg, 2011, p. 27, available at: **http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf**, accessed in February 4, 2014.

[41] ECtHR, Grand Chamber, case of *Hirst v. The United Kingdom* (No. 2), Application No. 74025/01, Judgment from 6 October 2005, para. 12, 13, 72, 82-85.

[42] In the case of *Greens and M.T. v. the United Kingdom*, the Court held that there had been a violation of Article 3 of Protocol No. 1 to the Convention. It found that the violation was due to the United Kingdom's failure to implement the Court's Grand Chamber judgment in the case of *Hirst (No. 2) v. the United Kingdom*. Given in particular the significant number of repetitive applications it had received shortly before the May 2010 general election and in the six following months, the Court further decided to apply its pilot judgment procedure to the case. Under Article 46 (binding force and execution of judgments) of the Convention, the United Kingdom was required to introduce legislative proposals to amend the legislation concerned. See, ECtHR, *Factsheet - Prisoners' right to vote*, February 2015, available at: **http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf**, accessed in February 4, 2015.

Because the United Kingdom failure to bring its legislation up-to-date, The Coust, subsequently, found violation of the right to vote in ten follow-up prisoner voting cases, but awarded no compensation or legal costs. In the Chamber judgment from the 12 August 2014, in the case of *Firth and Others v. the United Kingdom*, Application No. 47784/09 and nine others, ECtHR held that there had been a violation of Article 3 of Protocol No. 1.

[43] ECtHR, case of *Frodl v. Austria*, Application No. 20201/04, Judgment from 8 April 2010, para. 34-36.

In *Calmanovici v. Romania*[44] case and, subsequently, in *Cucu v. Romania*[45], the Strasbourg Court concluded that there has been a violation of Article 3 of Protocol No. 1 to the Convention, as the national legislation, at that stage, provided for the automatic withdrawal of his voting rights as a secondary penalty to a prison sentence and of the lack of competence of the courts to proceed with a proportionality test on that measure[46]. In ruling in favour of the applicants, the Court recalled that the rights guaranteed by Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law; a general, automatic and indiscriminate restriction on the right to vote applied to all convicted prisoners serving sentences is incompatible with that Article.

Of course, the present Criminal Code of Romania layed down new rules regarding the automatic withdrawal of the voting rights as a secondary penalty to a prison sentence, observing the findings of the Strasbourg Court.

Consequently, the provisions of Article 66 from the Criminal Code, dealing with the complementary penalties[47], introduced a difference between the right to be elected to the ranks of public authorities or any other public office [provided by para. 1 lett. a)] and the right to vote [provided by para. 1 lett.d)], which was not regulated in the former Criminal Code (from 1968).

Also, according to Article 67 para. 1 and 2 from the Criminal Code, the complementary penalty of a ban on the exercise of certain rights can be enforced if the main penalty is imprisonment or a fine and the Court finds that, considering the nature and seriousness of the offense, the circumstances of the case and the person of the offender, such penalty is necessary. Enforcing the complementary penalty of a ban on the exercise of certain rights is mandatory when the law stipulates such penalty for an offense.

The contents of Article 3 from the First Protocol which guarantees the right to free elections, as well as the large margin of appreciation allowed by the Court to the member state for the regulation of the electoral system generated the existence of some cases in which it was considered that the provisions of Article 3 were not violated. Hence, in *Scoppola (No. 3) v. Italy*[48], the Court held that in Italy there is no disenfranchisement in connection with minor offences or those which, although more serious in principle, do not attract sentences of three years' imprisonment or more, regard being had to the circumstances in which they were committed and to the offender's personal situation.

Concluding, the Court found that, in the circumstances of the case (the applicant was convicted of murder, attempted murder, ill-treatment of his family and unauthorised possession of a firearm), the restrictions imposed on the applicant's right to vote did not "thwart the free expression of the people in the choice of the legislature", and maintained "the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage" [see *Hirst (No. 2)*]. The margin of appreciation afforded to the respondent Government in this sphere has therefore not been overstepped. Accordingly, there has been no violation of Article 3 of Protocol No. 1.

2.4. Breach of voting secrecy

a.) Sedes materiae. If voting were not secret, any person who has the right to vote could be reluctant in expressing its electoral will for fear of possible consequences which its choice could generate, if known by the others. This is also why the breach of voting secrecy is sanctioned by the criminal law.[49]

The offence of breach of voting secrecy, provided for currently in Article 389 of the Criminal Code brought together, basically, all offences which related to voting secrecy, previously regulated in special laws in electoral matters[50].

"Art. 389. Violation of voting secrecy

(1) The violation, by any means, of the voting secrecy shall be punished by a fine.

(2) If the act was perpetrated by a member of the electoral bureau of the polling section, it shall be punishable by no less than 6 months and no more than 3 years of imprisonment and a ban on the exercise of certain rights."

[44] ECtHR, case of *Calmanovici v. Romania,* Application No. 42250/02, Judgment from 1 July 2008, para. 146-154.

[45] ECtHR, case of *Cucu v. Romania,* Application No. 22362/06, Judgment from 13 November 2012, para. 105-112.

[46] Although acknowledging the decision of 5 November 2007 of the High Court of Cassation and Justice, following an appeal in the interests of the law, the Strasbourg Court observed that this decision became mandatory for courts only in July 2008, after the applicant's conviction and sentencing.

[47] According to Article 65 para. 1 and 2 from the Criminal Code, an ancillary penalty consists of a ban on exercising the rights stipulated at Article 66 para. 1 lett. a), b) and d) - o), whose exercise was banned by a court of law as a complementary penalty. In the case of life imprisonment the ancillary penalty consists of the court banning the exercise of the rights stipulated in Article 66 para. 1 lett. a) - o) or a number of those.

[48] ECtHR, case of *Scoppola (No. 3) v. Italy,* Application No. *126/05*, Judgment from 22 May 2012, para. 107-110.

[49] S. Bogdan (coordinator), D. Al. Șerban, G. Zlati, *Noul Cod penal. Partea specială. Analize, explicații, comentarii. Perspectiva clujeană [The New Criminal Code. Special Part. Analyses, explanations, comments. The Cluj Perspective]*, Universul Juridic Publishing House, Bucharest, 2014, p. 777.

[50] What we mean is: Article 108 of Law No. 67/2004 on the election of the authorities of the local public administration; Article 60 of Law No. 370/2004, republished, on the election of Romania's President; Article 57 of Law No. 33/2007 on the organization and performance of the elections to the European Parliament; Article 54 of Law No. 35/2008 on the election of the Chamber of Deputies and of the Senate and on amending and supplementing Law No. 67/2004 on the election of the authorities of the local public administration, Law No. 215/2001 on the local public administration and Law No. 393/2004 on the Status of locally elected representatives; Article 53 of Law No. 3/2000 on the organization and performance of the referendum.

b.) Preexisting conditions. *Legal object of the crime. The special legal object* resides in the social relations concerning the proper performance of the elections; these relations involve the person's right to vote under conditions of secrecy, according with the applicable legal provisions, which is incompatible with the breach of voting secrecy.

Subjects of the crime. The active subject is not enlarged upon in the *standard variant* of the crime, provided for in para. 1, as it can be any person who meets the general conditions for criminal liability.

In case of the *aggravated variant*, provided for in para. 2, *the active subject is qualified* – a member of the electoral bureau of the polling section.

Looking at the wording, we can say that any other persons, even the members of the higher electoral bureaus, are excluded from the perpetration, as offenders, of the aggravated variant of the crime. Furthermore, for the perpetration of the crime, the offender has to act based on the functions it has within the electoral bureau. The aggravated variant shall not be applied if, for example, a member of a polling station renounces his functions, goes to another polling station and violates here the secrecy of a voter's option.[51]

The criminal participation is possible under all its forms (co-responsibility, incitement or complicity).

The main passive subject is the state, guarantor of the respect of voting secrecy and, overall, of the fairness of the electoral process.

The crime also has an *additional passive subject*, namely the natural person who has the right to vote, whose voting secrecy was violated.

Condition precedent. The perpetration of the crime requires the existence of a condition precedent – the performance of some election in Romania, no matter if local, presidential, Euro-parliamentary or parliamentary elections.

c.) The objective side. *The material element.* The material element of the objective side is the act of breach, by any means, of the voting secrecy by the members of the electoral bureau of the polling station, in case of the *aggravated variant*, or by other persons, in case of the *sandard variant of the crime*.

The breach of the voting secrecy involves finding out about the electoral option of a person, of the way in which the person expressed its electoral option.[52]

The breach of the voting secrecy in the sense attached to it by the incriminating norm has the meaning to disregard, to not obey the secrecy of the vote expressed by a person.[53] Hence, the elements of the crime provided for in Article 389 of the Criminal Code shall be met, for example if a person opens the ballot of another voter or enters the voting booth in order to find out how the respective person votes. The breach of the voting secrecy exists no matter how many persons found out, illegally, about a voter's electoral option.

It does not matter how a persons votes, for which candidate or political party, if the vote was a blank vote or if the person annuled its ballot, it is enough that the secrecy of that electoral option was violated.

For the existence of the crime the means by which the voting secrecy was violated are not relevant (taping, phtography[54], opening of the stamped ballot before introducing it in the ballot-box etc.). Obviously, if the means employed are by themselves a distinct offence, the rules of the concurrence of offences shall be applied.

One question which was asked in the specialized literature is if the legal text sanctions only revealing the vote to a person or also having the information about the content of the vote. Having regard to the fact that what is protected finally is the voting freedom, based on its secret character, we think that it can also be affected by the mere revealing of the choice. The information obtained can be used directly by the person who has it, for the purpose, for example, of altering the electoral process or for later revenge.[55]

It shall not be considered that voting secrecy was violated where the voter makes its electoral option known or where he/she allows or makes it easy for a third party to enter the voting booth and allows the third party to see how he/she exercises his/her right to vote.

The procedure concerning the exercise of the right to vote pertains to public law and is performed, formally, under the coordination of the electoral bureau of the polling station and first of its president, which shall guarantee, from a material point of view,

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[51] T. Manea in G. Bodoroncea, V. Cioclei, I. Kuglay, L. V. Lefterache, T. Manea, I. Nedelcu, F.-M. Vasile, *Codul penal. Comentariu pe articole [The Criminal Code. Article Comments]*, C.H. Beck Publishing House, Bucharest, 2014, p. 818. See also, in the same context, M. C. Sinescu in V. Dobrinoiu, I. Pascu, M. Hotca, I. Chiș, M. Gorunescu, C. Păun, M. Dobrinoiu, N. Neagu, M. C. Sinescu, *Codul penal comentat. Vol. II. Partea specială [The Criminal Code commented. Vol. II. Special Part]*, 1st edition, Universul Juridic Publishing House, Bucharest, 2012, p. 1016.

[52] The specialized literature stated that the wording "breach of voting secrecy" is extremely large and inaccurate in terms of the requirement of predictability of an incrimination text. See S. Bogdan (coordinator), *op. cit.*, p. 777.

[53] P. Dungan in P. Dungan, T. Medeanu, V. Pașca, *Drept penal. Partea specială. Prezentare comparativă a noului Cod penal şi a Codului penal din 1968 [Criminal Law. Special Part. Comparative presentation of the new Criminal code and of the Criminal code of 1968]*, Vol. II, Universul Juridic Publishing House, Bucharest, 2013, p. 407.

[54] By the *Decision of the Central Electoral Bureau No. 41/2008*, available at **http://www.beclocale2008.ro/documm/hot41.pdf**, accessed on 11.02.2015, in order to ensure the secret and freely expressed character of the vote according with Article 1 para. 2 of Law No. 67/2004 on the election of the authorities of the local public administration, in order to avoid any possible attempts at controlling the voting, it forbid the access into the voting booths with any recording or video taping devices. In this way they tried to limit the possibilities for electoral fraud, following offering of money or goods to persons who prove they voted for a certain candidate.

[55] T. Manea in G. Bodoroncea et al., p. 819.

the voter's full freedom to freely express its intimate belief. This procedure is one of the most important guarantees for the voting equality and secrecy, being at the same time a safeguard of its free character.[56]

As regards the *voting procedure*, it is provided for in relation with each type of elections in part: in Articles 82 and 86 of the Law No. 67/2004 on the election of the authorities of the local public administration; Article 44 of Law No. 370/2004 on the election of Romania's President; Article 46 para. 7-9 of Law No. 33/2007 on the organization and performance of the elections to the European Parliament; Article 42 of Law No. 35/2008 on the election of the Chamber of Deputies and of the Senate and on amending and supplementing Law No. 67/2004 on the election of the authorities of the local public administration, Law No. 215/2001 on the local public administration and Law No. 393/2004 on the Status of locally elected representatives.

We can say that the above mentioned legal provisions *are likely to ensure the respect of voting secrecy*, whereas the members of the electoral bureau of the polling station have the obligation to obey these legal provisions, including the obligation to not breach the voting secrecy.

The voters cast their votes separately, in closed booths, putting the stamp with the text "*Voted*" in the square which contains the list of the candidates or the name of the candidate they vote for. After having voted, the voters fold the ballots, so that the white page bearing the controll stamp stays outside and then introduce them into the ballot-box, taking care not to open them.

The presence of any other person in the voting booth, except the person who is voting, is forbidden. In exceptional cases, where the voter, based on justified reasons ascertained by the president of the electoral bureau of the polling station, cannot vote alone has the right to invite a companion of his choice to enter the voting booth to help.

Despite the fact that Law No. 67/2004 on the election of the authorities of local public administration very strictly provides for the rule of separate vote, in closed booths (the exception provided for in Article 86 being of strict interpretation), the breach of voting secrecy being sanctioned by the criminal law, on occasion of the monitoring of the local elections from 2008, a new way by which electoral fraud is attempted at was observed, namely the voter pretends to be incapable to focus on the vote and requires the assistance of another person, who is within the polling station and has a new electoral occupation, that is *„professional companion"*. In the county of Vrancea, the mayor of a town, who was sitting for a new mandate for a mayor, accompanied into the voting booth several persons who pretended to not be able to vote alone and in the county of Tulcea, some voters came to a polling station, pretended to be blind, without presenting a medical report to this effect, and entered the voting booth in the company of the candidates.[57]

With a view to the protection of the voting secrecy, but also in order to prevent voters' corruption we think that the introduction of an *interdiction concerning taking photographs or video-taping the ballots within the voting booth* is necessary, this being a method by which the voters are checked if and for whom they voted justified by amounts of money, goods or other advantages offered or given to them.

The immediate consequence is the creation of a danger for the social relations protected by the incrimination norm, created by the breach of the voting secrecy.

Causation results from the very materiality of the act, *ex re*.

d.) The subjective side. The offence is committed with direct or indirect intent, which implies that the offender knows that his act of breaching the voting will affect the social relations which protect the secret character of the vote within the elections.

The purpose or the reason based on which the offender acts are not relevant, but can be taken into consideration when establishing the sanctions.

e.) Forms of the offence. The acts of preparation, though possible, are not sanctioned. However, the attempt is sanctioned according with the provisions of Article 393 of the Criminal Code.

The offence is consummed in the moment when the breach of the voting secrecy is produced by any means.

f.) The sanctioning regime. Process related aspects. The breach of the voting secrecy in its standard variant provided for in para. 1 shall be sanctioned by fine and in case of the aggravated variant provided for in para. 2 shall be sanctioned by imprisonment from 6 months to 3 years and interdiction of the exercise of some rights.

In accordance with the provisions of Article 33 of the Criminal Code, the attempt shall be sanctioned with the punishment provided for by law for the offence consumed, its limits being reduced to the half.

The criminal proceedings are initiated *ex officio*[58].

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[56] E. S. Tănăsescu, *op. cit.*, p. 210.

[57] Asociaţia Pro Democraţia, *Reguli şi nereguli în alegerile locale 2008. Raport cu privire la monitorizarea campaniei electorale şi observarea procesului de votare de la alegerile pentru autorităţile publice locale din iunie 2008*, Bucureşti, Octombrie 2008, p. 66.

The situation was similar also in case of the presidential elections of 2009 or parliamentary elections from 2008. See, Asociaţia Pro Democraţia, Prezidenţiale 2009. *Raport de observare a alegerilor pentru Preşedintele României din 2010*, Bucureşti, mai 2010, p. 50, 59; Asociaţia Pro Democraţia, Parlamentare 2008. *Raport de observare a alegerilor parlamentare din 30 noiembrie 2008*, Bucureşti, 2008, p. 27-28.

[58] According with 3 para. 2 of Law No. 135/2010 on the Code of criminal procedure, *judicial functions are exercised ex officio, except in cases provided for by law*.

2.5. Short considerations on the legislation of some member states of European Union

a.) The crime provided for in Article 389 from the Romanian Criminal Code is consistent with the Code of Good Practice in Electoral Matters[59], which stipulates that the violation of secret suffrage should be sanctioned.

Secrecy of the ballot is one aspect of voter freedom, its purpose being to shield voters from pressures they might face if others learned how they had voted. Secrecy must apply to the entire procedure – and particularly the casting and counting of votes. Voters are entitled to it, but must also respect it themselves, and non-compliance must be punished by disqualifying any ballot paper whose content has been disclosed. Violation of the secrecy of the ballot must be punished, just like violations of other aspects of voter freedom. In this sense, the signing and stamping of ballot papers should not take place at the point when the paper is presented to the voter, because the signatory or the person affixing the stamp might mark the paper so that the voter could be identified when it came to counting the votes, which would violate the secrecy of the ballot. The voter should collect his/her ballot paper and no one else should touch it from that point on.[60]

In order to secure the voter's secrecy, the voter should generally be alone in the voting booth. Only in special cases, for example, blind voters, are exceptions to be allowed. The conditions for giving assistance to voters should, if necessary, be formalised in the electoral law or electoral commission instructions. In any case, it is unacceptable that "interpreters" accompany voters to the voting booth and indicate the name of the candidate for whom the voter wants to vote. This is what happened, for example, with illiterate Roma voters during the rigged mayoral election held in the town of Mukachevo (Ukraine) in 2004.[61]

Obviously, family and group voting is by no means acceptable. It tends to deprive women, and sometimes young people, of their individual voting rights and as such amounts to a form of electoral fraud. The Congress Recommendation 111 (2002)[62] emphasised the paramount importance of women's right to an individual, free, and secret vote and underlined that the problem of family voting is unacceptable from the standpoint of women's fundamental rights.[63]

b.) Regulation of electoral crimes is not a specificity of the Romanian legal system, the existence of such crimes being found in other European countries.

The examination of electoral regulations in comparative law reveals that the crime of breach of confidentiality of the vote provided for in the national law is also found, with a similar content, in the legislation of other European countries:

✓ Criminal Code of Estonia[64]

Article 166 (Violation of confidentiality of voting) - Violation of the procedure for voting by secret ballot at an election or referendum is punishable by a fine of up to 100 fine units or by detention.

Article 153 (Violation of Free Determination) - Whoever at an election or ballot compels a voter to answer for his vote, or asks him how he has voted, or why he has not voted shall be punished by a fine or sentenced to imprisonment for not more than one year.

✓ Criminal Code of Slovenia[65]

Article 156 (Obstruction of Secrecy of Ballot) - Whoever violates the secrecy of the election or ballot shall be punished by a fine or sentenced to imprisonment for not more than six months.

If the offence under the preceding paragraph is committed by an official through the abuse of his function relating to the election or ballot, such an official shall be sentenced to imprisonment for not more than two years.

✓ French Electoral Code[66]

Article L113 - Apart from the cases specially provided for by the provisions of laws and decrees, anyone who, either in the frame work of an administrative or municipal commission, either in a polling station or in offices in town halls, prefectures and sub-prefectures, before, during or after ballot, will, by voluntary disregard for the law or orders of the prefect, or by any other fraud, violates or attempts to violate the secrecy of the vote, violates or attempts to harm the honesty of the vote[67], prevents or attempts to prevent voting operations or changes or attempts to

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[59] *Code of Good Practice in Electoral Matters. Guidelines on Elections*, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002), para. 4, p. 9, available at: **http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282002%29023-e,** accessed on 15.01.2015.

[60] *Code of Good Practice in Electoral Matters. Explanatory Report*, adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002), para. 52, 55, 34, 35, p. 24, 21, available at: **http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282002%29023-e,** accessed on 15.01.2015.

[61] Council of Europe, *Electoral Law*, Council of Europe Publishing, Strasbourg, 3 July 2013, para. 145, p. 132-133, available at: **http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL%282013%29006-e,** accessed on 15.01.2015.

[62] Congress of local and regional authorities of Europe, *Recommendation 111 (2002) on women's individual voting rights: a democratic requirement*, adopted on 6 June 2002.

[63] Council of Europe, *Electoral Law*, *op. cit.*, para. 147, p. 133.

[64] The Penal Code of Estonia, available at: **http://legislationline.org,** accessed on 15.01.2015.

[65] The Criminal Code of Slovenia, available at: **http://www.policija.si/,** accessed on 15.01.2015.

[66] French Electoral Code, available at: **http://legifrance.gouv.fr,** accessed on 15.01.2015.

[67] Regarding the notion of "honesty" in electoral matters, see R. Ghevontian, *La notion de sincérité du scrutin*, *Cahiers du Conseil constitutionnel No. 13 (Dossier: La sincérité du scrutin)*, Janvier 2003, available at: **http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/cahiers-du-conseil/cahier-n-13/la-notion-de-sincerite-du-scrutin.52035.html,** accessed on 15.01.2015.

change the outcome of the elections, shall be liable to a fine of 15 000 euro and imprisonment of one year or one of these penalties.

Article L116–(1) Those who, by any fraudulent means, performed even outside the premises or commissions referred to in article L. 113, have violated or attempted to undermine the honesty of the vote, violated or attempted to violate the secrecy of the vote, prevented or attempted to prevent voting actions, or by the same maneuvers, changed or attempted to change the results of the vote, shall be punished with sentences provided for in those articles.

✓ German Criminal Code[68]

Section 107c (Violation of secrecy of elections) - Whosoever contravenes a provision which serves to protect the secrecy of elections with the intention of obtaining for himself or another knowledge as to how a person voted, shall be liable to imprisonment not exceeding two years or a fine.

According to Section 108d (Jurisdiction), Sections 107 to 108c shall apply to elections to the parliaments, election of members of the European Parliament, other popular elections and ballots in the Federation, the member states, municipalities and municipal associations, as well as direct elections in the social security system. The signing of nomination papers or the signing of a popular referendum shall be equivalent to an election or ballot.

✓ Swiss Criminal Code[69]

Article 283 (Breach of voting secrecy) - Any person who obtains knowledge by unlawful means of how individuals have voted is liable to a custodial sentence not exceeding three years or to a monetary penalty.

3. Conclusions

Almost two decades after having returned to democracy, the law maker considered it necessary to include in the New Criminal Code, based on the trend of modernization of the codification of the incrimination of criminal acts, Title IX which contains the electoral offences (Articles 385 – 393)[70], whereas the texts bring a better systematization of incriminations in this matter considering their legal object.[71]

From this perspective we would like to mention the introduction of an offence to sanction *the breach of the voting secrecy*, which is likely to ensure a higher stability of the incrimination, on the one handside, and to eliminate the existing parallel incriminations which existed in the previous framework, on the other handside.

The possibility of any citizen to freely and unrestrictedly express their will when exercising their right to vote is exactly that guarantee of free expression based on which the voter elects freely and independently, without being subject to any constraint. From this perspective it is important to mention that the law maker has the obligation to create a coherent and stable legal framework in electoral matters which is likely to ensure, *inter alia*, the respect of the voting secrecy, as well.

We consider that the legal provisions as a whole create sufficient instruments, both in relation with the actual way of ensuring the voting secrecy, given that, as mentioned, all normative acts in electoral matters provide for the right of the voters to vote separately, in closed booths, whereas the presence of any person in the voting booth, except the person casting her vote, is forbidden, but also in relation with the regulation of a criminal sanction (Article 389 of the Criminal Code), incident when the members of the electoral bureau of the polling station or any other persons do not respect the legal provisions and violate the voting secrecy.

To close with, we would like to mention that the offence in Article 389 of the Criminal Code is in accordance with the provisions of the Code of Good Practice in Electoral Matters which states that the breach of voting secrecy has to be sanctioned, the same as cases of violation of other aspects of the freedom to vote. Voting secrecy is an aspect of the freedom of vote whose purpose is the protection of voters against any form of pressure they can be confronted with in case other persons find out about which candidates they voted for. The principle of secrecy has to be applied to the entire procedure and especially to the phase of voting and counting of votes. Voting secrecy is not only a right of the voter, but also an obligation to respect the right of the other.

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[69] Swiss Criminal Code, available at: **http://www.admin.ch/**, accessed on 15.01.2015.

[70] M. C. Sinescu in V. Dobrinoiu et al., *op. cit.*, p. 993.

The law maker actually came back to the traditional approach existent during the inter-war period, namely the Criminal Code of 1936, which contained in Book II – Crimes and offences in special, Title II – Offence against the exercise of political and civil rights.

[71] *Law No. 286/2009 on the Criminal Code – notes and explanations*, p. 274, available at: **http://www.just.ro/LinkClick.aspx?fileticket=Wpo7d56II%2fQ%3d&tabid=2604**, accessed on 15.01.2015.

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THE CRIME OF UNJUSTIFIED ABSENCE IN THE ROMANIAN CRIMINAL CODE

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Abstract

The new Criminal Code of Romania regulates in Title XI of its Special Part the crimes against the combat capability of the military forces. Under this title, Chapter I is dedicated to the crimes committed by the military and defines the crime of unjustified absence. In this study, the author analysed the specific elements of this crime, including: the specific legal object - military discipline, the field of the active subject and the essential requirements imposed by its objective side.

Keywords: *criminal law, new Romanian Criminal Code, unjustified absence, crimes against the combat capability.*

1. Introduction

The new Romanian Criminal Code (which came into force on February 1, 2014), under Title XI of its Special Part, regulates the crimes against the combat capability of the military forces. In this way, they maintained the solution adopted by the previous Criminal Code by which was expressly repealed the Military Justice Code which has been active since 1937 being preferred the creation of a unitary regulation framework. In this way, with some isolated exceptions, all the incrimination norms which regard deeds committed by the military are kept in the Criminal Code, being avoided the instances of incoherence and inconsistencies found in relation to the previous regulation. As compared to the regulation from the previous Criminal Code, the simplification and modernization of the regulations from this category is remarked, so that such regulations should comply with the requirements to which the field is subject, particularly with reference to the double status held by Romania, of a Member State of the European Union (involved in the implementation of the common security policy), respectively of Member State of NATO (involved in the peace maintenance actions managed by this organization). The crimes from Title IX of the Special Part of the Criminal Code are grouped in two chapters, according to the criterion of the qualification of the active subject: crimes committed by the military, respectively crimes committed by the military or by the civilians.

All the crimes from this title impair the social relationships whose existence and development would not be possible without the maintenance of the combat capability of the military forces. The speciality doctrine indicates that the combat power represents the capacity, the possibility of a force at any time to obtain results in the development of a specific mission against a certain enemy, in a specific combat environment[1]. In the same opinion, it is observed that "the maximum combat power of operative land forces is realized by means of the integration of all the types of composing forces, into a unitary whole, within inter-arms, inter-categories. force or multinational groups. The forces envisaged are: a) *combat forces*, of which the following are part: armoured divisions (mechanized, tanks, army rangers); divisions without armoured vehicles (infantry, army rangers, paratroopers (airborne) and special forces; b) *support combat forces* (artillery units; artillery and anti-tank missile units; artillery and anti-aircraft missile units; corps of engineers; electronic war units; nuclear, biological and chemical defence units – NBC; research units; communications and information units; military police units). c) *logistic support forces* (supply and transport units, maintenance units, medical units, sanitary-veterinarian units, traffic control and guidance units, campaign banking units)".

2. The analysis of the crime

The crimes which can be perpetrated only by the military, as provided in Art. 413 of the Criminal Code, include also the crime of unjustified absence. According to the incrimination wording, "the unjustified absence of any military from his unit or from his service, which exceeded 4 hours, but not more than 24 hours, in time of war, during the state of siege or the state of emergency, shall be punished by imprisonment from one to 3 years or by a fine".

The unjustified absence is incriminated in a wording that is noticeably different in the new Criminal Code as compared to the former regulation. Thus, the deed is construed as a crime if perpetrated by any military, but only in time of war, during the state of siege or the state of emergency, not in time of peace, as in the previous Criminal Code.

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[1] F. Ianoşiu, Manevra – element al puterii de luptă, in Revista forţelor terestre, available at http://www.rft.forter.ro/2007_4/02-tgl/01.htm.

The special *legal object* in case of the crime of unjustified absence, as it is regulated under Art. 413 of the Criminal Code in force, consists in the social relationships regarding the observance of military order and discipline. On the strength of Art. 2, para. (1) of the Regulation of Military Discipline[2], military discipline consists in the observance by the military of the legal provisions, of the norms of order and conduct, which are mandatory for the maintenance of a functional state, fulfilment of specific missions and proper performance of the military activities. At the same time, fulfilment of the military service requires the strict observance of the military discipline rules specific to the Romanian Army because it represents one of the decisive factors of the ***operational capacity of the army*** and is based both on the conscious acceptance of the established norms of conduct, and on the granting of rewards and application of disciplinary sanctions.

The operational capability to which the military regulation refers is the very combat capability of the military forces, so that a very clear connection is established between the imperative of observing the military discipline, and the capability to fight back or to defend of the military forces of which the respective military man is part.

The active subject of the crime is qualified, the crime of unjustified absence being a crime on its own. The qualification of the active subject implies that, beyond the general conditions which should be ascertained in case of this subject, for the particular situation of unjustified absence, the fulfilment of an additional condition is mandatory – that the author should be ***any*** military.

The scope of the direct active subject of the crime of unjustified absence results from the very Art. 1 para. (2) of the Regulation of Military Discipline, which expressly indicates the fact that its provisions apply to active military men, professional soldiers and officers, reservists during concentration or mobilization, pupils and students of military education and training institutes for active military men.

Criminal participation is not possible in the form of co-authorship. This is because the crime is one that is committed *in propria persona*, since each military man has the individual obligation to observe the norms of military discipline. Even in the assumption that several military men would agree to have unjustified absences from their service during a period relevant for the existence of the crime of unjustified absence, there shall be no co-authorship in the crime of unjustified absence, but each military man shall be charged with a distinct crime.

There can be participation in the form of *instigation or complicity*. Both the instigator and its accomplice may be any person meeting the general conditions of the criminal liability.

The primary passive subject in case of this crime is always the State, because the State is the one that is vulnerable because of the endangerment of the combat capability of its military forces. The secondary passive subject is always the unit of which the military man responsible for breaching the norms of military discipline is part.

The material element of the crime consists in the *unjustified absence* of the military man from his unit or service for a term ranging from 4 to 24 hours. It is not relevant for the existence of the crime whether he left the unit with or without the approval of his commanding officers, nor is it relevant whether he returned willingly or he was captured and delivered by the authorities. Undoubtedly, however, these elements will be important in the process of individualizing the punishment to be applied.

Unit shall mean any military formation, regardless of the number of military men composing it and regardless of its permanent or temporary nature. *Service* shall mean the place where the military man is effectively carrying out a certain activity. For the crime to exist, it is mandatory that the military man should have actually left the premises where he was supposed to carry out his activity, his mere absence from the call being unable to realize the contents of the crime[3].

For the existence of the material element of the crime, it is necessary that ***three essential requirements*** are met.

A first requirement is that the absence from the unit or service should be *unjustified*, as expressly required by the incrimination wording. The term should be understood, however, as "unmotivated", as there is otherwise the risk to generate the confusion borne by the reference only to the justifying causes provided by Arts. 18-22 of the Criminal Code. The marginal name and, implicitly, *verbum regens* in case of this crime were maintained with the names provided in the previous Criminal Code, without consideration to the fact that the new Criminal Code defines justifying causes, as well as the causes for non-imputability. Under these conditions, the unmotivated absence from the unit or service of the military man should be both unjustified, and non-imputable (imputability being, otherwise, one of the essential features of any crime)[4]. In other words, if, for instance, the military man happens to be immobilized by a person and confined to a room, which prevents him from returning from a leave in time, his deed shall not constitute the crime of unjustified absence, as it is not

[2] Approved by Order No. 64/2013 issued by the Minister of National Defence, published in The Official Gazette of Romania, Part I, No. 399 bis of July 3, 2013

[3] The Bucharest Military Tribunal, Criminal Decision No. 366/1972, quoted in V. Dobrinoiu, I. Pascu, M.A. Hotca, I. Chiş, M. Gorunescu, C. Păun, M. Dobrinoiu, N. Neagu, M.C. Sinescu, Noul Cod penal comentat, 2nd Edition, Universul Juridic Publishing House, Bucharest, 2014, p. 1036.

[4] M. Gorunescu, I.A. Barbu, M. Rotaru, Drept penal, partea generală, Universul Juridic Publishing House, Bucharest, 2014, p. 71.

imputable to him. The cause for non-imputability is that defined by Art. 24 of the Criminal Code – the physical constraint and, although the absence from service is not unjustified, but only non-imputable, the contents of the deed provided by Art. 413 of the Criminal Code are not realized.

A second requirement takes into account the fact that the unmotivated absence should last for more than 4 hours, but should not exceed 24 hours.

If the unjustified absence from the unit or service lasts less than 4 hours, the deed shall not constitute a crime, but the disciplinary deviation regulated by Art. 49 letter c) of the Regulation of Military Discipline. When the duration exceeds the interval of 24 hours, the crime that is committed is not the unjustified absence, but that of desertion, as defined by Art. 414 of the Criminal Code.

The third essential requirement refers to the condition of time for the deed to be committed in time of war, during the state of siege or the state of emergency[5].

In the legal definition, Art. 185 of the Criminal Code states that *time of war* means the duration of the state of mobilization of the military forces or the duration of the state of war.

The state of mobilization represents the entirety of the extraordinary measures that can be instituted, primarily, in the political, economic, social, administrative, diplomatic, legal and military fields, planned and prepared in time of peace, as well as of the actions performed for their application, according to law, upon the appearance or imminence of a severe threat that may affect the sovereignty, independence and unity of the State, the territorial integrity of the country and the constitutional democracy.

The state of war represents the entirety of the extraordinary measures that may be instituted, primarily, in the political, economic, social, administrative, diplomatic, legal and military fields, in view of exercising the inherent right of the State to individual or collective self-defence[6].

The state of siege and the state of emergency are defined in Emergency Government Ordinance No. 1/1999 regarding the regime of the state of siege and of the state of emergency[7].

The state of siege represents the ensemble of exceptional measures of political, military, economic, social and other nature, applicable on the entire territory of the country or in certain territorial-administrative units, instituted for the adaptation of the country's capability of defence against current or imminent grave dangers, threatening the sovereignty, independence, unity or territorial integrity of the State. In case the state of siege is instituted, exceptional measures can be taken, which are applicable throughout the entire territory of the country or in certain administrative-territorial units.

The state of emergency represents the ensemble of exceptional measures of political, economic, and public order nature, applicable on the entire territory of the country or in certain territorial-administrative units which are instituted in the following situations: a) the existence of current or imminent grave dangers regarding the national security or the functioning of the constitutional democracy; b) the imminence of the occurrence or the production of calamities which render necessary the prevention, limitation or removal, as applicable, of the consequences of certain disasters.

For the unjustified absence from the unit or service to have the criminal significance given by Art. 413 of the Criminal Code, it is mandatory that all these requirements should be met.

The immediate consequence consists in the creation of a state of danger for the combat capability of the military forces, deriving from the ignorance of the military order and discipline in a military unit or service, and the causality relation results from the mere perpetration of the material element, the crime being one of danger.

The subjective element in case of the crime of unjustified absence is the intention in the methods of direct or indirect intention[8]. The mobile and purpose in case of this crime do not have any relevance for the existence *per se* of the crime, they only influence the individualization process of the punishment.

Essential requirements. The subjective element in the crime of unjustified absence necessarily implies that the active subject, having the capacity of a military man, knows precisely the unmotivated character of his absence from the unit or from service. If, for instance, out of an error of the records department, in the service or travel order of the military man there appears an erroneous date of returning to the unit, one day beyond the real interval of travel, and the military observes such date, he shall not be liable for an unjustified absence, being in error with regard to the date of appearance. The error represents, otherwise, a cause for non-imputability, as provided by Art. 30, para. (1) of the Criminal Code.

The preparatory acts for the crime of unjustified absence are not incriminated by the lawmaker, and the attempt is not possible.

The consummation of the crime occurs immediately after the lapse of the 4 hours since the military man has been absent without any justification from his unit or service. Furthermore, the crime of unjustified absence is liable to extend in time. When the absence continues after the lapse of the 4 hour-

[5] The state of war, the state of mobilization, the state of siege and the state of emergency are mentioned in the Constitution, as well, under Arts. 63, 65, 89, 92, 93 or 152.

[6] These two notions are regulated by Law No. 355/2009 published in Official Gazette No. 805 of November 25, 2009.

[7] EGO No. 1/1999 regarding the regime of the state of siege and the regime of the state of emergency, published in Official Gazette No. 22 of January 21, 1999, approved by Law No. 453/2004, published in Official Gazette No. 1052 of November 12, 2004.

[8] T. Vasiliu, D. Pavel ş.a., *op. cit.*, vol. II, p. 487; D. Cojocaru, *Infracţiunile contra capacităţii de apărare a României* Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1975, p. 46.

term, the crime becomes continuous. Termination occurs in this hypothesis when the military man returns to his unit or service, but only if this event occurs within the 24-hour interval referred to in Art. 413 of the Criminal Code. As soon as the 24-hour interval is exceeded, the typical nature of the crime of unjustified absence is no longer met; it becomes the crime of desertion, provided in Art. 414, para. (1) of the Criminal Code.

It does not exist in case of the crime of unjustified absence, because the excess of the 24-hour interval referred to in the incrimination norm transforms unjustified absence into desertion, even under the conditions of the aggravated version from Art. 414, para. (3) of the Criminal Code, as it occurs in time of war, during the state of siege or emergency.

Unjustified absence is punished by imprisonment from one to 3 years or by a fine. According to the provisions of Art. 67, para. (1) of the Criminal Code, should the Court deem it necessary, the complementary punishment of the prohibition of exerting certain rights can also be applied to the perpetrator.

Between the crime of unjustified absence and other crimes, there are certain elements of closeness. Most such elements exist between the crime of unjustified absence and the crime of desertion (Art. 414 of the Criminal Code). This is because the material element of the two crimes is common (the unjustified absence), being in certain normative methods even a continuous conduct that only the premise-situation causes it to be differently classified. Thus, if the unjustified absence from the unit or service of the military man occurs in time of war, during the term for which the state of siege or the state of emergency is declared, up to a duration of 4 hours, the deed represents a disciplinary misconduct, more than 4 hours, but no more than 24 hours represent unjustified absence, and a period exceeding 24 hours is already realizing the contents of the crime of desertion, even in it's aggravated version [Art. 414 para. 3) of the Criminal Code].

If, from the point of view of the fulfilment of the premise-situation for declaring either of the exceptional states indicated by Art. 413 of the Criminal Code, the fulfilment of the requirement is not ascertained, the deed shall have a criminal significance only after the lapse of 3 days of unjustified absence. This is because the state opposite to those previously indicated is the state of peace, of normality, and the unjustified absence of the military man from service in this context becomes desertion only after it exceed three days.

By reporting to the qualification of the active subject of the crime, if the requirement regarding the quality of *any military man* is not met (for instance, the person is a policeman) to which the incrimination norm refers, such a deed may constitute eventually an abuse in service, if all the conditions for the existence of such crime exist.

Also in terms of the trial the unjustified absence presents certain specific aspects. In this way, the criminal action is initiated only when the commanding officer is notified (Art. 431 of the Criminal Code). The competence of judgment on the merits belongs to the military tribunal, if the military who is absent without justification has the rank of colonel, inclusively. When the unjustified absence is committed by a general, the competence of trial in the first instance belongs to the military court of appeal. The same court is competent also if the military man is a judge from the military tribunal or a military prosecutor from the military prosecutor's offices attached to these courts. The competence belongs to the ordinary courts of appeal if the military man who perpetrates the deed is a judge with the Military Court of Appeal or a prosecutor with the prosecutor's office attached to it.

3. Conclusions

The crime of unjustified absence is a low-key version of the crime of desertion, both being crimes directed particularly against the norms of military order and discipline. As the other crimes from this category, the crimes against the combat capability of the military forces were changed and adapted to the specific nature of the social realities which should be covered by the new regulation in the criminal field. In this study, we chose to analyze the constitutive elements of the crime of unjustified absence, because only by means of a proper understanding of such elements can the incrimination wording benefit from a thorough and correct application.

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SELF-DEFENCE IN SPECIAL SITUATIONS (I)

Lamya-Diana HĂRĂTĂU*

Abstract

In the reality of practical cases and in certain special situations, self-defence may present some complex forms consisting either in accidental amplification of the issue in fact when self-defence is claimed, or in the correlation in fact of self-defence to other cases which remove the criminal nature of act[1]. For these reasons, we decided to analyse few of such special situations.

Keywords: *self-defense, criminal nature, state authority, acts committed on fault, deviated counter.*

1. Issue of existence or inexistence of self-defence if the attack comes from the representative of a state authority.

In time[2], other specialised works approached the issue of existence or inexistence of self-defence if the attack comes as well from the representative of a state authority.

Although this issue no longer represents a problem currently, we have considered presenting few theories lying on the base of its settlement.

- Abolition theory.

According to this theory, the citizen had the obligation to submit unconditionally to the orders and acts of the representative of authority, enjoying the absolute presumption of legality.

- Liberal theory.

According to this theory, it is deemed that the citizen was entitled to reject the illegal act of authority. As stated in the doctrine, this theory was sustained in France by Armand Carrel[3] in the magazine "National" dated 24 January 1832, as well as in front of the jury of Sena on 13 March 1832 by the lawyer Odillon Barrat. Their assertions relied on the disposals of art. 11 of the Declaration of human and citizen rights[4] stating that *any act exercised by a representative of the state and without the acts claimed by law, is arbitrary and tyrannical.*

- Intermediary theory.

This theory divided however the right to turn to defence depending on the aggressors, more exactly depending on the authority of aggressing agents. Thus, submission is deemed obligatory according to this theory only towards the agents holding orders, titles, even irregular, since the existence of order and title created a presumption of legality, and the title was owed faith. On the other hand, it was allowed the counter if illegality was *manifested*, for instance if the agent was obviously incompetent[5].

Currently, according to the disposals of the new Code of criminal proceedings (art. 310), in case of flagrant crime, any individual may hinder the criminal and hand it over to the authority. In such a situation, we no longer deal with the unfair nature of aggression which would justify a self-defence counter.

However, as exemplified as well in the recent doctrine[6], if the individual depriving of freedom the criminal "does not take him in front of judicial authorities and does not announce its capture, turning the detention in a private detention, the deprivation of freedom becomes unfair justifying a self-defence of the prisoner."

Another case mentioned in the specialised literature[7] considers the detention of a representative of authority with the breach of the limits stipulated by law. Thus, it is provided as example the situation when an individual with arrest warrant opposes to its enforcement, and the police bodies are using force to immobilise the criminal. If violence exercised in this case is obviously disproportionate and useless, states the author, we shall deal with an unfair aggression, which may determine the occurrence of self-defence. The doctrine stipulates as well[8] that an act of authority may represent an aggression when it is obviously illegal and arbitrary[9].

Currently, the issue of aggression coming from authority no longer generates controversy because, as

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[1] V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, Theoretical explanations of Criminal Code, vol. I, Bucharest, ed. Academiei RSR, 1969, p.358;

[2] PhD Thesis of D. Clocotici, entitled "Self-defence – excuse of challenge", under the coordination of prof. Gr. Rîpeanu, 1971;

[3] French journalist, historian and essayist;

[4] Declaration of human and citizen rights, 1789; The main scope of this declaration was to provide to every individual the use and maintenance of its rights;

[5] See I.Tanoviceanu, Treaty of law and criminal proceedings, vol. I, Bucharest, p. 900; Pop T. Compared criminal law – general part, Cluj, 1924, p. 519;

[6] Fl. Steteanu, D. Nițu, Criminal law general part, university course, vol. I, ed. Universul juridic, 2015, p.358;

[7] Same, p. 359;

[8] V. Dongoroz, Criminal Law, Bucharest, 1939, p. 450

[9] In this respect, Chr. Hennau, G. Schamps et J. Verhaegen,'Indispensable responsabilite´ de l'entreprise, inacceptable culpabilite´ collective – A propos de l'avantprojet de loi belge relative a` la responsabilite´ pe´nale des personnes morales', Journal des Tribunaux, 1998, p.194;

long as the aggression is unfair, the counter is allowed in terms of law, although it comes from an authority.

2. Issue of solving self-defence by running.

Another issue approached by the specialised doctrine related to self-defence, is the answer to aggression by running.

It is discussed if it is still incident self-defence if under the conditions of such issue in fact, the victim of aggression, having the possibility to run to avoid the aggression, he didn't, on the contrary, he responded.

In time, there were distinct opinions related either to the possibility or to the obligation of running from the aggressor. On this decision depends the consideration of self-defence as justificatory cause.

More ancient specialists of criminal law[10] analysed the manner how the victim was forced or not to run, if he had this possibility, and if he doesn't, to what extent may self-defence be claimed.

The author analyses this situation historically, bringing into discussion different opinions of some criminalists dealing with this issue. We shall present further on as well such points of view.

Thus, some authors stated that, although the victim could avoid the risk by running, however he could have killed the aggressor without being punished[11]. Other authors stated that it was necessary to avoid counter by prays, screams, run, and if the possibility of running imposes its need, no self-defence can exist[12].

In another opinion[13], besides the situation when someone has a position to guard, in general one cannot put in legal precept cowardice, however running is obligatory when the aggressor is a madman, a child or an agent of public force.

Also, it was considered as well that everything was an issue in fact on the discretion of the judge who may enforce an easier punishment or declare innocent the victim who did not run although he had this possibility[14].

Another point of view shows that running, that is the escape of the victim in this manner, does not represent a legal obligation, but only an issue of consciousness[15].

More ancient French doctrine[16] appreciated that the obligation of running depended on the social class of the victim. Thus, there was no obligation of running for the aristocrat, gentleman, soldier, since running for them was shameful. However, "the runt" was even obligated to run if being in such situation.

This idea was rebutted because "never, as we know, in our books of law, this privilege was awarded to noble individuals or militaries". It is asserted that, if the victim may run without being in danger, he cannot claim self-defence[17].

In our opinion, obviously running may be much better than counter in such situations, but we cannot disagree that deciding for counter instead of running as self-defence could lead in fact to not considering this justificatory case.

In our specialised doctrine was decided as well that there is self-defence when the victim may escape by running[18]

The alternative of running is not possible in all situations, and this decision depends from one individual to another, but also on the real circumstances of the issue in fact.

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[10] PhD thesis of D. Clocotici, entitled "Self-defence – excuse of challenge", under the coordination of prof. Gr. Rîpeanu, 1971

[11] Julius Clarus, famous criminalist, counsellor of the king of England Charles V, in George Bowyer, The English Constitution: A Popular Commentary on the Constitutional Law of England, ed. J. Burns, 1841, p. 497;

[12] F. Carrara, Programma del corso di diritto criminale: Parte generale, Vol.1, ed. Fratelli Cammelli, 1897, p. 308;

[13] Luigi Majno, Commento al Codice penale italiano, ed 2, ed. Unione tipografico-editrice torinese, 1912, art. 49;

[14] Vidal quoted by T.Pop in Compared criminal law – general part, Cluj, 1924, p.560;

[15] I. Werbőczy, A. Wagner, Decretum Oder Tripartitum Opus Der LandtsRechten vnnd Gewonheiten des Hochlöblichen Königreichs Hungern, Formica, 1599, p. 19;

[16] Pierre-François Muyart de Vouglans, Les lois criminelles de France, ed. Mérigot, 1780, p.32-33;

[17] Johannes Samuel Fridericus Boehmer, Observationes selectae ad Bened. Carpzovii ... Practicam novam rerum criminalium imperialem Saxonicam quibus Praelaudati Auctoris .... accessit index locupletissimus, Fr. Varrentrapp, 1759, quaestionem XXX nr. 59/64, p. 69 and the following.

[18] V. Ionescu, Self-defence and state of need, ed. Ştiinţifică, Bucharest, 1972, p.37-49; In the same respect, C. Mitrache, Romanian criminal law, general part, 3rd edition reviewed and added, publishing house and press ŞANSA, Bucharest, 1997, p.108; during the year 2002, p.125; In judicial practice, it was decided that one cannot claim to the victim of an aggression to run from agression; see, T.S.col.pen., dec.no.394/1961, p. 424 and dec.no.925/1965 in CD/1965, p. 321. On the contrary, I. Dobrinescu, in J.N. no. 4/1957, p. 641; I. Pascu, Criminal law general part, 2nd edition, Hamangiu, 2009, p. 289 states: "it is discussable in the doctrine if there is self-defence when the victim has the possibility to run from the aggressor. Quoting Antoniu (Criminal guilt, p. 272) states that " modern doctrine accepts that running, in this case, is not a proof of cowardice, but of wisdom, a proof of cooperation for the extinction of conflict".; V. Dongoroz, Criminal law, Bucharest, 1926, p.181: "If the victim under the condition of self-defence had the possibility to escape from aggression by running, is he in self-defence if he decides not to run and to attack the aggressor? Controversy. We believe that it is, since no text of law, no principle of law or moral proclaims as rule of conduct running in front of danger, cowardice. On the contrary, the one who faces a material, actual and unfair aggression against himself or another deserves not only our admiration for his courage but the gratitude of a society to which it has done a veritable favour. If the aggressor runs without attacking we do no longer deal with self defence, but with revenge from the victim". Attention" in the same work, p.187-188, V. Dongoroz wonders if "Challenge excludes self-defence?" and gives the following example: A slaps or curses B; B being thus challenged to take out the weapon. A the challenger is in self-defence, if, for avoiding the bullet of B kills B. If B had taken out the weapon without a previous challenge, obviously A would have been in self-defence, but the fact that A challenges B excludes for A self-defence."

4. May self-defence be incident for the acts committed on fault?

Considering the act of defence committed on fault, French practice stipulated that self-defence cannot be incident but for the actions with intent but not for the acts committed on fault in self-defence[19]. Authors of specialised literature[20] rejected such direction, in the judicial practice, the victims of an aggression even stating that they rebutted with intent and not on fault in order to enjoy the effects of self-defence.

The supporters of the possibility that defence is done as well on fault appreciate that the presence of subjective element in case of defence has nothing incompatible with the possibility of committing an act on fault, the victim being aware of the existence of aggression and commits an action meant to remove it. The result appeared in such situation is not the one anticipated.

It is provided as example to these arguments the situation when the accused followed with the axe by the victim sees a vehicle parked in the neighbourhood and tries to get rid of the aggressor leaving with that car. The accused handles however mistakenly the gearshift therefore, instead of driving ahead, the vehicle drives backwards and hits thus the aggressor who is heading towards the car, causing him a seriously body injury or death.

In the opinion of the author[21] of example, there is no reason to refuse the justificatory effect of self-defence under the conditions that the same act would be justified in case of act with intent.

We support as well this point of view and the idea according to which as long as the justification is allowed and indeed considers in principle a defence and a result with intent, this however does not remove the same justification in case of a guilty result as well.

Indeed, we consider as well that the contents of art. 19 par. (2) of the new criminal code is controversial since the expression of the legislator ”act to remove an aggression” tends to lead to the interpretation that the act committed in defence must be with intent. However, as other authors showed as well, an extensive interpretation of this formulation is not opportune, as it must be understood in strict sense, namely that of the action committed to remove an aggression, and not of fact overall[22]. Even a judgement of the former Supreme Court admitted self-defence even in case of praeterintentionate defence [23].

We appreciate that the proposal of de lege ferenda in terms of amending the legal text in the version ”act to remove an aggression committed with intent or on fault” is opportune for the legislator to uniform such different points of view related to this interpretation.

5. Deviated counter (error in personam / aberatio ictus)

In time, the doctrinaires analysed the situation when defence was directed towards an innocent third party, as a consequence either of the error of the victim over the aggressor, or of the deviation of hit. The solutions may be obviously different. It may be stated that there is no self-defence but a state of need of the victim, or an irremovable error which determines the absence of liability.[24]

The specialists[25] decided for the variant when the defence committed under such conditions entails a state of need.

If the victim hits mistakenly another individual than the aggressor, it should be examined if a fault may be incumbent upon the one who rebuts or if the deviation of defence is accidental. In the first situation, since it is determined that the victim acted with obvious fault towards the third party (s.n.), it will be enforced the punishment for manslaughter for a manslaughter on fault or bodily injury on fault and in the second situation, the hit of the third party must be deemed as caused in state of need.

A supported opinion must be analysed if the victim hits a third party obviously imprudently or has taken advantage of the fact of being aggressed using afterwards self-defence.

If the victim is forced by the conditions of defence to react in such a manner as endangering a third party, his act will be deemed committed in a state of need[26].

In another opinion, it is considered that self-defence represents only a particular enforcement of the general theory of need, the murder or assault committed in case of deviation of the hit or error over the individual must be considered as self-defence[27].

The former Supreme Court decided that an individual facing a material, direct, immediate, unfair attack, while defending himself, instead of hitting the aggressor, hits mistakenly a third party, and this error is not incumbent upon him under any circumstance, the act must be considered committed in self defence[28].

It was omitted the opinion according to which self-defence cannot be claimed in such situations since

[19] J.H. Robert quoted in F. Streteanu, quoted work, p. 364;
[20] M.L. Rassat, J.H. Robert, F. Desportes, F. Le Gunehec, J.P. Delmas Saint Hillaire quoted in F. Streteanu, quoted work, p.364;
[21] Fl. Streteanu, quoted work, p. 365;
[22] In the same sense, same;
[23] T.S., s.pen., dec. no. 2515/1976, in RII, p. 235;
[24] PhD thesis of D. Clocotici, entitled ”Self-defence – excuse of challenge”, under the coordination of prof. Gr. Rîpeanu, 1971
[25] V. Dongoroz, Criminal law, 1939, p.433; Tanoviceanu, Treaty of law and criminal proceedings, vol I, ed. a II-a, 1924, p. 920;
[26] Same;
[27] P.I. Pastion, M.I. Papadopolu, Criminal code annotated, ed. Librăriei Socec&Comp., 1922, p. 448;
[28] T.S.Col.pen.decision no. 888 dated 26 June 1962 in J.N. no. 1/1963, p.173;

firstly considering the drafting of the legal text defence must be always directed only against the aggressor.

Also, the same opinion shows that one cannot support either the state of need, because in such situation the imminent risk faced by the individual who rebuts must be avoided only by such counter.[29]

Analysing as well the disposals related to the error of fact, these cannot be enforced either. The hitting of third party on the occasion of counter, due to causes not incumbent upon, states the same author, cannot lead to the conclusion that the one who rebuts is in one of the situations ruled by the criminal code. Also, the deviation of assault cannot represent either an error of fact.

We do not agree with the arguments of the said opinion.

Thus, one of the essential traits of the crime is that the act is committed on fault.

Or, if it is determined that the act of the victim and with consequences on a third party lacks a subjective element, then the act is not a crime.

In our opinion, if the one who defends himself commits the act, although he could have anticipated, but he ignored without reason a potential result, although he didn't anticipated although he should have and could anticipate such result, he may be held criminally liable for a crime committed on fault. The form of guilt of intent is no longer debated since it would remove from the beginning the argument of error or deviation of assault.

It isn't discussable the fact that self- defence may be corroborated with the error of fact and also that the victim assaults mistakenly another individual than the aggressor or appreciates erroneously the gravity of assault committing mistakenly an excess of defence.

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THE EXCLUSION OF ILEGALLY ADMINISTERED EVIDENCE

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Abstract

Both judicial practice and specialized texts have brought up the problem of what the punishment for breaking the legal provisions in the activity of evidence administration is, if a matter of fact had been presented by means that are not legally specified or if a piece of evidence was administered by means that are legally specified, but with the violation of legal provisions.

Romania has adhered to the most important international juridical instruments adopted in the sphere of human rights by the adoption, modification or completion of internal legislation.

As such, for the first time in Romanian criminal procedural legislation, a sanction for the exclusion of evidence has been introduced, as a corollary for the principle of legality and of loyalty in administering evidence.

The New Criminal Procedure Code provides the sanction of exclusion as well, but this time the legislator didn't resume his or herself to a mere conceptual regulation of the sanction, providing both a specific invalidation procedure as well as procedural solutions. In the New Criminal Procedure Code it is shown that in the sphere of evidence-showing a set of rules has been introduced that establishes the principle of loyalty in the obtainment of evidence. These rules, that provide the sanction of excluding evidence obtained through illegal or unloyal means, will determined the growth of professionalism in the ranks of the judiciary bodies on the subject of obtaining evidence and, on the other hand, will guarantee the firm upholding of the parties rights to a fair trial.

"Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much…" Lord Justice Sir James Lewis Knight-Bruce

"It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price". – Antonio Lamer Former Chief Justice of the Supreme Court of Canada.

Keywords: *illegally administered evidence, the principle of loyalty, derivative evidence, torture, inhuman treatement.*

1. Introduction

Exclusion is a specific procedural sanction, applicable for evidence that had been administered with the violation of the principle of legality or loyalty. This sanction has a particular domain in which it is applied, thus setting itself apart from the sanction of nullification that is only applied to procedural papers.

The exclusion of evidence can be provided in the event a substantial and significant violation of a legal provision regarding the administration of the evidence which, in the specific circumstances of the case, determine the maintaining of the piece of evidence that had been thus administered to harm the equitable character of the criminal trial.

Art. 100 paragr. 3 of the New Criminal Procedure Code explicitly provides that evidence obtained by torture and inhuman or degrading treatement cannot be used in the criminal trial.

Through this, it is to be assumed on an absolute level that the equitable character of the criminal trial will always be harmed if the evidence is obtained by torture and inhuman or degrading tratement.

As such, in the situation provided in paragr. 3 of art. 100 of the New Criminal Procedure Code, the sanction of exclusion will be applied *de jure.*

Applying the institution of the exclusion of derivative evidence requires analyzing the possibility of excluding evidence that is legally administered, but that is derivative (closely connected) from illegally obtained evidence. As such, if the derivative, legally administered evidence is directly and necessarily obtained through the use of torture, inhuman or degrading treatment, the sanction of the exclusion of derivative evidence will be operated, as stated in art. 100 paragr. 4 from the New Criminal Procedure Code.

Similarly, the exception provided in paragr. 5 of art. 100 from the new criminal procedure Code project is not applicable since, as previously shown, the situation stated in paragr. 2 of the same article is not applicable to evidence obtained through torture, inhuman or degrading tratement.

2. Content

In the development of the criminal trial, transgressions from the instituted procedural setting are possible and in such situations certain procedural sanctions are available to interfere. In addition to inadmissibility, deterioration and nullification, the legislator has explicitly provided the exclusion of illegally obtained evidence as a distinct procedural sanction[1].

As a completion to the basic rule of respect towards human dignity as specified in art. 11 paragr. (1), the sanction of exclusion of evidence obtained

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[1] Ion Neagu -Tratat de procedura penala. Partea generala. In lumina noului Cod de procedura penala, Universul Juridic, Bucharest, 2014, pg .105.

through torture, as well as derivative evidence, has been regulated through art. 102.

As far as the principle of respect towards human dignity is concerned, we signal Romania's adherence to the Convention against torture and other cruel, inhuman and degrading punishments and treatments[2], an initiative that has left its mark on criminal and criminal procedural legislation. As such, through Law 20/1990[3], the crime of torture was introduced in the criminal Code adopted in 1968 (art 282 New criminal code[4]).

On the subject of commiting to the right of freedom, we also find it necessary to bring into discussion the content of art. 1 of the European Union Charter of Fundamental Rights, which states that "Human dignity is inviolable. It must be respected and protected". In the same lines, art. 4 states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

The current Constitution has established this principle in "Fundamental rights and liberties", stating in art. 22 paragr. (2) that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". This fundamental principle establishes the legal setting regarding the tratement that must be applied to the suspect or accused throughout the entire legal trial.

Similar provisions are to be found in the legislation of other states, as such in art. 191 of the Italian Criminal procedure code it is stated that evidence obtained by the violation of the legally established provisions cannot be utilized[5]. Similarly, in the German criminal procedure system[6], the freedom of an accused to decide and the freely express his or her will cannot be restricted through harmful treatement, through torture, deceit and hypnosis. Force can be used only within the limits of the law. Threatening the accused with unallowed measures or promising an advantage that is not stated in the law is forbidden. Measures that can affect the memory of the accused or her or his capacity to reason are forbidden. These interdictions stated in the German criminal procedure law are to be applied regardless of the existence of a possible consent on the part of the accused. Declarations that are obtained from the violation of these rules cannot be used even if the accused may agree upon it.

The Spanish criminal procedure legislation offers as well examples of juridical norms that serve the purpose of protecting the dignity of the accused from crimes that can be carried out during a criminal trial. As such, the questions that will be addressed to the accused will be direct so that under no circumstances can they be formulated in a suggestive or insidious manner. The accused cannot be subjected to any sort of constraint or threat[7]. Exclusion, through the perspective of comparative law, comes under a variety of shapes, all of them requiring the balancing of interests, first and foremost the establishing of truth in a criminal case determined according to the rights of the accused and, indirectly, of the entire population, rights that are considered so important by the legal order that they are provided in either conventions that regulate human rights, either in national constitutions[8].

During the development of a criminal trial, transgressions from the instituted procedural setting are possible and in such situations certain procedural sanctions are available to interfere. Inadmissibility, deterioration and nullification have been stated in the current Criminal procedure code. In addition, the legislator has provided the exclusion of illegally obtained evidence as a distinct procedural sanction. This distinct sanction intervenes in the area of evidence, in the event the principles of legality and loyalty in the administration of evidence are violated.

The exclusion of illegally obtained evidence is a new institution in our procedural system, as it was included in the doctrine along with the text of art. 64 paragr. (2) C.p.c. 1968, which states that "illegally obtained evidence cannot be used in the criminal trial". *The return of the sanction of nullification in the area of evidence handling is thus explained*, by the modification brought to the text of art. 102 of the New Criminal procedure code through the Law of application. As such, according to the current

[2] This convention has been adopted in New York, on the 10st of December 1980. Romania had adhered to this Convention through Law 19.1990, published in the Off.M.no.113 FROM THE 10TH OF OCTOBER 1990.

[3] Law nr 20/1990 for the modification and completion of a number of provisions from the Criminal code and the Criminal procedure code was published in the Off.M. no.112 from the 10th of October 1990.

[4] The legal content of the crime is as follows: (1)The act of a public worker that fulfills a function that involves exercising state authority or of another person that acts towards instigation or with the expressed or tacit consent of this person to provoke strong physical or psychological suffering to an individual: a) for the purpose of obtaining information or declarations from the person or from a third party; b) for the purpose of punishment for an act that the person or a third party has commited or is suspected to have commited; c) for the purpose of intimidating or pressuring her or him or of intimidating or pressuring a third party; d) by reasons of any form of discrimination, it is punishable by 2 to 7 years in prison and the removal of a number of rights. (2) If the act stated in paragr. (1) resulted in bodily harm, the punishment is from 3 to 10 years in prison and the removal of a number of rights. (3) Torture that resulted in the death of the victim is punishable by 15 to 25 years in prison and the removal of a number of rights. (4) Attempting the crime as stated in paragr. (1) is punishable. (5) No exceptional circumstances, regardless of what they are, whether it is related to war or threat of war, to internal political instability or any other exceptional state cannot be invoked to justify torture. Similarly, acting on the order of a superior or of a public authority cannot be invoked. (6) It does not constitute as torture the pain and suffering that result exclusively from legal sanctions and are inherent to or provoked by these sanctions.

[5] P.Pajordi *et alli*, Codicele Penale e di Procedura penale, Editore, Pirola, Milano, 1991, p.745

[6] Art. 136a paragr. (2), strafproze b ordnung (StPO)

[7] Art 489 paragr. (2) and (3), Ley de Enjuiciamento Criminal, 1882

[8] Stephen C. Thaman, The Exclusionary Rule, General reports of the XVIIIth Congress of the International Academy of Comparative Law / Karen B. Brown, David V. Snyder eds , pages 657-704, year 2012, p. 662.

formulation of the text of art. 102 paragr. (3), the evidence can be excluded if the act by which the evidence has been set or authorized or by which it had been administered is affected by absolute or relative nullification, although in the latter case an infliction that cannot be otherwise removed must have been caused. As such, a contradiction of sorts has remained between the principle stated in art. 102 paragr. (2) of the New Criminal procedure code, which sets the rule that illegally obtained evidence cannot be used in the criminal trial, and the rule from paragr. (3) of the same article, which regulates the way in which the principle states in paragr. (2) will actually operate, which is only by means of the nullification sanction, absolute and relative. As such, in art. 101 of the NCPC the principle of loyalty in evidence administration is specified. The previous article states that: *1) It is forbidden to use violence, threats or any other constraining methods, such as promises or orders, for the purpose of obtaining evidence. (2) Interrogation methods or techniques that affect the person's capacity to consciously and voluntarily recall and relate the events that constitute as evidence cannot be used, this interdiction applies even if the interrogated person gives their consent for such methods or techniques to be utilized. (3) It is forbidden for criminal judiciary bodies or other persons that act on their behalf to provoke a person to commit or to continue the committing of criminal acts for the purposes of obtaining evidence.*

Art. 102 of the NCPC also provides the sanction for not respecting the principle of legality and loyalty in administering evidence, more specifically the exclusion of illegally obtained evidence. The article states that *(1) Evidence obtained through torture, as well as derivative evidence cannot be used in the criminal trial. (2) Illegally obtained evidence cannot be used in the criminal trial. (3) The nullity of the act by which the administration of evidence had been set or authorized or by which it had been administered determines the exclusion of the evidence. (4) Derivative evidence is excluded if it has been directly obtained through the illegally obtained evidence and could have not been obtained through any other way.*

The moment a piece of evidence has been obtained through the violation of legal provisions, two interests come into conflict: society's interest for the person which has committed a crime to be identified, judged, punished and for her or his sentence to be carried out and the individual interest of people that none of their rights is to be violated by the abusive behavior of the ones who are tasked with the criminal investigation. In many legal systems, the sanction of the exclusion of evidence has been found to be the most efficient way of "reconcile" these interests. The sanction of the exclusion of evidence has seen, especially in the common-law system, a long development, as it was not applied in the same manner throughout its existence, being constantly subjected to criticisms related to doctrine, regarding both the manner of use as well as the utility of its own existence.

The principle in common-law legal systems is that every piece of relevant evidence is admitted, except in the cases where a legal disposition excludes the piece of evidence or if the piece of evidence is excluded by the judge as a consequence of exercising the liberty to exclude certain evidence. If the evidence is part of a category whose exclusion is expressively stated by the law then it is excluded regardless of other criteria that may be in the favor of using the respective piece of evidence (such as the public interest to obtain the sentencing of the person that is incriminated by the evidence), with the exception of the existence of exceptions from the exclusion of evidence.

Recently, common-law jurisdictions have elaborated discrete norms regarding the acceptance and the exclusion of illegal or unloyal evidence, provisions regarding human rights becoming the main set of reference for establishing admissibility[9].

As far as the motives that are behind evidence exclusion are concerned, common-law legal systems and the doctrine have identified more than one of these motives: discouraging the investigation bodies to commit illegal acts, protecting citizens' rights, protecting the integrity and the prestige of courts, respecting the state law. The idea of discouraging investigation bodies from committing illegal acts is that it will be realized if the evidence that is obtained through illegal or unloyal methods will lead to the impossibility of obtaining a sentence. Protecting individual rights is mainly focused on human rights, either by their substantial aspect or by their procedural aspect, as the sanction of exclusion protects the fundamental nature of these rights. Naturally, both the motive of discouraging investigation bodies in regards to potential abuses and the motive of protecting human rights are tightly connected, as the reason for which the violations of legal norms by the investigation bodies are sanctioned exactly because these norms protect individual rights. Motives related to the integrity of judiciary systems have their base exactly in the fact that courts are not supposed to tolerate illegal acts because, by having such behaviors, they could be able to affect public perception regarding the act of justice and the trust in the judiciary system. Otherwise, trials will be "tainted" by the admission of illegal evidence, and the role of courts is that of "supporting" the law and not of approving violations in law by supporting, even indirectly, illegal investigation activities that will lead to obtaining sentences (see footnote 9). In the legal systems where the judge has the liberty of

[9] William van Caenegem, New trends in illegal evidence in criminal procedure: general report – common law This Report was prepared for the World Congress of the International Association of Procedural Law, Salvador, Brazil, 2007., Bond University, Queensland, Australia, pg. 96, http://epublications.bond.edu.au/law_pubs/223.

excluding evidence, even if the main motive for excluding evidence is one of the previously shown ones, the judge can also refer to other motives for which the sanction will be applied, according to concrete circumstances.

In the Explanatory Memorandum of the NCPC it is shown that the Project explicitly regulates for the first time the principle of procedure loyalty in the administration of evidence, for the purpose of avoiding the use of any means that may be made with the purpose the wrongful administration of a piece of evidence or that might have the effect of provoking the carrying out of a crime, for the purpose of protecting the person's dignity, as well as his or her right to a fair trial and a private life. The institution of exclusion of illegally or unloyally administered pieces of evidence knows a detailed regulation, as the theory of legitimacy is utilized, which places the debate in a larger context that considers the functions of the criminal trial and of the juridical decisions with which these are ended in. Considering the nature of this institution (adopted in the continental legal system from common-law tradition) as well as the jurisprudence of the European Court of Human Rights, the evidence that is administered with the violation of legal provisions can be exceptionally used if they do not bring harm to the equitable character of the criminal trial as a whole. On the level of principles, even if the Explanatory Memorandum has no obligatory force, it can constitute an important element in interpreting the provisions of a normative act, since from this source important information regarding the object and the purpose of a normative act norm can be deduced.

The Explanatory Memorandum becomes even more important as we are getting close to the moment the normative act will be put into effect, and the ulterior interpretation of a normative act, as we get further away from its adoption, can be an evolutional one, capable of starting a discussion about the initial jurisprudence and even about the intent of the authors of the act, an intention that with the passing of time tends to become obscure, controversed and inaccessible to the larger audience.

From the Explanatory Memorandum we can observe that the legislator has understood to offer special attention to the way in which criminal trial evidence are obtained, as well as the way in which they are administered. As such the principle of loyalty in evidence administration is referred to, a principle expressly regulated in art. 10 of the NCPC and by the good faith that must govern the activity of evidence handling in the criminal trial. More so, it is expressly shown that the purpose of this principle is to protect human dignity as well as to protect a person's right to a fair trial and to a private life.

As a rule, the sanction of exclusion intervenes following the violation of the legality and loyalty principles in evidence handling, in the moment the evidence was obtained or administered. On the other hand, the principle of free assessment of the evidence appears during the criminal trial and after the evidence has been administered and after the loyalty and legality of their obtainment and subsequent administration had been verified. On the subject of evidence that is tainted as far as its credibility is concerned, during the criminal trial either the sanctioning of the respective piece of evidence can intervene, either the court can apply the principle of free assessment of the product and to declare that, in relation to the evidence ensemble, priority must be given to other evidence, but the reasonings are different. As such, if the sanction of exclusion will be used, it must be applied exclusively on considerations related to the way in which the evidence was obtained or administered (for example, a confession in which a certain person is identified as the culprit that was obtained through violence on the part of the investigation bodies must be first and foremost excluded because it is not credible evidence). If the evidence was legally obtained and administered, but the criminal prosecution body or the court deems that they cannot base their decision on the evidence as it is lacking credibility, they must not exclude the evidence, but apply the principle of free assessment on the evidence (for example, a confession by which a person is identified as the culprit, legally obtained and administered, but that contradicts other declarations from the file, which place the culprit in another location at the time of the committing of the crime).

In the literature, it has been shown that the illegal character of the evidence can result by the mere means the evidence was obtained (confession under torture) or by the circumstances in which the evidence was obtained and administered (listening to telephone conversations in circumstances not allowed by the law or if the evidence had not been subjected to contradictory debate)[10].

As part of the category of evidence that are inadmissible by their nature, the doctrine offers the examples of: confessions obtained through the use of violence, especially through torture, inhuman or degrading treatment, confessions obtained through the use of threats or other constraining methods (psychological violence), promises, orders, evidence obtained through the violation of the right to remain silent, the use of narco-analysis, hypnosis or resorting to a polygraf[11].

As part of the category of evidence that are inadmissible in connection to the circumstances in which they have been obtained, we offer as examples evidence obtained through police provocation, evidence obtained by the violation of professional

[10] C. De Valkeneer, La tromperie dans l'administration de la prevue penale, Lacier, Bruxelles, 2000, p. 81-91; F. Kuty, L'exigence de loyaute dans la recherché de prevue legale, note sous Cour mil. 18th of December 1997, Revue du droit penale et de criminologie, 1999, p.254-268, apud Gheorghiță Mateuț, op.cit., p. 85.

[11] Gh. Mateuț, op.cit. Tratat de procedura penala. Partea generala. Vol.I p. 85.

secrecy, those obtained by listening or intercepting private conversation and telephone conversation carried out with the violation of legal provisions, illegal searching ordered and executed with the violation of the house[12].

As part of the category of evidence that are inadmissible because of the circumstances of their administration, anonymous witness declarations have been given as examples, taking into account the fact that a witness's anonymity cannot be allowed unless he or she can offer pertinent and sufficient reasons (see footnote 12: Mateuț, *op.cit.*, p. 90-91). For anonymous testimonies to be utilized in a criminal trial, three conditions that results from the jurisprudence of the European Court of Human Rights must be met: it is necessary for the witness to be able to make use of pertinent and sufficient reasons while explaining her or his refusal, it is necessary for the defense to have had sufficient and adequate occasions to contest the anonymous testimony of the accusing, taking into account art. 6 paragr. 3 of the Convention, by which the accused can interrogate the witnesses of the accusing, in the spirit of the principle of contradictionality, it is necessary for the piece of evidence to not be the only one and not to be the one to determine culpability.

As far as the conditions that must be met in order for the exclusion to be functional are concerned, they are mainly three. The first condition is given by the existence of a violation in the rights and liberties of the accused, rights and liberties than can be of a procedural as well as a substantial nature. The 2nd condition is tied with the existence of a violation of legal provisions in the activity of obtaining or administering the evidence that is able to harm the principle of legality and loyalty in the activity of evidence handling. The 3rd condition is for a connection between the violation of legal provisions and the harm to exist. The first two conditions demand a clarifying analysis, but the 3rd condition is one that in jurisprudence and in foreign literature has generated controversy regarding the concrete manner in which it can be established.

As far as the connection between the harm brought to the accused and the violation of legal provisions is concerned, in foreign jurisprudence there have been some diverging opinions in attempts to establish if this connection must or must not be one of causality. As such, in some situation, in Canadian jurisprudence it has been established that there must be a causality between the violation of legal provisions and the produced harm[13].

In other situations it was considered that the connection needn't be one of causality, a temporal connection being sufficient, in the sense that the violation of legal provisions had taken place before or during the obtainment of evidence[14]. In the support of this point of view it has been shown that the existence of the causality relation is a condition that is too narrow and difficult to apply, which is why the entire event chain in which a violation of legal provisions has occurred must be analyzed. More so, it has been shown that in practice the situation in which a temporal connection between the illegal act and the harm is searched can, as well, generate difficulties as it can be very distant, which is why a connection between the illegal act and the harm must be established according to the particular case. In Dutch literature it has been considered that a temporal connection is not necessarily a causal connection, and the connection must necessarily be one of causality. This point of view has also been shared by the jurisprudence of this country's supreme court[15].

In relation to this last condition it is extremely difficult to establish, on a theoretical level, what are the minimum criteria that must be met in order to establish that there has been a connection between the violation of the legal provisions and the harm, also priority cannot be given neither to the interpretation according to which the connection must necessarily be one of causality nor to the interpretation that deems a temporal connection as sufficient, as such, the interpretation should be made according to the particular case, excluding neither of the two interpretations. Evidently, this interpretation can harm to a certain degree the predictability.

If the evidence is obtained by torture only one condition must be met, and that is that it will be established that the evidence had been obtained in this matter and for it to be automatically excluded. The solution is identical in both the case of the initial evidence as well as the derivative evidence.

As far as the persons that can solicit exclusions are concerned, the previously mentioned legal provisions state that it can be any person whose legitimate interest have been harmed. As such, the exclusion can be invoked by the main procedural subject, more precisely the suspect and the harmed person, as well as those who have been deemed as part of the trial, more precisely the defendant, the civil part and the civilly responsible part. But all these persons must justify an interest, an interest that can be harmed if the exclusion of illegally obtained evidence will not be carried out. More so, the exclusion can also be invoked by default by the prosecutor, in this case the

[12] Gh. Mateuț, op.cit., p. 86-90.

[13] R. v. Upton, [1988] 1 S.C.R. 1083., apud Gerard Mitchell, THE SUPREME COURT OF CANADA On S-s. 24(2) OF THE CHARTER, 2007, p. 34.

[14] R. v. Strachan, [1988] 2 S.C.R. 980 apud Gerard Mitchell, op.cit. p. 34.

[15] M.J. Borgers & L. Stevens, The Use of Illegally Gathered Evidence in the Dutch Criminal Trial vol 14.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW (December 2010), p. 6 <http://www.ejcl.org/143/art143-4.pdf>.

interest is presumed, as it is acting for the purpose of defending society's general interests. As the interest belongs first and foremost to the accused, the suspect or the defendant, she or he will be the one that will formulate the request for the exclusion of the evidence, other cases existing more or less in theory.

After the court has been notified, the legality of the evidence is verified by the preliminary hearing judge, and he or she has the ability to check the legality of the administration of evidence and of the elaboration of the procedural papers towards the criminal prosecution bodies, as well as the legality of the arraignment made by the prosecutor.

As such, the object of the procedure in the initial hearing is carried out, by verifying, after the arraignment has been made, of the competence and the legality of the initial court notification, as well as verifying the legality of the administration of evidence and the carrying out of the papers by the criminal prosecution bodies. Verifying the legality of the arraignment or lack thereof comes as a distinct judiciary function, the principle of separation of judiciary functions finding their legally expressed mention in art. 3 of the NCPC. In the doctrine it has been shown that this judiciary function comes as a *sui generis* institution, an independent institution that is not a part of either the prosecution phase or the trial phase, this being a result of the systematization of the subject, as the preliminary hearing judge does not elaborate prosecution papers but also does not carry out the judgment [194]. By carrying out this procedural function, the preliminary hearing judge does not have the power of initiative in matters of evidence, but is the guarantor of rights for the phase which precedes the criminal trial, as his or her attributes are expressly and exhaustively stated in the law. Despite all this, through Law no. 255/2013, art. 3 of the new has been modified since, although the rule remains that carrying out a judicial function is incompatible with carrying out another judicial function, by exception, the function of verifying the legality of the arraignment or lack thereof is compatible with the function of carrying out judgment. The legislator went even further and has modified art. 346, paragr. 7 so that there is no possibility for the judge that verifies the legal court notification and commences the judgment to also proceed to judge the case, more specifically the preliminary hearing judge that commences the judgment also carries out the function of judging the case, so that on a practical level, when the judgment is commenced, the two judiciary functions are reunited. From the point of view of the impact these modifications have over the administration and evaluation of evidence in the judgment phase, the modification is to be criticized[16].

According to the jurisprudence of the European Court, in theory it is not forbidden to use in a criminal trial a piece of evidence that has been illegally obtained, if the procedure as a whole is equitable and the defendant has had the possibility of contesting it. In such cases it is considered sufficient to remedy the violation of the rights of the accused by declaring the violation in the internal law and the offering of compensations, without it being necessary to exclude the obtained evidence. From this perspective, introducing in the internal law the procedural sanction of excluding illegally obtained evidence regardless of the reason of illegality might appear as excessive in front of the European Court jurisprudence. In the jurisprudence of the Court a more just meeting is made between the general interest of society, to find the truth so that the ones who have committed crimes will be punished, and the personal interest of the accused persons, which demands the respecting of all their material and procedural rights.

It is a different situation when the obtainment of evidence is realized *with the violation of the person's right to not be subjected to torture or to inhuman or degrading treatment.* In this case, not only *the principle of legality of the criminal trial* is being violated, but also *the respect for human dignity* and, because of this, the approach must be different. If the use of evidence obtained by violating this right would be used in court, it would also affect *the finding of the truth*, as the reliability of the procedure would be placed in discussion. More so, by using this evidence, the moral justification of the calling to account of persons who have committed crimes would be lost. In these conditions, the European Court has drawn some principles regarding the use in trial of evidence obtained through torture, inhuman and degrading treatment, through a famous decision which has gone through intense debate in the literature, pronounced in the Grand Chamber on the 1st of June 2010 in the Gäfgen vs. Germany case.

As a principle, *direct evidence* obtained through these means must be excluded.

In the internal practice it has been stated that the use of violence in order to obtain a declaration in the criminal trial by the prosecution bodies has consequences not only upon the declaration, which cannot be used in trial, as it is a illegally obtained evidence, but also anticipates the existence of elements that constitute the crime of abusive investigation[17].

As far as the *evidence* that are *derivative* from the direct evidence obtained by the violation of art. 3 from the European Convention is concerned, the Court has adopted the rule according to which, it must mainly be excluded if there is a connection of causality between the evidence which was obtained through harmful treatment and the derivative evidence (the "fruit of the

[16] Noul Cod de procedura penala-Nicolae Volonciu,Andreea Simona Uzlau,Corina Voicu,.. Bucharest, Editura Hamangiu, 2014, p.242.

[17] HCCJI crim. s. Dec no. 6218 from the 26th of October 2006, in I. Ciocla, Probele in procesul penal.Practica judiciara, Editura Hamangiu, Bucharest. 2006, p.294-296.

poisonous tree" theory)[18].

As far as the evidence which is derivative from evidence administered by torture is concerned, these will always be excluded, regardless if they were obtained directly or indirectly from the evidence administered by torture. More so, it does not matter if this derivative evidence could have been obtained through other means. These conclusions are to be imposed taking into account the formulation of art. 102 paragr. (4), where the necessary conditions are stated only as far the exclusion of evidence derived from illegal evidence is concerned.

3. Conclusions

In conclusion, in light of these principles resulted from the ECHR, the text of art. 102 from the New Criminal procedure code must be interpreted, more precisely the article which regulates in paragr. (1) the conditions of evidence directly obtained through torture and derivative evidence, and that in paragr. (4) talks about evidence that derives from the ones which had been illegally obtained and that couldn't have been obtained through any other way. But the jurisprudence of the Court refers to evidence obtained through inhuman or degrading treatment and its derivative evidence, while the text of the internal law talk about illegal evidence, regardless of the cause of illegality. In the case of other illegalities, such as the ones in art. 8 of the Convention, the Court applies other rules, allowing their use in court, under certain conditions. For this reason it is necessary to ultimately turn to the rules of the sanction of relative nullity, meaning the exclusion of evidence only if it has produced a harm that cannot be removed in any other way. This harm would be judged by the judiciary bodies according to rules elaborated in the jurisprudence of the European Court, thus reconciling in an equitable manner both the individual interest of the defendant as well as society's general interest. In the case of evidence obtained through torture or inhuman or degrading treatment the sanction of nullity cannot be applied, as we have shown before that that their rules are much stricter.

The way in which exclusion is regulated in the Criminal procedure code offers the judge relatively large space for appreciation when a piece of evidence demands analysis in relation to a concrete situation. The situation is no different in other juridical systems. And that is why the role of the judge is even bigger in the carrying out of this right.

If before the NCPC was placed into effect the jurisprudence was able to avoid the sanction of exclusion, since the old CPC only mentioned it expressly once, after it was put into effect it cannot be considered a sui-generis sanction anymore. What remains to be seen is how it will be applied in the jurisprudence, more precisely the reasons stated by the courts for which it shall be applied and how will judges manage to find a balance between these rights and liberties and the need for criminal punishment. Using the vision of the English philosopher Betrand Russell about the way in which other philosophies must be perceived, we could say that the analysis of methods of regulation or interpretation of legal provisions in various legal systems cannot but made with either an attitude of veneration nor with one of desconsideration. For starters we must try to understand why those legal systems have achieved a certain regulation or why have they ended up expressing their opinions in a certain direction. Afterwards it is required of us to see these regulations and interpretations with a critical eye, and if some of the aspect may seem absurd we should try to see if this sensation is or isn't a result of our prejudice, as we use as reference the legal system that we are "used to" and in the case they are truly absurd, how could they have seemed for someone else, in another era, as being fair. Desconsideration is an obstacle in trying to relate to another legal system, veneration prevents us in perceiving it with a critical eye.

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[18] In the English language doctrine we often encounter this problematic under the name of "fruits of the poisonous tree". This theory was generated by the Silverthorneb Lumber v. The United States of America case. In this case, in the year 1920, the Supreme Court of the United States of America had states that federal agents, by the use of illegally confiscated financial documents, have accused a person of committing crimes towards the tax regime, in the end the derivative evidence from these illegally obtained documents were excluded from the case.

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THE POSTPONEMENT OF EXECUTION OF THE PUNISHMENT AND THE SUSPENSION OF SENTENCE UNDER SUPERVISION FOR THE CRIMES OF FAMILY ABANDONMENT AND THE PREVENTION OF THE ACCESS TO GENERAL COMPULSORY EDUCATION

Andrei-Viorel IUGAN[*]

Abstract

In addition to the general conditions in which the court may order a judicial individualization measure without depriving a person of its freedom, the legislator created for certain criminal offenses, some regulations derogating from this regime. For these crimes, for reasons related to the protection of family life, if the defendant is aware of his crime, by fulfilling his obligations, the legislator presumed in an Absolut way that there is no requirement to effectively enforce the sentence and execute the punishment, in such cases the court being obliged to postpone the execution of the punishment or to order the suspension of sentence under supervision.

Keywords: *the postponing of the execution of the punishment, suspension under supervision of the sentence, abandonment of family, the prevention of the access to general compulsory education.*

1. Introduction

The imposition of a punishment and its effective enforcement are not likely to ensure that these measures will achieve the purpose of the punishment and the social reintegration of the person who has committed an offense in each case. Often the detention environment transforms the persons subject to such manner of punishment in more dangerous criminals, and in many cases imprisonment doesn't contribute to the social reintegration of offenders, but on the contrary, to their social isolation. Also in economic terms, imprisonment is expensive, involving significant financial costs for the state. In some specific cases, reported to the gravity of the crime and to the person of the offender, enforcing a punishment is not justified.

In these circumstances, the legislator has created some mechanisms of judicial individualization of the punishment that allow this, if certain conditions set by law in a limitative manner, are met: the postponing of the execution of the punishment and the suspension of the execution of the punishment. In the event of committing certain offenses, the legislator went further on, practically imposing on the court to rule in the sense of applying an execution measure without depriving a person of its freedom, in the cases where the conditions provided for by law are met[1].

2. Content

2.1. The legal provisions

According to Art. 378 of the Criminal Code, it constitutes the offense/crime of family abandonment the following actions: when the person who has the legal obligation of providing support to the person entitled to the support, commits one of the following actions:

a) the departure, the banishment or letting unaided, and by these actions exposing him to physical or moral suffering;

b) failure to fulfill the obligation of support as provided by law, with bad faith;

c) failure to pay, for 3 months, the alimony established by a judicial way, with bad faith;

shall be punished with imprisonment from 6 months to 3 years or a fine.

With the same punishment is sanctioned the failure to execute, acting in bad faith, by the convicted person, the periodic obligations established through a court judgment, in favor of the persons entitled to receive support from the victim of the offense.

Criminal proceedings shall be initiated upon prior complaint of the injured party.

If, until the decision of conviction becomes definitive, the defendant fulfills its obligations, the court may rule, if appropriate, case by case, the postponing of the execution of the punishment or the suspension under supervision of the sentence, even if the conditions stipulated by law for this are not met.

Regarding the crime of preventing access to compulsory education, it is incriminated in Art. 380 of the Criminal Code as follows: the parent or person entrusted by law with the custody of a minor, that unduly withdraws or prevents by any means a minor to attend compulsory education, shall be punished with imprisonment from 3 months to one year or a fine .

If, until the decision of conviction becomes definitive, the defendant ensures the resumption of class attendance by the minor, the court may rule, if appropriate, case by case, the postponing of the execution of the punishment or the suspension of the

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[1] C. Bulai, B.Bulai, *Manual de Drept Penal.Partea Generală*, Bucureşti, Ed. Universul Juridic, 2007, p.233.

execution of the punishment, even if the conditions stipulated by law for this are not met.

The old legal regulation/legal provisions also stipulated the obligation of the court to order the conditional suspension of execution of the punishment for the crime of family abandonment (the crime of preventing access to compulsory education having no counterpart in the old Code). Thus according to Art. 305 para. (4) - (5) of the old Criminal Code (1969), if the parties haven't reconciled, but during the trial the defendant fulfills its obligations, the court, when determining the guilt of the defendant, rules in the sense of a suspended conditional sentence, even if the conditions laid down in Art. 81 are not met. The revocation of the conditional suspension occurs only if, during the probation period, the convicted person commits the crime of abandonment of the new family again.

2.2 Conditions

In case the conditions laid down in Art. 378 para. (5) and Art. 380 para. (3) of the Criminal Code are met, the court is obliged to rule in the sense of postponing of the execution of the punishment or suspension under supervision of the sentence. Unlike the general background of these measures, the legal texts mentioned above do not establish a facultative choice for the court, but an obligation. The court nevertheless retains the possibility to determine which of the two institutions best fits the crime and the defendant's degree of dangerousness. Although the legal text does not provide for, we consider that nothing prohibits the court to rule in the sense of waiving the application of a punishment if it considers that it wouldn't be appropriate to set such a penalty and the other conditions laid down in Art. 80 of the Criminal Code are met.

Therefore, in order to rule in the sense of the postponing of the execution of the punishment or the suspension under supervision of the sentence for the two types of criminal offences, the following conditions have to be met:

- to have committed in the consumed form a crime of abandonment of family or the crime to prevent access to general compulsory education.

The offense must be typical, attributable and unjustified. For example if the person liable for providing the legal support is acting in good faith and doesn't have the objective possibility to actually pay the support alimony, the solution required is acquittal. Likewise, a parent cannot be convicted for the crime of preventing the child to attend school, if that parent is abroad and the actual care and support of that child is performed entirely by the other parent.

Also, for the offense/crime of family abandonment, the court cannot rule in the sense of postponing of the execution of the punishment or the suspension under supervision of the sentence, if the person entitled to support/alimony support withdraws his/her complaint. In this case the court shall rule cessation of the criminal trial.

The legal provisions regarding the postponement of the execution of the punishment and the suspension of sentence under supervision are applicable only when the crime/offense is in a consumed form, the only attempt for any of the two offenses not being incriminated by law.

- the defendant has to have fulfilled its legal obligations, in the crime of family abandonment, and for the crime of preventing access to compulsory education – to have provided that the minor had resumed attendance of classes, between the time calculated from the preparation of the indictment, until the judgment becomes final.

If the defendant meets its obligations, or ensures the resumption of school attendance during the criminal investigation, before the preparation of the indictment, the prosecutor will proceed to the dismissal of the case, the defendant's conduct having the value of a non-punishment clause. In the old regulation there was no provision of such a cause for non-punishment. Therefore, if the defendant performed his duties during the criminal investigation, the prosecutor should have notified the court, which will have ruled in the sense of conditional suspension (of course if the court didn't assessed that the offense doesn't have the concrete degree of social danger of an offense, in which case it would dropped the charges against that person).

Also we consider that if the defendant meets its obligations, or ensures the resumption of school attendance during the investigation, but the prosecutor still pursues a criminal trial, the court will be obliged to pronounce the termination of criminal proceedings under Art. 16 lit. h of the Criminal Procedure Code. The court is obliged to ascertain the incidence of a cause that removes the functional ability of the criminal action (the existence of a cause of non-punishment in this case), even if this cause wasn't found by the prosecutor, in these conditions the court not being able to rule in the sense of postponing the execution of the punishment or the suspension of sentence under supervision.

-the defendant is of full age.

According to Art. 114 of the Criminal Code, towards the minor who, at the time of the offense, is aged between 14 and 18, and non-custodial or custodial educational measure shall be taken. Since the legislator has ruled against the possibility of juvenile sentencing, the court obviously could not postpone or suspend the execution of punishment under supervision.

Regarding the two offenses covered by this study, we consider excluded the possibility that a minor would commit the crime of preventing access to compulsory education. But we do not exclude the possibility that a minor is liable to pay alimony support to his minor child, thus committing the crime of family abandonment if he does not pay acting in bad faith.

If the above conditions are satisfied the court will be obliged to rule in the sense of postponing the execution of the punishment or the suspension of sentence under supervision (as shown above court may also rule in the sense of waiver of penalty) even if the conditions provided for in Art. 83 or Art. 91 of the Criminal Code are not met.

Therefore nothing will prevent the court to postpone the application of the punishment if it establishes for the crime of family abandon a sentence of 3 years, even if according to Art. 83 para. (1) of the Criminal Code, the fixed penalty ought to be of 2 years at most. Also the postponement or suspension under supervision is mandatory, even if the defendant was previously convicted, regardless of the nature of the offense committed, the form of guilt or the penalty sentence imposed.

Being a compulsory measure, the court shall order the postponement or suspension, even if reported to the person of the defendant, his previous conduct before committing this crime, his efforts to eliminate or mitigate the consequences of his offense/crime and his means of correcting, the court would appreciate it necessary to enforce the sentence.

At the same time the court will choose a non-custodial way of judicial individualization, even if the defendant has evaded prosecution or trial, or tried thwarting finding the truth or the identification and criminal accountability of the author or participants.

Regarding the condition on the agreement to perform unpaid community work we consider that we must make a distinction between the methods of individualization that the court will take.

If the court decides upon the postponement of execution of the punishment, the legislator leaves it to the judge of the case the choice of imposing the obligation on community work. If the court considers that the reintegration of the accused can be made only by applying this obligation, his consent is necessary. Otherwise, we believe that the court shall decide upon postponement, with or without the consent of the defendant in this respect, because Art. 378 para. (5) and Art. 380 para. (3) of the Criminal Code have priority towards Art. 83 par. (1) c [2].

If the court considers it necessary to decide suspension of sentence under supervision, then it is compulsory to oblige the defendant to perform community work for a period between 60 and 120 days. In this case, the condition of the agreement to provide unpaid community work must be fulfilled, because otherwise there would be a violation of the Constitution and the European Convention on Human Rights[3].

As emphasized in the legal literature, ignoring the conditions laid down in the general part of the Criminal Code shall not cause the creation of new institutions. Therefore if in the case of a penalty fine the only solution is postponement of application of punishment, because suspension under supervision for a fine would be a hybrid institution that borrows the subject from postponement institution and the procedure from the suspension institution[4].

However, if the defendant fails to fulfill his legal obligations required for the offense of family abandonment, or doesn't provide for the resumption of school attendance, for the offense of preventing access to compulsory education, until the final judgment, the court will be able to rule in the sense of postponement of application of the punishment or suspension of sentence under supervision, but only if the conditions laid down in the general part of the Criminal Code are met. The provisions of Art. 378 par. (5) and Art. 380 par. (2) of the Criminal Code are derogatory in favor of the defendant, and do not allow to reach the conclusion that, if the obligations are not fulfilled the defendant could not benefit of a non-custodial modality of judicial individualization[5].

Problems may arise if besides the crime of family abandonment or preventing access to general compulsory education, the defendant has committed other competing crimes.

In this regard we consider that the distinctions made under the old legislation should remain valid. The court shall order, as a mandatory rule, postponement of application of the punishment or suspension under supervision of the sentence if the conditions prescribed by the Art. 378 par. (5) or Art. 380 par. (3) of the Criminal Code are met. With regards to the competing offense/crime the court may order postponement of application of the punishment or suspension under supervision of the sentence if the conditions of the general part of the Criminal Code, namely Art. 83 and 91 of the Criminal Code are met. The court cannot rule on postponement or suspension with regards to all offenses/crimes under Art. 378 par. (5) or Art. 380 par. (3) of the Criminal Code, because the exceptional conditions laid down in these legal texts with regards to all offenses/crimes are not met. Therefore for each offense/crime, the court will rule by a separate non-custodial modality of judicial individualization, and the probation periods will run in parallel. Merging of the punishments and the imposition of an increase of penalty will be made only if the two measures will be revoked.

If for the second offense/crime the court considers that the conditions with regards the

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[2] A. Risnita, I.Curt, *Renuntarea la aplicarea pedepsei. Amanarea aplicarii pedepsei*, Ed.Universul Juridic, Bucharest, 2014, p.170. On the contrary, M. Udroiu, *Drept Penal. Partea Generală. Noul Cod Penal* , Bucharest, Ed, CH Beck, Bucharest, 2014, p.255.

[3] A. Vlăsceanu, in G. Antoniu (coordinator), *Explicații Preliminare ale Noului Cod Penal, Bucharest*, Bucharest, Ed.Universul Juridic 2011, p.192.

[4] A. Rîșniță, I.Curt, *read*, p.168.

[5] To the same effect, according to the old legislation, solution which is maintained in present times as well, the Court of Appeal decision 512/1998, in I.C.Morar, *Suspendarea condiționată a executării pedepsei. Culegere de practică judiciară*, Bucharest, Ed. CH Beck, 2007, p.176-177.

postponement of application of the punishment or suspension of sentence under supervision are not met, the court shall order its effective execution, without this influencing in any way on the solution given with regards the crime of family abandonment or preventing access to general compulsory education. In this regard, the application of the punishment will be postponed, or execution of sentence will be suspended. Of course the requirements and the supervision measures will remain without object and cannot be executed. Merging these punishments and applying an increase of penalty can be achieved only in the event of revocation of the postponement or suspension of the execution[6].

2.3. The term of surveillance

According to art. 2 of Law no. 253/2013, the term of surveillance or the supervision period designates the time frame in which the person towards which one of the following measures has been taken: the postponement of application of the punishment, the suspension of sentence under supervision, the release on parole or a non-custodial educational measure (in the case of minors), must comply with the obligations or surveillance measures ordered by the court in its task.

In case of postponement the surveillance term is 2 years, while in the case of suspension under supervision the surveillance period is between 2 to 4 years without being shorter than the length of sentence given.

The surveillance term begins to run from the date of the final judgment of the court, and being a substantial term, the period shall be calculated on full days.

Regarding the crimes of family abandonment or preventing access to general compulsory education there are no derogations with regards the term of supervision.

2.4. Surveillance measures and obligations

Art. 85 of the Criminal Code states that during the term of supervision, the person towards which the postponement of execution was ordered, must meet the following supervisory measures:

a) to report to the probation service, at the dates set by it;

b) to receive visits from the probation officer assigned with his supervision;

c) to notify in advance, when moving to another address and any travel periods of over 5 days;

d) to communicate when changing jobs;

e) to communicate any information and documents, in order to enable control of his sources of livelihood.

The court may require that the person towards which the postponement of execution was ordered to carry out one or more of the following obligations:

a) to attend a school/training course or vocational training;

b) to perform unpaid community work for a period between 30 and 60 days under the conditions set by the court, unless that, due to health reasons, the person cannot perform the work;

c) to attend one or more social reintegration programs run by the probation service or organized in collaboration with institutions from the community;

d) to accept control measures, treatment or medical care;

e) not to communicate with the victim or members of his/her family, with the people with who he/she committed the crime or with other persons, determined by the court not to be approached;

f) not to be in certain places or at certain sports events, cultural or other public gatherings, determined by the court;

g) not to drive certain vehicles determined by the court;

h) not to hold, to use and to carry any type of weapons;

i) not to leave Romania without the court's consent;

j) not to occupy or to perform public functions, his/her profession or the activity that has been used for committing the offense.

Regarding the suspension of sentence under supervision, according to Art. 93 of the Criminal Code, during the surveillance period, the convicted person must respect the following supervisory measures:

a) to report to the probation service, at the dates set by it;

b) to receive visits from the probation officer assigned with his supervision;

c) to notify in advance, when moving to another address and any travel periods of over 5 days;

d) to communicate when changing jobs;

e) to communicate any information and documents, in order to enable control of his sources of livelihood.

The court imposes that the convicted person has to execute one or more of the following obligations:

a) to attend a school/training course or vocational training;

b) to attend one or more social reintegration programs run by the probation service or organized in collaboration with institutions in the community;

c) to obey the control measures, treatment or medical care;

d) not to leave Romania without the court's consent.

During the surveillance period, the convict will perform unpaid community work for a period between 60 and 120 days, under the conditions set by the court, unless because of health reasons, he/she cannot perform the work.

[6] G. Antoniu, in G. Antoniu and C. Bulai (coordinators), *Practica judiciară penală*, vol. II, Bucharest, Ed. Academiei Române, 1990, p.76.

The new Criminal Code has regulated the possibility to modify or terminate the obligations and supervisory measures if during the period of supervision, some changes that require such measures occur.

2.5. The revocation of the postponement of execution and of the suspension under supervision of the sentence, for the crimes of family abandonment or preventing access to general compulsory education

According to Art. 88 of the Criminal Code (and Art. 96 Criminal Code) the postponement of execution and of the suspension under supervision of the sentence is revoked in the following three cases:

a) If during the supervision term the supervised individual, acting in bad faith, does not comply with or does not perform the supervisory measures or obligations established by law.

b) If until the expiration of the supervision term the supervised person does not fully meet the civil obligations established by the court's decision.

c) If during the supervision term the supervised person has committed a new offense/crime, intentionally or with exceeded intention, discovered within the period of supervision, for which a conviction was ordered even after this period (if the court ruled on suspension under supervision of the sentence, the revocation will only intervene if in the case of the new offense/crime the court sentenced imprisonment, while in the case of postponement the revocation will occur even if the penalty applied is a criminal fine). If the subsequent offense is committed by negligence, the court may revoke or maintain the postponement of execution, or the suspension under supervision of the sentence.

In the case of suspension of sentence under supervision, the legislator provided in Art. 96 par. (3) a particular cause for revocation, namely if the penalty fine that accompanied the imprisonment penalty under Art. 62 was not enforced and was replaced by imprisonment under Art. 63 par. (2) or art. 64 par. (5) and par. (6), the court shall revoke the suspension and enforce the sentence, to which it will add the imprisonment penalty with which the criminal fine was replaced.

Regarding the two offenses covered by this study, it should be noted that there is a legal provision such as that provided by Art. 305 par. 5, which stated that revocation of conditional suspension, occurs only if, during the probation period, the convicted person commits again the crime of family abandonment. Therefore, now if the court rules on suspension under supervision for any of the two offenses/crimes mentioned above, this suspension will necessarily be revoked if the convicted person intentionally or with mixed guilt (both intentionally and by negligence) commits a crime (in the case of a crime of negligence a suspension of the sentence can be imposed under Art. 96 par. 6) during the period of supervision, regardless of the nature of the offense/crime.

However, according to the majority opinion prevailing in the legal doctrine and in legal practice, we consider that the revocation will not operate if the new offense/crime is still a crime of family abandonment, or of preventing access to compulsory education and the court deferred or suspended under supervision the sentence for this new crime. Therefore, as shown in the legal doctrine, otherwise this would dispossess of content the measure of suspension imposed for the second penalty, despite the fact that the defendant has fulfilled its legal obligations and would have deserved to benefit from an actual suspension of execution of the sentence. The intention of the legislator was to exert some pressure on the defendant to determine him/her to fulfill his/her legal obligations, and once this goal achieved, the interest and justification of the penalty imposed disappears; whether this method to compel the defendant has been used once or several times, granting him/her actual freedom becomes even necessary in order for him/her to be able to fulfill its duty/legal obligations towards his/her family[7].

An argument in this regard is the fact that in the project for the new Criminal Code adopted by Law no. 301/2004, which however never came into force, it is expressly stated that special conditional suspension for the offense/crime of family abandonment shall be applicable only for the first conviction of the offender for this kind of offense/crime (Art. 228 par 5 of the Criminal Code). If the legislator wanted this provision to take effect, it would have been included in the new Criminal Code, applicable at this time.

Maintaining the postponement of execution or the suspension of sentence under supervision will be ordered regardless whether the offense/crime committed during the term of surveillance is different from the one for which the postponement or suspension was ordered (originally the defendant committed a family abandonment and afterwards he/she commits a crime in order to prevent access to compulsory education or vice versa) and regardless whether for the new offense the court rules on postponing the execution of punishment or suspension under surveillance.

The revocation of the suspension under supervision may be ordered in case of failure to execute, acting in bad faith, the penalty fine accompanying the imprisonment penalty. Exceptionally, one might imagine some situations when the defendant through the crime committed pursues a material benefit, for example a parent that withdraws his child from school in order for both of them to work (paid work) at building a house. In these cases the court could sentence the convicted person to pay a criminal fine and in case of failure, acting in bad

[7] G. Antoniu, note II to criminal decision no. 896/1971 of the Gorj County Court in the Romanian Journal of Law (decizia penală nr. 896/1971 a Tribunalului Județean Gorj în Revista Română de Drept), nr.2/1974, p.145-147.

faith, this measure could be replaced with imprisonment.

Failure to respect, acting in bad faith, the measures or obligations imposed by the court (including the ones regarding community work), require the revocation of the postponement or of the suspension under supervision of the sentence, for these crimes, as well.

Regarding the revocation of postponement or of the suspension of sentence under supervision given due to failure to execute the civil obligations established by the court, there are some remarks to be made. As emphasized in the legal literature, this case of revocation is inapplicable for the offense of family abandonment in the version of unpaid alimony, because the civil action in this case is devoid of purpose given that the injured party is already in possession of an enforceable title[8]. Whereas for the other normative ways of committing the offense of family abandonment, the injured party may still pursue civil action, in case there are moral damages suffered. By fulfilling the obligations imposed for the offense of family abandonment done by leaving, it is considered that the person that is required to provide the support has fulfilled the obligations if he/she resumes providing support and care, and not if it pays any potential moral damages, because these can be determined only by court order, until then not being certain nor legally demandable. While it would be hard to imagine a practical example, at least theoretically a civil action covering moral damages, could be initiated also when the offense was done by failure to pay alimony.

We consider that for the offense/crime of prevention of access to compulsory education, civil action is always admissible, this kind of offense being likely to cause material or moral damages. In all these cases, if the court ordered the postponement of application of punishment or the suspension of sentence under supervision, and admitted the civil action, failure to execute the civil obligations will attract revocation of the suspension[9].

2.6. The cancellation of the postponement of application of the punishment and of the suspension of sentence under supervision for the crimes of family abandonment or preventing access to general compulsory education.

The cancellation of the postponement of application of the punishment and of the suspension of sentence under supervision consists in abolishing the court's order of imposing a non-custodial individualization modality, when this modality was struck from the beginning by a critical irregularity, because at the time of delivery of the final solution the court had no knowledge, due to circumstances that are not attributable to it, of the existence of a criminal record of the defendant, information that, if it had been known, it would have excluded the incidence of this modality of judicial individualization.

Seeing that the postponement of application of the punishment and of the suspension of sentence under supervision for the crimes of family abandonment or preventing access to general compulsory education enjoy a derogation, being disposed independently of the criminal record of the defendant, we consider that the institution of cancellation is not incidental for these two offenses.

By exception, if the court ordered the postponement of application of the punishment or the suspension of sentence under supervision, without the conditions laid down in Art. 378 par. (5) or Art. 380 par. (3) of the Criminal Code being met, it does it under the legal provisions of the general part of the Criminal Code (Art. 83 and 91 of the Criminal Code).

2.7. The effects of the postponement of application of the punishment and of the suspension of sentence under supervision for the crimes of family abandonment or preventing access to general compulsory education.

There are no derogating provisions with regards the effects of postponement of application of the punishment and of the suspension of sentence under supervision for the two offenses covered by this study.

Regarding the postponement of application of the punishment, Art. 90 of the Criminal Code determines that for the person against whom a postponement of the punishment has been ordered, the actual punishment will no longer be enforced, and that person will not subject to any revocation of rights, prohibitions or incapacities that could result from the offense, if until the end of the surveillance period, that person has not committed a new offense, and the postponement was not revoked.

If for any of the two offenses, the court ordered the suspension of sentence under supervision, the punishment is considered as executed if the convicted person has not committed a new crime discovered by the end of the supervision period and revocation of suspended sentence under supervision was not ordered. From the end of surveillance period starts to run the terms prescribed by law for the rehabilitation of the convicted person.

3. Conclusions

We consider objectionable the option of the legislator to incorporate in the new Criminal Code the mandatory application of non-custodial individualization modalities for the offense of family abandonment, and to extend it to another offense. This legal provision can lead to paradoxical situations in practice, situations in which a person who committed more crimes to serve the sentence for some, and for

[8] I.C. Morar, *Suspendarea condiționată a executării pedepsei, sansă sau capcană ?,* Ed. Lumina Lex, Bucharest, 2002, p.255-256.

[9] A. V. Iugan, *Revocarea suspendării executării pedepsei sub supraveghere în lumina noului Cod Penal*, in Criminal Law Writings, nr. 2/2014, p.68-69.

others to benefit from postponement of application of punishment or suspension under surveillance. Also, it made possible the existence of supervisory terms that run in parallel for concurrent offenses. Another criticism is the possibility for a person to commit how many crimes of family abandonment or of preventing access to general education compulsory he wants, because if during the trial he fulfill its legal obligations or assures the resumption of class attendance, he will not actually execute the punishment.

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THE ESTABLISHMENT, INDIVIDUALISATION AND CHANGE OF THE REGIME REGARDING THE IMPRISONMENT PENALTY

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Abstract

In this study our aim is to analyze the way of establishment, individualize and change of the arrangements for the execution of the punishment in relation to changes brought about by the Law no. 254/2013, on the implementation of the measures and penalties of imprisonment arranged by legal bodies during trial, published in the Official Gazette no. 514 of August 14 2013.

Also, we will examine the role of the Commission for the establishment, individualization and changing arrangements for executing the sentences of imprisonment, including through the atributions in provisional determination of the arrangements for implementation, the role of the judge appointed for the supervision of imprisonment and the court ruling in the case of application of these schemes.

Keywords: *Establishment, change, individualization, imprisonment, sentencing regime.*

Preamble.

The domain of the study thematic is represented by the execution of the punishment regimes with an emphasis on how to laying down, individualize and change of such schemes, in relation to changes brought about by Law No 254/2013, on the implementation of the measures and penalties of imprisonment arranged by legal bodies during trial.

The importance of the proposed study lies in the fact that arrangements for the execution of penalties is applied in one form or another to all imprisoned persons, both to the ones which are under the enforcement of a punishment, implemented by a final judgment and to the persons for whom they decided that preventive arrest measure, constituting that set of rules applicable to the entire period of arrest, even if some of them are not to be found in the same form in different regimes of arrest.

These rules shall determine ratios of life in prison, natural ratios in an institution that apply strict rules of supervision, security, escort, safety. In the normal circumstances of the enforcement of the rules, daily life in the penitentiary shall be conducted in such a way that the re-socialization programs, work, training and recreational activities are to be carried out and from them should be able to benefit all sentenced people regardless of the arrangements for the enforcement of punishment in which they are situated.

The object of study is the presentation of the establishment and individualization way of the schemes and changes intervened during the execution of punishment, as the preparation of the detainee for his release must be carried out in the very first day of arrest, this constituting the purpose of all steps taken, for a fundamental objective respectively the increase of the condemned person's capacity of social reinsertion to facilitate, as far as possible, the detainee rehabilitation for a life of freedom, to an attitude of compliance with respect to the values of society, so the gradual change during the period of detention of the regime for the execution of punishment in one less severe is of crucial import to achieve this goal.

In the first section of the study we will present a brief history of the systems and procedures for the enforcement of penalties and after that in the second section will be an overview of European principles and provisions as regards the arrangements for the application of penalties of imprisonment, including the relevant Romanian legislation.

The study is to be formed in the third section of presentation, arrangements for the enforcement of prison sentence with an emphasis on how to laying down, individualize and changing of these schemes, in relation to changes brought about by the Law no. 254/2013, on the implementation of the measures and penalties of imprisonment arranged by legal bodies in the trial.

1. Short history of the systems for the execution of the punishment.

In the existence of punishment institution, prison was one of main punishments, being used from the most ancient times as being fully customizable to the needs of penalty promised to commission of the crimes.

In the whole ancient world and Middle Ages prison was considered the anteroom of death, a respite before tantalizations and the capital execution.

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It was not until the 18th - century, when the situation of prison sentence shall be assessed by the progressive leaders, for the detaining of those who could be redeemed or could by themselves pay for the guilt. Appear as variants of detaining: imprisonment in common, the American Pennsiylvanian system, the Auburnian and Progressive joint regime, the open regimes[1].

In the 19th century have been tried several types of penitentiary systems. The imprisonment in common system lies in the fact that both during the day, and at night-time, the sentenced people work and are imprisoned in common. The Cellular System (Pennsylvanian or Philadelphian) has occurred in the year 1790 in the region Pennsylvania, U.S.A. , by knowing two forms of detention: the absolute (lonely) cellular system and the separation cellular system. The Auburnian system (system of silence) is a joint system, characterized by the fact that during the day the imprisoned worked and ate in common, with the obligation to keep quiet, at night-time being isolated in rooms, and has been applied for the first time in the year 1920, at the jail from Auburn - the State of New York, U.S.A.

This latter system has been the basis of the progressive system, which, along with the reformator of an American origin are the first two forms of the sentence of imprisonment which provide the possibility of licence supervision.

The progressive system is of English origin, being proposed by Lord Crofton[2] , and devotes this opinion saying that in order to integrate into society, the convicted had to get gradually from the cellular regime to freedom. This system had 3 stages:

First stage have a fixed duration of 9 months, during which the sentenced people were isolated both in time of day, as well as at night, in the second stage the sentenced men were isolated only at night, during the day they did work in common and on the basis of their behaviour and thoroughness in their job, they could obtain some advantages and advance in a higher class or could be kept in the cell and during the day.

Finally the third stage was represented by provisory licence supervision, innovative element and kept up nowadays by the laws of most of the States. The sentenced was released under the control and supervision of the authorities of the state[3] .

A similar version of the progressive system for the execution of the punishment is the Irish system, it involves elements of the Auburnian system and the Pennsylvanian system. Irish gradually system involves 4 stages, the first and the second being similar to those in English system, adding the period of execution of the sentence in intermediate institutes and being finalised with the licence supervision. The passing of the sentenced from one stage to the next was conditional on good behavior, put to the test for the duration of the execution.[4]

The system of credits (marks) is an auxiliary technical means often used by the gradually system and shall consist of the measurement and duration of punishment on the basis of the number of points which accounted for quantifying labor and of the proper manners of the sentenced. The convict stood up in class, achieving improvement of the regime and benefits in proportion to the number of points obtained[5].

The progressive system regarding the schemes of the execution of the punishment was applied in Romania during the period from 1929 - 1945, when the law of enforcement of punishments of the year 1929, was extremely drawn up in relation to a description of the systems of regime in the sense that there were several schemes for the enforcement of penalties and with a wide range of penitentiaries with a profile on beggary, stray, criminals usually, thieves and violent criminals, criminals, minors, women, as well as other categories.

At present in the whole of the community of European countries the progressive system is used in one form or another and is improved by adapting criminal penalties without deprivation of freedom or by replacing imprisonment with punishment restrictive of rights. The current European penitentiary system tends towards the possession in common, the emphasis being on the conduct in common of occupational activities, labor, sports, training and education, combined with the permission of exit of the penitentiary the half opened or opened arrangements.

2. European provisions and principles as regards the arrangements for the application of penalties of imprisonment and relevant Romanian legislation on the matter.

The Council of Ministers of the Council of Europe on 12 February 1987 adopted Recommendation no. R (87), with regard to European rules on prisons, which consists of a European version of the Assembly of minimum rules for treatment of prisoners. This includes 100 provisions referring among others to: basic principles; the administrations of penitentiaries institutions; staff; the detention regime; rules applicable to different categories of sentenced.

A number of principles which tend toward speeding punishment progressiveness of responsibilities and reduce effects of repressive times of stress have been regulated in the the content of

[1] See Ioan Bala - The evolution of the execution of the imprisonment penalties in the Romanian law , The Legal Universe Publishing House, Bucharest, 2011, page 281-285.
[2] Ioan Chis - Executional criminal law, Wolters Kluwer Publishing House, Bucharest, 2009, page 82
[3] Ioan Băla - Op.cit., pg. 283.
[4] Gheorghe Margarit – The licence supervision, Novelnet Publishing House, Ploiesti, 1998, page 35-36.
[5] Ioan Băla - Op.cit., pg. 282.

Recommendation No R(89) 12 of the Committee of Ministers of the Council of Europe, adopted on 13 October 1989 and were thus laid the foundation of the efforts of the penitentiary administrations of the West Europe for transformation of the penitentiaries in institutions of re-socialization.

Recommendation of The Committee of Ministers of the Member States relating to European Penitentiary rules REC(2006)2 (adopted by the Committee of Ministers, on the date of January 11 2006,) shows that all imprisoned persons will be treated according to the respecting of the human rights, and point 1 provides that imprisoned persons shall keep all the rights which have not been withdrawn by law, after the decision of the court to sentence them to imprisonment or preventive arrest.

European penitentiary rules also show that the restrictions imposed on imprisoned persons must be reduced to the simple bare necessities and shall be proportional to legitimate objectives for which they were imposed, life in prison should be as close as possible to the positive aspects of life from outside prison, and each period of detention should be managed in such a way as to facilitate reintegration of the imprisoned persons in the free society.

In accordance with the provisions of the Constitution of Romania and in our country have been adopted a series of laws and decrees, which form national law and is an important factor of normative regulations and social integration, which shall establish measures by which it shall apply the provisions in respect of progressiveness punishment with imprisonment for life and prison sentence and arrangements of enforcement.

The new penal code adopted by Law No 286/2009, published in the Official Gazette no. 510 of 24 July 2009 and entered into force on 01.02.2014 lays down a progressive system of criminal punishment, showing from the begining the features of infringement and guilt (Article 15 and 16 of Penal Code).

These legal provisions come to foreshadow the progressive individualization of penalty, the judicial individualization being possible by choosing a nature of punishment and its size of the maximum limits and minimum set for each offense in the penal code, or if crime is carried out in full or only as attempt.

By Law No 275/2006, on parole and measures arranged by legal bodies during trial, published in the Official Gazette no. 627 of 20.7.2006 (now repealed) were introduced the 4 arrangements for the execution of the punishment, being consacrated the principle of progressive and regressive type of their implementation, has been introduced the function of the judge delegated to carry out, which supervises, controls and shall exercise the authority over the activity of penitentiaries.

By Law No 254/2013, on the implementation of the measures and their sentences of imprisonment arranged by legal bodies in the trial, had been consolidated these institutions inclusively the institution of the judge being appointed for the surveillance of imprisonment, which ensures by direct control the legality of imprisonment.

In Article 8 of the regulation it is showed that the president of the Court of Appeal in whose territory is a penitentiary, a center of detention and preventive arrest, a center for preventive arrest, an educational center or a center of detention, shall designate annually one or more judges for the surveillance of the imprisonment, from the courts near the court of appeal.

The law also changed the criteria for determining the arrangements for the execution of the penalty, by modifying the establishing and changing criteria, in particular in reference to the amount of penalties which make it possible to framing of the sentenced person in a given regime, but also the time period in which it is taken into account the change of the regime.

3. Establishment, individualization and change for the penalty execution regime in relation to changes brought by Law No 254/2013

The arrangements for the enforcement of sentences of imprisonment are based on progressive and regressive type systems, the sentenced persons passing from one scheme to another, ensure compliance with and the protection of privacy, health and dignity of sentenced persons, of their rights and freedoms, without causing physical suffering and without humiliating the sentenced person.

In Article 30 of Law No 254/2013, on the implementation of the measures and penalties of imprisonment arranged by legal bodies in the course of criminal law, it is stated that arrangements for the enforcement of penalties shall include all the rules underlying enforcement of sentences of imprisonment.

In Chapter III, "arrangements for executing the sentences of imprisonment" of Law No 254/2013 are prescribed the same four schemes for execution, established under this form in the Romanian legislation by the Law no. 275/2006, starting from the most severe regime, which lays down freedom of movement, how to carry out the daily tasks and the conditions of detention to gain access to the least restrictive ones.

The law establishes that the arrangements for the enforcement of penalties are based on progressive and regressive type systems, and the convicted person in the course of execution of the sentence can cross the schemes in one direction or the other, in relation to the conduct and the fulfilment of the conditions laid down by law.

In accordance with the provisions of Article 31 of the law 254/2013 these schemes are: for maximum security, closed, arcade, and open.

The maximum precautionary arrangements shall apply initially to the persons sentenced to life

imprisonment or to the imprisonment for more than 13 years.

In accordance with Article 34 (6) Article 4 of the law regarding the enforcement of punishments, the persons who are running in the maximum security penitentiary "are subject to strict measures to guard, surveillance and escort, are accommodated, as a general rule, individually, carrying out work and carry out their activities educational, cultural, therapeutic, psychological counselling and social assistance, moral religious, school education and vocational training, in small groups, in spaces which are laid down in the penitentiary, under continuous surveillance."

The arrangements for maximum security does not apply to the sentenced persons who have reached the age of 65 years of age; pregnant women or women who have in care a child aged up to one year; persons in first degree of invalidity, as well as those with serious locomotive ailments.

Concurrently, the persons convicted to life sentence or with a sentence of imprisonment of more than 13 years who have reached the age of 65 years would execute penalty involving deprivation of liberty in a closed scheme, and the other categories of persons who cannot apply to the scheme for maximum security shall carry out penalty involving deprivation of liberty in a closed scheme, during the period of the cause which imposed the non-exertion of the maximum safety scheme.

The closed penitentiary scheme is the common scheme in prison, less severe than the maximum-security one, which involves execution of sentence in common, they work outside, with continous surveillance and armed security.

This system shall be applied to punishment greater than 3 years but not exceeding 13 years, in accordance with Article 36 of the Law 254/2013. Closed penitentiary regime is typically to all penitentiaries, but also to special prisons where they have categories such as the young people, women, recidivists, dangerous, the ill or elderly persons, in matters of common rules, those specific adding in relation to what is needed for the categories concerned.

The arcade will be applied to those who have imprisonment punishments greater than one year but less than three years, in accordance with the provisions of Article 37 of the framework law for execution of punishments.

This scheme is easier than those set out above, people sentenced have the ability to be accommodated in common, can be moved in the building unaccompanied, namely in the areas defined in the penitentiary " can perform work and conduct educational, cultural, therapeutic , Etc, outside prison without being guarded with armament, may participate in socio-educational activities in larger groups, and the imprisonment rooms of the Divisions may remain opened during the day.

The least restrictive regime is the opened one, in accordance with Article 38 of the law of enforcement of punishments. To this type of scheme are submitted those who are sentenced to imprisonment for up to one year.

It is considered that these persons have furnished proof of good conduct during the time that they were carrying out punishment in under more severe scheme and represent minimum danger for society, but they can't be released, it is practiced a system of minimum surveillance, most of the times pursuing activities without supervision, but with a periodically check or at different times of the day. Rooms in which they are accommodated are separated from the rest of the condemned men.

Concurrently, the sentenced persons who carry out punishment in open regime are accommodated in common, can be moved in areas unaccompanied inside penitentiary, may perform work and can conduct educational, cultural, therapeutic, psychological counselling and social assistance, moral, religious, training educational and vocational training, outside prison, without supervision, under the conditions laid down in the implementing regulation of this law.

Execution of sentence in the different schemes sets out the question of the methodology of establishment and the transition from a system to another or return from an easier scheme to one more restrictive, in the course of their work to individualize of the arrangements for the enforcement of penalties.

So, in accordance with Article 32 of the law 253/2014 in each penitentiary works a commission for the establishment, individualization and change of the schemes for the execution of imprisonment penalties and consists of: the director of the penitentiary, who is also the president of the Commission, The head of service or office for the implementation schemes and the head of service or education office or head of service or office of psycho-social support.

The arrangements for the execution of the punishment of imprisonment shall be established by the Commission at the first meeting, after the end of the quarantine period and observation or after provisional application of the regime.

In the arrangements for the execution of the penalty, the Commission will take into account the following aspects: the duration of the punishment of imprisonment; the risk of the person convicted; criminal history; age and health of the person convicted; conduct of person convicted, positive or negative, including in the periods of prior detention; identified needs and skills of person convicted, necessary inclusion in educational programs, as well as psychological and social assistance; the availability of person condemned to perform work and to participate in education, cultural, therapeutic, psychological counselling and social assistance, moral, religious, school training and vocational training.

With regard to the degree of risk of the person convicted shall be analyzed several criteria such as : committing an offense by the use of firearms or

cruelty; breakout times leaving the workplace in this punishment or in previous punishments; attempt to escape, forcing of the safety devices or destruction of safety systems; the not justified default of the detainee from the date and hour of output permission in the penitentiary; the introduction, possession or trafficking of guns, explosive materials, drugs, toxic substances or other objects and substances which endanger the safety of the penitentiary, of the official missions or of persons; abetting, influencing or participation in any way in the production of revolt or hostage situations[6].

An important element of novelty brought by Law No 254/2013 is that of provisional application of a type of regime, for a short period of time, after the end of the quarantine period and only if during this period it has not been established the regime of enforcement. The regime of performance actually is to be established by the Commission for the establishment, individualization and changing arrangements for executing the sentences of imprisonment.

According to Article 33 (2). 1 of the law enforcement of punishments, after the end of the quarantine and observation period, to the convicted person, to which hasn't been established the enforcement arrangements it shall be applied on a provisional basis the regime of performance corresponding to the amount of penalty that executes.

So are listed situations in which it is appropriate to apply the provisional arrangements for implementation, namely:

(a) of the date of expiry of the period of quarantine and observation, for detainees which were received in the penitentiary on the basis of their mandate for the execution of the punishment of imprisonment and for detainees whom they have issued the warrant for the execution of the punishment of imprisonment within this time interval;

(b) of the date of termination of his measure of preventive arrest as a result of the definitive judgment and the final conviction in that case;

(c) of the date of substitution, termination of right or revocation measure of preventive arrest for detainees arrested in another question, if they have not been established a system of enforcement.

As regards the followed procedure has to be said that the decision on the arrangements for the enforcement of sentences of imprisonment shall be communicated to the convicted person, and against the laying down way this one may make a complaint to the judge for the surveillance of depriving of freedom, within 3 days of the date on which the sentenced was notified about the decision.

As regards the magistrate invested with the settlement of the complaint we will make a brief parenthesis and we will display the fact that the law 254/2013 proposes a new appointment - the judge of surveillance of depriving of freedom, which replaced the judge delegate, an appointment, more concise for the judge who has the main surveillance missions and for the review of the legality of the parole and measures of imprisonment, including the possibility of listening to sentenced person in the place of arrest.

According to the article 39 paragraph 6 of Law No 254/2013, the judge of surveillance of imprisonment is obliged to resolve the complaint within 10 days from the date of its receipt, and by pronounced concluding will be to rule one of the following solutions:

a) accepts the complaint and rules the alteration of the enforcement regime set by the Commission provided for in Article 32;

b) rejects the complaint, if it is unfounded, belated or inadmissible;

c) takes note of withdrawal of the complaint.

Article 39 lists practically such powers as the judge of surveillance has in the matter of establishing arrangements for the execution of the punishment bounding clearly his administrative activity of the administrative –jurisdictional one, and this distinction is useful, and is aimed at putting an end to the controversies arising after the date of entry into force of law no. 275/2006 regarding the legal nature of the activity of the judge supervising the imprisonment.

From the formal point of view the conclusion of the judge for the surveillance of imprisonment shall be communicated to the person convicted and penitentiary administration, within 3 days of the date of its delivery, and against the conclusion of the judge the person convicted and penitentiary administration may appeal against the court in whose constituency is the penitentiary, within 3 days of the day on which they were notified.

Legislator has provided for this path of attack for the purpose of complying with the constitutional principle of free access to justice, as the mode of establishment and by default the framing of the sentenced person in a more severe or more gentle for the execution, is of crucial importance for the imprisoned, and the censoring by a court of an admnistrative decision, like the one of the commission for the establishment of a system of performance, constitutes a guarantee in addition for the sentenced person.

An appeal shall not suspend the execution of conclusion and it is judged in open court, with citing of the convicted person and of penitentiary administration, and the sentenced person shall be brought to court only when requested by court, in this case being heard. Legal aid is not mandatory, and in the case in which the prosecutor and the representative of the penitentiary administration participate in the

[6] Article 27 of the project of Decision of the Government for the approval of the Regulation for the implementation of the Law no. 254/2013, on the execution of penalties and of the measures of imprisonment arranged by legal bodies in the course on trial displayed on the site of Ministry of Justice (www.just.ro).

judgment, they shall bring into force conclusions and the court pronounces by final court ruling.

Changing arrangements for executing the sentences of imprisonment is also provided by the Commission for the establishment, individualization and changing arrangements for executing the sentences of imprisonment.

According to Article 40 of Law No 254/2013 the Commission is under an obligation that after the execution of 6 years and 6 months, in the event of detention with punishments for life, and one fifth of the time prison punishment, to analyze the behaviour of the sentenced person and the efforts of social reintegration, endorsing a report which shall be notified to the convicted person, under signature.

In its work, the Commission shall take into account the results of the implementation of instruments-standard evaluation of the activities carried out by prisoners, approved by Decision of the general director of national administration of penitentiaries.

The framework law for the enforcement of punishments shows that the regime for the execution of sentences of imprisonment has changed in respect of the imprisonment penalties in immediately inferior regime as severity may be disposed, taking account of the nature and mode of commitment of the offense, if the sentenced person:

(a) had a good conduct, established by reference to the granted rewards and the applied penalties and did not resort to actions that indicate a negative constant behavior; and

(b) kept up the work or was actively involved in the activities set out in the individualized plan of assessment and educational and therapeutic intervention.

Changing arrangements for executing the sentences of imprisonment in a more severe one may be disposed of at any time of the execution of the sentence, if the convicted person has committed an offense or disciplinary action or has been punished for a very serious misconduct or for more serious disciplinary offenses.

The Framework law further provides that if the person convicted has been included in the category of those with degree of risk for the safety of the penitentiary, it will be provided the change of the regime for the execution of imprisonment sentences in respect of the arrangements for maximum security.

From the procedural point of view, the decision of the Comission through which is provided the maintenance or the change of the arrangements for the execution of the penalty, includes also the term of second thought that may not be for more than one year, but he has an obligation to consider, at regular intervals, the situation of the convicted person, at the expiration of the established term.

The decision to change the arrangements for executing the sentences of imprisonment shall be communicated to the convicted person, and sentenced person may make complaint to the judge of surveillance of depriving of freedom, within 3 days of the date on which it was communicated.

In the case of Article 40 (13) of Law No 254/2013 the judge for the surveillance of depriving of freedom shall settle the complaint within 10 days from the date of its receipt and decide, by reasoned conclusion, one of the following solutions:

a) Accepts the complaint, featuring on amendment of the execution arrangements laid down by the Commission;

b) rejects the complaint, if it is unfounded, belated or inadmissible;

takes note of withdrawal of the complaint.

c) For advice on how to appeal to the court of judge's resolution and the procedure of the court, they are similar to those shown above to establish arrangements for the execution of the punishment. The Individualization of the regime regarding the imprisonment penalties it is also ruled by the Commission for the establishing, individualization and change of the regime concerning the execution of the imprisonment penalties.

In accordance with Article 41 of the Law no. 254/2013, arrangements apart of executing the sentences of imprisonment is to be established by the Commission in relation to the duration of conviction, behavioral, personality, the degree of risk, age, health status, identified needs and the possibilities of social reintegration of the sentenced person.

So, the convicted person is introduced in educational, cultural, therapeutic, psychological guidance and social assistance, moral-religious activities, training and vocational training school, which are realized by the staff of the education and psycho-social support departments from the penitentiaries, with the participation, as the case may be, of the probation advisers, volunteers, associations and foundations, as well as of other representatives of the civil society.

An important aspect in the process of individualization it is that for each sentenced person, the specialists of the service of education and psycho-social support will draw up a plan for the evaluation and individualized educational and therapeutic intervention, showing recommended activities and programs, in the light of the risks and identified needs.

Framework law puts a particular emphasis in the case of young people, who are included, for the duration of execution of the sentence, in special programs educational, as well as psychological and social assistance, on the basis of the age and personality of each, being considered young people within the meaning of law, persons who have not reached the age of 21 years old.

Progressiveness of execution of the sentence to prison at the present stage is based on attracting the convicted towards committing to personal responsibilities, that will support him in the decision to

re-integrate into the society that gives him plenty of opportunities.

CONCLUSIONS:

The knowledge and compliance of the imprisoned persons from prohibitions and obligations give rise to application of the procedures for change of the schemes with no freedom of movement and without taking responsibilities, towards easier arrangements, through the provision of facilities and by supplementing the rights via a system of legal reward, which may go as far as permitting output in the penitentiary by permissions or even holidays.

The convicted persons may pass from a scheme of performance to the other in accordance with the conditions laid down by the law of executing the sentences, the rule to be applied is that the penalty begins with a more severe system and that, in the course of execution and the passing of a mandatory period, the regime becomes closer to the social rules, and towards the end of the period of performance of the punishment and proximity of the licence supervision or within the time limits, are granted facilities such as to lead to a greater re-socialization.

However although new legislative provisions are generous as regards of the arrangements for the execution of punishments, in close correlation with the rights and obligations of persons private freedom, Romanian penitentiary system is suffering from the crisis of the over-agglomerated places of imprisonment and low-financing and application of the new provisions is an undertaking costly problems transferring crime problems only towards penitentiaries. Gradually System arrangements for the enforcement of penalties involves much more human resources, materials, financial and the construction of more modern penitentiaries has been blocked by chronic shortage of financing.

As regards to the forthcoming period, it is necessary to adopt an emergency Regulation for the application of Law no. 254/2013, for detailed overview of some aspects which are not sufficiently detailed in the framework law, at the present time the draft decision by the government for the adoption of the regulation being displayed on the site dedicated to the Ministry of Justice (www.just.ro) to public debate.

The need of approval as urgent as possible of the regulation resides also from the fact that in present, the workers in penitentiaries apply the new law on execution of sentences, by calling to transitional provisions drawn and assumed by the National Administration of Penitentiaries, following changes in the Penal Code, entered into force on February 01 2014.

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THE REASONABLE DOUBT IN THE ROMANIAN CRIMINAL TRIAL

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Abstract

This work represents a doctrinary approach with certain judiciary practice highlights of the manner in which the standard regarding the evidence "beyond any reasonable doubt" can be found in the new Criminal Procedure Code. The research made led to the ascertainment that the acknowledgment of this standard of evidence consecrated at the European level and its assimilation into the Romanian juridical regulations ensured a guaranteeing of human rights within the criminal trial.

Keywords: *reasonable doubt, criminal trial, human rights protection, criminal law.*

1. Introduction

The Romanian criminal trial has been in a continuous transition in the last 25 years under the influence of the various factors that modify, condition and modernize it at the same time. As early as the 1990s, after adopting a new social and political organization system, consistent and important changes occurred, the objective of which was to align the criminal trial to the standards specific to a democratic state. The most important factor for the regularization of the national criminal trial is the standard for the protection of human rights imposed by means of the jurisprudence of the European Court of Human Rights. Through the ratification of the European Convention of the human rights by means of Law No. 30/1994[1] and through the acceptance of the jurisdiction of the European court, Romania took on the assimilation in its internal legislation of the guarantees and protection mechanisms for human rights imposed at the European level.

One of the most important and delicate aspects from the economy of the entire criminal trial, regardless even of the system in which such trial takes place, is represented by evidence. In the legal definition, evidence means any *de facto* element which serves at ascertaining the existence or inexistence of a crime, at identifying a person who perpetrated it and at knowing the circumstances necessary for the just solving of the cause. The doctrine observes, with regard to the notion of "evidence" that evidence shall be construed any *de facto* circumstance which has an informative relevance in the cause and which may be physically verified[2].

2. The evidence in criminal trial

The importance of evidence is beyond any question mark, as there are opinions in accordance with which from the very moment when the criminal trial as initiated and until its final solving, all the merits issues of the cause are solved by means of the evidence, so that the very *perpetration of criminal justice depends primarily upon the system of evidence*[3].

From the lawmaker's perspective, the aspects that should be clarified by means of evidence are circumscribed to the object of the evidence detailed by Art. 98 of the Criminal Procedure Code. On the strength of this legal text, the following form the object of producing evidence: a) the existence of the crime and its perpetration by the defendant; b) the facts regarding civil liability, when there is a civil party; c) the facts and the *de facto* circumstances on which law enforcement depends; d) any circumstance necessary for the just solving of the cause. The manner in which the quoted legal text is worded indicates that the norm has an exemplary nature in its essence because letter d) of Art. 98 of the Criminal Procedure Code allows the extension of the object of evidence also to any other circumstance necessary for the just solving of the cause. The doctrine shows that the object of evidence means the ensemble of the facts or of the *de facto* circumstances which require being evidenced in a criminal cause for the purpose of solving it[4].

In any case, the object of evidence is formed only of the facts and of the *de facto* circumstances[5]. National juridical norms, presumed facts, obvious facts, notorious facts, unchallenged facts and facts established by means of a Court order should not be

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[1] The law for ratifying the European Convention of Human Rights, published in The Official Gazette of Romania, Part I, No. 135 of May 31, 1994.

[2] A. Zarafiu, Procedură penală, C.H. Beck Publishing House, Bucharest, 2014, p. 155.

[3] I. Neagu, M. Damaschin, Tratat de procedură penală. Partea generală, Universul Juridic Publishing House, Bucharest, 2014, p. 412-413.

[4] A. Zarafiu, op. cit., p. 157.

[5] Gr. Theodoru, Tratat de drept procesual penal, 3rd edition, Hamangiu Publishing House, Bucharest, 2013, p. 284.

evidenced[6]. The following evidence is not admissible, representing an exception from the principle of freedom of evidence: the evidence forbidden by the law, the evidence contradicting the moral or scientific convictions about the world, as well as the evidence regarding undetermined negative facts[7].

The requirements to be met by evidence are: admissibility, pertinence (it should be connected with the solving of the cause), conclusiveness (decisive role in the solving of the cause), its production should be possible, utility (its production should be necessary). The production of evidence is the exclusive attribute of the judiciary body.

As far as the appreciation of evidence is concerned, the doctrine is unanimous in showing that *the principle of the freedom of appreciating over the evidence* is traditionally working in the Romanian criminal trial. This principle assumes that judiciary bodies may appreciate the evidence in a file freely, without any legal constraints, its contents being listed also by Art. 103 para. (1) of the Criminal Procedure Code: "the evidence has no value pre-established by law and is subject to the free appreciation of judiciary bodies further to the evaluation of all the evidence produced in the cause".

A special meaning is held by the legal provisions included in Art. 103, para. (2) of the Criminal Procedure Code by means of which the internal regulation takes over a classic standard in the field of evidence reflected in the jurisprudence of the European Court of Human Rights. According to the internal norm: "in making the decision regarding the existence of the crime and of the guilt of the defendant, the court will decide in a motivated manner with reference to all the evaluated evidence. Sentencing shall be ordered only when the court is convinced that the accusation was proven beyond any *reasonable doubt*" (our underlining – B.M.).

3. Reasonable doubt as standard

Generally, the standards for appreciating the evidence from the two major trial systems present significant differences[8]. In the continental system, were traditionally adopted, with regard to evidence, the *principle of the free appreciation of evidence* and the *principle of the free or intimate conviction of the judge*. Adversarial systems, however, have limited in time this freedom of the judge, imposing *various standards for the appreciation of evidence*. Such standards include the standard of the *preponderance of evidence*, consisting in the adoption of the solution that is supported by preponderant evidence; this standard is regularly used in civil trials. In the criminal field, the *standard of the proof beyond a reasonable doubt* particularly imposed. It is obviously a standard that is higher than the first one, because the condemnation requires that the proof supporting the guilt should create the conviction of the judge. This conviction can be affected by the existence of a doubt, but the doubt must be maintained within reasonable limits. When doubt exceeds reasonable limits, there cannot be ordered a solution of condemning the defendant. The lawmaker expresses its opinion in the same respect in Art. 4 of the Criminal Procedure Code with regard to the presumption of innocence: "(1) Any person is considered innocent until his/her guilt is established under a final Court decision. (2) After the production of all the evidence, *any doubt in forming the conviction of judiciary bodies shall be interpreted in favour of the suspect or of the defendant.*" (our underlining B.M.). The doctrine observes that the reasonable doubt may originate either in the insufficiency of the evidence brought by prosecution in support of the charges, or in the exclusion of the evidence which was unlawfully obtained[9]. We believe that the evidence produced with breaching the principle of loyalty is in the same situation[10]. The principle finds its express regulation in Art. 101 of the Criminal Procedure Code, based on which: "it is forbidden to use violence, threats or other means of constraint, as well as promises or guidance for the purpose of obtaining proof". The principle has two more components regarding: the prohibition of the use of hearing methods or techniques which affect a person's capacity to remember and report consciously and voluntarily the facts that constitute the object of proof (even in the assumption in which the person consents to it), namely the interdiction of challenging a person to perpetrate or continue the perpetration of a criminal deed, in order to obtain a proof. In an ideal manner, even the proofs that were obtained in breach of these interdictions should be subject to the sanction by exclusion. The doctrine shows that the exclusion of the proofs unlawfully or unfairly produced is the very trial-related sanction which applies to the proofs which are not appropriate from the perspective of the two principles invoked, even in case in which rights and liberties guaranteed by the European Convention of the Human Rights were breached (*e.g.* in the assumption that torture was used)[11]. The sanction regards also the proofs which were impaired by the flaw which determined exclusion, as well as all the proofs deriving therefrom, being applied in this field the doctrine of *the remote effect* or *the fruits of the poisonous tree*[12]. Nonetheless, there is also the opinion according to which, by reporting to the provisions of

[6] A. Zarafiu, op. cit., p. 158-159.
[7] I. Neagu, M. Damaschin, op.cit., p. 421-422.
[8] C. Ghigheci, Principiile procesului penal în noul Cod de procedură penală, Universul Juridic Publishing House, Bucharest, 2014, p. 79 *et seq.*
[9] C. Ghigheci, op.cit., p. 81.
[10] B. Micu, A.G. Păun, R. Slăvoiu, Procedură penală, Hamangiu Publishing House, Bucharest, 2014, p. 87.
[11] M. Udroiu, op.cit., p. 655.
[12] I. Neagu, M. Damaschin, op. cit, p. 433.

Art. 102, para. (3) of the Criminal Procedure Code, exclusion is not an autonomous trial-related sanction, as it is subsumed to the sanction by nullity, in the sense that it occurs only in case of ascertainment of the nullity of the act by means of which the production of a proof was ordered or authorized or by which such proof was produced[13].

In other hypotheses, the reasonable doubt may occur also when all the proofs produced are maintained, not being subject to the sanction by exclusion in the stage of filtering the evidence in the preliminary room, the court considering that such proofs were lawfully and fairly produced. This effect may appear also due to the fact that some of these proofs cannot be vested with full evidentiary value, as they are affected by certain limitations. It is, for example, the case of the statements made by the undercover investigators included by the European Court of Human Rights in the category of "anonymous witnesses"[14]. With respect to the statements made by these anonymous witnesses, the European court deemed that their use to order the sentencing of a person is not, *per se*, incompatible with the provisions of the European Convention of Human Rights, but the European court underlines that, should its anonymity be maintained throughout the entire criminal trial, the defence shall face particular special difficulties. The court has constantly appreciated that, if this solution of preserving anonymity is chosen, the disadvantage faced by the defence shall have to be counterbalanced in a sufficient manner by means of the procedure followed by the judiciary authorities. In the assumptions that the balance between weapons cannot be ensured, the proofs obtained from witnesses should be extremely carefully inspected, and the sentencing of a person cannot rely exclusively or decisively on the anonymous testimony[15]. In this respect, in the case Saidi versus France, the European Court of Human Rights ascertained the breach of the provisions of Art. 6, paras. 1 and 3, letter d) of the European Convention, since anonymous testimonies represented the only basis for the sentencing, after having previously been the only basis for suing[16]. In the same category of anonymous witnesses, the European court includes also the civil party heard as a witness, the injured party, as well as the witnesses who no longer want to make any statements.

In case the produced proofs include exclusively or decisively proofs affected in their probative component, although at a summary appreciation, they might form the basis for sentencing a person, being liable to contribute to the removal of the presumption of innocence beyond any reasonable doubt, this effect should not be obtained. The reason for which this doubt might appear is not rooted in the sanction by the exclusion of any of the respective proofs, but the fact that, in fact, their probating force is diminished.

In no case can be issued a solution of sentencing a person when there is a reasonable doubt regarding the existence of the deed, the criminal nature of such deed, and assigning the respective deed to the defendant, in fact regarding the object of probation. Otherwise, symmetrically, by reporting to the provisions of Art. 103, para. (2) of the Criminal Procedure Code, Art. 396 of the Criminal Procedure Code, which regulates the solving of the criminal action provides that: "the court decides with respect to the charges made to the defendant, ruling, as applicable, on the sentencing, waiver of the application of punishment, postponement of the application of punishment, acquittal or termination of the criminal trial". Either of these solutions is issued, however, only if it is ascertained ***beyond any reasonable doubt*** that the deed exists, is construed as a crime and was perpetrated by the defendant" (our underlining – B.M.).

Also in the internal judiciary practice we can note the wider and wider acceptance of the standard of proof "beyond any reasonable doubt", even if it is not referred to as such, being most frequently related to its component of complementarity to the presumption of innocence. Thus, in a decision related issued in a case, the High Court of Cassation and Justice indicates[17]: "therefore, with respect to the crimes of taking bribe, in case of informers M.C.D. and I.G.A., the Court found that, in the case, the presumption of innocence of which the defendant benefits on the strength of the provisions of Art. 66, para. (1) of the Civil Procedure Code[18] was not dropped and, according to the *in dubio pro reo* rule, any doubt operates in favour of the defendant, the Court found that the first Court correctly ordered … the acquittal of defendant T.L. for the perpetration of the crime of taking bribe (in the version of claiming)". The same decision also underlined that in the respective case "the Court took into account the fact that the defendant's guilt is established on the basis of secure and certain proofs and, since the proofs produced in the case leave room for an uncertainty with respect to the defendant's guilt, it is required to give efficiency to the rule according to which *any doubt is in favour of the defendant* (*in dubio pro reo*)". On the same occasion, the Court deemed that the *in dubio pro reo* rule constitutes a complement of the presumption of innocence, an institutional principle reflecting the manner in which the principle of finding the truth, consecrated in Art. 3 of the Civil Procedure Code is found in the field of probation. And by reference to the European conventional norms, the

[13] M. Udroiu, op.cit., p. 659.
[14] M. Udroiu, O. Predescu, Protecția europeană a drepturilor omului și procesul penal român, Editura C.H. Beck, București, 2008, p. 226.
[15] European Court of Human Rights, Case Delta versus France, decision dated December 19, 1990.
[16] European Court of Human Rights, Case Saidi versus France, decision dated September 20, 1993.
[17] High Court of Cassation and Justice, Criminal Sentence, Decision 389/2014, www.scj.ro.
[18] The quote from the decision refers to the 1969 Criminal Code.

High Court stated that "the same idea is included in the provisions of para. 2 of Art. 6 of the European Convention of Human Rights, providing that *any person accused of a crime is presumed to be innocent until his/her guilt shall be legally established*, thus imposing that the Court should not start from the idea that the defendant perpetrated the deed for which s/he was referred to judgment, the task of producing the proof being incumbent on the prosecution, while the defendant benefits from the doubtful situation". By reporting to all these legislative and principle issues invoked in the case which is subject to analysis, the supreme court indicated that "as it has been shown, the entire probative material produced in the case does not reveal the existence of *decisive, complete and secure proofs liable to lead to the conclusion that defendant T.L. would have perpetrated the crimes of* taking bribe, in case of informants M.C.D. and I.G.A". (our underlining – B.M.)

Similarly, in another decision, the High Court indicated that "it is, however, ascertained that the probating material produced in the case indicated without a doubt the fact that this defendant perpetrated this crime, all the legal conditions for engaging the defendant's criminal liability being met…"[19]. The High Court underlined also in another situation: "The proofs produced suggest, *beyond any reasonable doubt*, that the defendant would have used the very office held by him in order to directly finance the trading activity of certain business companies which were used for the perpetration of tax evasion crimes, with high prejudices, as well as to ensure the protection of the persons involved in this criminal activity ….". (our underlining – B.M.)

4. Conclusions

Effective February 1, 2014, Romania has a new legislation in the criminal field. Although this legislation is not beyond any criticism, both the doctrine and the jurisprudence already remarking certain difficulties generated by the provisions included in the two codes or in the legislation for putting these codes into application, it is already active, being more important at this time for it to be understood and applied in a reasonable manner rather than criticized at all costs. Many of the matters traditionally regulated in the criminal procedure field were maintained by making efforts for the modernization and connection to the European standards regarding the protection of human rights. One of the matters with respect to which a considerable modernization was desired is that referring to proofs, as they are consistently contiguous to the standard of proof which is transparent from the jurisprudence of the European Court of Human Rights. In this field, although the principle of the free appreciation of proofs was maintained, it was expressly imposed by the lawmaker's will and by the standard of appreciation "beyond any reasonable doubt" often imposed also by the European Court.

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THE COMPLEMENTARY PENALTY OF PUBLISHING THE CONVICTION DECISION IN TERMS OF THE NEW CRIMINAL CODE

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Abstract

We think that the approach of such subject presents without a doubt a scientific interest, in the context of the legal amendments brought by the new criminal law. In the form of a monographic study, the article is dedicated to analysing the complementary penalty of publishing the final conviction decision, in case of the natural person as well as of the legal one, by reference to the provisions of the Criminal Code, but also to the incidental laws. As we are talking about the introduction of new complementary punishments, which haven't been previously mentioned in the criminal doctrine, but also about amendments in relation to the content, the application and performance of the complementary punishments, we tried to overcome this void by presenting some personal idea in relation to the new regulations.

Keywords: *complementary penalty, penalty, decision of conviction, the new criminal code.*

1. The complementary penalty of publishing the decision of conviction in case of natural persons

For the first time in our criminal law there is the possibility to publish the final decision of conviction in case of natural persons, without having a correspondent in any of the previous regulations. This complementary penalty, in the previous Criminal Code was provided in a specific form, only in case of natural persons.

According to the provisions of art. 70 Criminal Code the publication of the final decision of conviction can be decided when considering the nature and seriousness of the crime, the circumstances of the trial and the person of the convict, the court thinks that the publication shall contribute to preventing the performance of other such crimes. The publication of the decision of conviction is published in excerpt, in the form established by the court, in a local or national newspaper, only one time. The publication of the final decision of conviction is made upon expense of the convicted person, without revealing the identity of other people.

A similar regulation is subject to art. 36 of the Italian Criminal Code and art. 131-35 of the French Criminal Code.

The criminal code in 1936[1] provided similar provisions in Section II - Complementary penalties, art. 25 paragraph 4 „publishing and displaying the conviction decisions, according to the law", and in Chapter VI - Publishing and displaying the decision, art. 61 regulated the following: „The final decisions issuing any of the criminal penalties provided by art. 22 are published by care of the Prosecutor's Office, in excerpt, in the Official Gazette and is displayed for at least one month on the door of the convict, at the city hall of the commune where the crime was committed and at the one where the victim has his/her residence. In correctional terms, the court can order publishing the decision of conviction, only upon request of the harmed party and only when the publication would be a manner of moral repair. This provision is applied to simple imprisonment".

The aim of establishing this complementary penalty was to increase the efficiency of the message in the justice action, but also ensuring a moral repair for the harmed person[2]. By publishing the content of the decision of conviction, even the court of law contributes, by its authority, to repairing the harm produced to the victim.

Also, the Criminal Code wants to ensure to the judge a wide range of measures which, through flexibility and diversity, allow a good judicial individualization. In relation to this, the incidence range of the complementary penalties, of the number of rights included in the complementary penalty of prohibiting certain rights has been significantly extended and this new type of applicable complementary penalty was introduced - publishing the final decision of conviction [3].

The publishing of the decision is a complementary penalty with a special moral character, with a strong intimidating effect if the offender is notorious in that locality, the criminal offences have produced a major impact in terms of interest of the public opinion, or in case the nature and seriousness of the crime have aroused a vivid interest for the community. In such situations, the publication of the decision has an increased effect in relation to the convict, but also by power of the example of the case,

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[1] Published in the Official Gazette, Part I no. 65 of 18/03/1936.

[2] M. A. Hotca, *Noul Cod Penal şi Codul penal anterior. Aspecte diferenţiale şi situaţii tranzitorii,* Ed. Hamangiu, Bucharest, 2009, p. 74.

[3] Presentation of the reasons for the new Criminal Code, published on the website of the Chamber of Deputies– http://www.cdep.ro/proiect/2009/300/00/4/em304.pdf.

which can contribute to the prevention of other such offences[4]. For this, the duration of the impact for publishing the decision is relative, lasting in time in relation to the interest of the public opinion towards the crime produced, its consequences or the offender. On the other side, the negative publication of the offences committed by the offender, on his/her expense, warns the public in order to prevent committing similar types of crimes[5].

The new Criminal Code provides this new complementary penalty so that the prevention of the offences can be achieved also through knowledge by publishing, with the power of the mass-media means to penetrate in the conscience of citizens.

Another reason would be the moral repair which can be granted to the harmed person, which can obtain full satisfaction, especially if the offence was performed using also the means provided by the mass-media. In case the advertising of the case affects the victim of the offence, the publication of the decision is achieved with the necessary anonymity for the victim not to be identified. The same thing is achieved also in case of the legal person[6].

The complementary penalty of publishing the conviction decision is a disreputable penalty, which submits the convicted person to public odium. Such sanction can have a strong deterrent effect, being a true defamation performed on own expense, meant to warn the public opinion about the offence of the convict.

In relation to this, the complementary penalty of publishing the decision of conviction is a penalty with positive effects in terms of penalty purpose, affecting the image of the convicted person, as it can have patrimonial consequences in case the convict losses his/her credibility for performing certain positions or services. It is a penalty performed and a string general prevention, considering it prevents committing new such offences.

As the law does not provide any condition related to the main penalty next to which the complementary penalty of final publication of the conviction decision can be applied, it results that this complementary penalty can be applied independently of the type and seriousness of the penalty issued. So, the publication of the final decision of conviction can be decided in case of conviction to life imprisonment, in case of conviction to imprisonment or in case of fines. Also, in the absence of a contrary provision, this complementary penalty can be applied also in case the execution under supervision was decided in relation to the main penalty [7].

Not being conditioned by the application of a certain main penalty or by its duration, in principle the publication of the final decision of conviction can be decided provided there is a conviction, which distinguishes it from the complementary penalty of displaying or publishing the conviction decision, specific for legal persons, whose application is conditioned by applying the main penalty of the fine[8].

The complementary penalty of publishing the decision of conviction is applicable for both intentional offences and offences by fault and is related to all natural persons which are criminally liable, and there are no categories subject to exceptions. The sanction is optional for the court, and according to the case it shall be assessed if it is necessary to apply it, according to the nature, seriousness of the offence, the circumstances in which it was committed and the impact of the negative publicity performed in this manner[9]. So it results that unlike the other two complementary penalties whose application is optional as well as compulsory, the application of the complementary penalty consisting in the final publication of the decision of conviction is only optional[10].

The court of law can decide the publication in excerpt, in a form in which the content is explicit and understandable to the public opinion, in the exposure and impact form as visible as possible on the first page, with a certain printing format, with a certain size of the letter or of the border, on the pages of a local or national newspaper. In relation to the form of display, it is obvious that the lawmaker refers to the manner in which the natural person has the obligation to ensure the display of the decision's operative part, respectively to the format of the ad, the sizes must be so that they allow the people which read the local or national newspaper to observe and read the ad. In order to reach the purpose of sanctioning, the publication must also include a short presentation of the de facto situation, as noted by the court of law, as well as the elements of the decision's operative part.

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Unlike the complementary penalty of displaying or publishing the decision of conviction in case of legal persons, which is performed for a period between one month and 3 months, in case of the natural person it shall be published only once. In this manner, the

[4] I. Chiş comment in I. Pascu şi colab., *Noul Cod Penal comentat*, Part generală, vol. I, Ed. Universul Juridic, Bucharest, 2012, p. 456.
[5] M. Basarab şi colab., *Codul penal comentat*, Part generală, vol. I, Editura Hamangiu, Bucharest, 2007, p. 400.
[6] I. Chiş comment in I. Pascu şi colab., *Noul Cod Penal comentat*, Part generală, vol. I, Ed. Universul Juridic, Bucharest, 2012, p. 456.
[7] C. Mitrache comment in G. Antoniu şi colab., *Explicaţii preliminare ale noului Cod Penal*, vol. II, Ed. Universul Juridic, Bucharest, 2011, p. 69.
[8] V. Paşca, *Curs de drept penal. Part generală*, ed. a II-a, Ed. Universul Juridic, Bucharest, 2012, p. 441.
[9] G. Antoniu şi colab., *Noul Cod Penal*, vol. II, Ed. C. H. Beck, 2008, pag 189.
[10] G. Antoniu şi colab., *Explicaţii preliminare ale noului Cod Penal*, vol. II, Ed. Universul Juridic, Bucharest, 2011, p. 70.

lawmaker describes this complementary penalty as an absolutely determined penalty, although apparently it could seam an undetermined penalty.

The publication of the final decision of conviction is performed on the expense of the convict, with only one appearance in a local or national newspaper. In this manner, the lawmaker describes this complementary penalty as an absolutely determined penalty, although apparently it could seam an undetermined penalty.

Although it has a temporary determined nature (publishing it only one time), its effect in time is relative, being determined by a series of factors such as the spreading area and the circulation of the publication, the interest of the public opinion towards the cause, factors which the court should consider when it decides such a penalty, in order for its effect to be according to the seriousness of the offence[11].

The law does not provide any term for the application of the complementary penalty of publishing the final decision of conviction, which means that its performance can be performed immediately after the decision of conviction remains final.

The publication of the decision of conviction must not affect the subjective rights of the victim, reason for which with the publication of the decision the identity of the victim or of other people in the file, as well as the names of the judges in the panel, of the lawyers, of the witnesses etc. cannot be revealed (in order to avoid possible revenges). The law also regulated the case according to which in the circumstances of the trial there are more people, which are also protected in relation to their right to a private life, their identity not being revealed. The complementary penalty must target exclusively the person in relation to which this penalty was decided, the identity of the victim or of other participants cannot be revealed, if in relation to this it was not decided to apply the complementary penalty of publishing the final decision of conviction.

As this complementary penalty for the natural persons is recently introduced, the practice of the courts of law shall develop the situations in which it can be applied. The efficiency of such complementary penalties for legal persons, represented by natural persons, lead to the conclusion of applying the measure directly in relation to natural persons[12].

Considering that the provisions of the Criminal Code provide the possibility to apply the complementary penalties in case the main punishment is imprisonment, as well as in case the main penalty is the fine, **de lege ferenda ("with a view to future law") we propose introducing the regulations regarding the interdiction of exceeding, through the publication expenses, the amount of the fine applied to the natural person through the offence committed (the inspiration source might be the provisions of art. 131-35 French Criminal Code).**

In relation to the enforcement of the complementary punishment of publishing the decision of conviction, art. 565 Criminal Procedure Code provides that it is enforced by sending the excerpt, in the form established by the court, to a local newspaper which appears in the jurisdiction of the court which issued the conviction or of a national newspaper, for the publication upon expense of the convicted person.

Still, we consider that the moment for beginning the execution of a complementary penalty coincides with the moment of sending the excerpt from the final decision of conviction to the local newspaper which appears in the jurisdiction of the court which issued the decision of conviction or of a national newspaper, and the actual execution takes place the moment it is published.

Art. 33 of Law no. 253/2013 regarding the execution of the punishments, of the educational measures and of other measures without imprisonment decided by the legal bodies during the criminal trial provides that, in order to enforce the punishment of publishing the decision of conviction, the judge appointed with the enforcement sends the excerpt, in the form established by the court, to the local or national newspaper assigned by it, requesting the communication of the rate for publication.

Within 10 days from receiving the answer from the management of the assigned newspaper, the judge appointed with the enforcement communicates to the convicted person the cost of the publication and its obligation to make the payment within 30 days.

The news paper assigned shall publish the excerpt of the decision of conviction within 5 days from the date of payment and shall notify the judge appointed with the enforcement about the publication, communicating a copy of the published text.

If within 45 days from the communication made to the convicted person according to paragraph (2), the judge appointed with the enforcement does not receive the notification regarding the performance of the publication, shall proceed to checking the reasons which lead to its non-performance.

In case the management of the assigned newspaper does not supply the information provided in paragraph (2) or when it doesn't take the necessary measures in order to ensure the publication, the judge appointed with the enforcement can grant a new term for performing these obligations, which cannot exceed 15 days, or assigns another newspaper in the same category for publication.

If it is established that the non-performance of the publication was due to the fault of the convicted person, the judge appointed with the enforcement can grant a new term for publication, which cannot exceed 15 days.

[11]V. Pașca, *Curs de drept penal. Part generală*, ed. a II-a, Ed. Universul Juridic, Bucharest, 2012, p. 441 - 442.
[12] I. Chiș comment in I. Pascu și colab., *Noul Cod Penal comentat*, Part generală, vol. I, Ed. Universul Juridic, Bucharest, 2012, p. 456.

If the convicted person did not make the payment for publication in the term provided by paragraph (2) or, according to the case, at paragraph (6), the judge appointed with the enforcement shall notify the competent criminal prosecution office, in relation to performing the offence of failure to comply with the criminal sanctions, provided by art. 288 paragraph (1) of Law no. 286/2009, amended and supplemented.

If upon enforcement of the decision or during the execution any query or prevention of the execution appears, the judge appointed with the enforcement can notify the execution court, which shall proceed according to the provisions of art. 595 and 596 Criminal procedure code.

Considering that the complementary penalty of publishing the decision of conviction is a newly introduced provision, we think it is not applicable in the case of the offences committed before its entry in force.

2. The complementary penalty of publishing the decision of conviction in case of the legal person

According to the provisions of art. 145[13]Criminal Code, the display of the final decision of conviction or its publication is performed upon expense of the convicted legal person. By displaying or publishing the decision of conviction, the identity of other people cannot be revealed. The display of the decision of conviction is performed in excerpt, in the form and place established by the court, for a period between one month and 3 months. The publication of the decision of conviction is performed in excerpt and in the form established by the court, through the written or audiovisual media or through other audiovisual communication means, assigned by the court. If the publication is performed by written or audiovisual, the court establishes the number of the appearances, which cannot exceed 10, and in case of publication through audiovisual means, its duration cannot exceed 3 months.

In the legislation of our country we find similar provisions in the Criminal code of 1936 which, in Section II - Complementary penalties, art. 25 paragraph 4 „publication and display of the decisions of convictions, in the conditions established by the law", and in Chapter VI- Publication and display of the decisions, art. 61, shows that: „The final decisions which issue any of the criminal penalties provided by art. 22 is published by care of the prosecutor's office, in excerpt, in the Official Gazette and is displayed for at least one month on the door of the convict's residence, at the city hall of the commune where the offence was committed and to the one where the victim has its residence. In correctional terms, the court can order the publication of the decision of conviction, only after the request of the harmed party and only when the publication constitutes a way of moral repair. This provision is applied to simple imprisonment".

Regulation of the complementary penalty of displaying the final decision of conviction as regulated by the new Criminal Code is similar to the one of the Criminal Code of 1968.

A first amendment of the lawmaker of the new Criminal Code is given by the replacement of the term "distribution" with the one of "publication of the final decision of conviction.

Another amendment consists in the explicit introduction of the provision according to which by displaying or publishing the decision of conviction the identity of other persons cannot be revealed {art. 145 paragraph (2) Criminal Code}, excluding in this manner the possibility to display or publish the decision in case there is the approval of the harmed party or of its legal guardian, as was the phrasing of art. 71[7]paragraph (2) of the old Criminal Code. Considering these arguments, the complementary as regulated by art. 145 Criminal Code is more restrictive, allowing only to reveal the identity of the legal person, choosing in this manner a better protection for the damaged party.

In terms of its content, the complementary penalty of displaying or publishing the decision of conviction consists in notifying to the public the decision of conviction of a legal person which committed an offence provided by the criminal law[14].

[13] Art. 71[7]Codul penal of 1968 – „The display of the final decision of conviction or its distribution is performed on the expense of the convicted legal person. By display or distribution of the decision of conviction the identity of the victim cannot be revealed, except there is his/her approval or the approval of his/her legal representative. The display of the decision of conviction is performed in excerpt, in the form and place established by the court, for a period between one and 3 months. The distribution of the decision of conviction is performed in excerpt and in the form established by the court, through the written or audiovisual media or through other audiovisual communication means established by the court. If the distribution is made through the written or audiovisual media, the court establishes the number of appearances. which cannot exceed 10, and in case of distribution through other audiovisual means, its duration cannot exceed 3 months".

[14] C. Marinescu, *Răspunderea penală a persoanei juridice. De la teorie la practică*, Ed. Universul Juridic, Bucharest, 2011, p. 235; With the criminal sentence no. 599/2013 of 09.07.2013 Court of Law of district 6 in the file no. 25294/303/2010 convicts the defendant Clinical Hospital „Prof. Dr. P. S.", represented by its manager for committing the following offences: - manslaughter, provided by art. 178 paragraph (2) și paragraph (5) Criminal Code reported to art. 71[1] paragraph (2) Criminal Code, to the penalty of criminal fine in the amount of 400.000 lei (four hundred thousand lei); - accidental bodily injury, provided by art.184 paragraph (2) și paragraph (4) Criminal Code related to art. 71[1] paragraph (2) Criminal Code, to the penalty of criminal fine in the amount of 80.000 lei (harmed party C. M. D.); - accidental bodily injury, provided by art.184 paragraph (2) și paragraph (4) Criminal Code related to art. 71[1] paragraph (2) Criminal Code, to the penalty of criminal fine in the amount of 80.000 lei (harmed party C. A.). - accidental bodily injury, provided by art. 184 paragraph (2) și paragraph (4) Criminal Code related to art. 71[1] paragraph (2) Criminal Code, to the penalty of criminal fine in the amount of 80.000 lei (harmed party C. Ș.). - accidental bodily injury, provided by art. 184 paragraph (2) și paragraph (4) Criminal Code related to art.71[1] paragraph (2) Criminal Code, to the penalty of criminal fine in the amount of 80.000 lei (harmed party S. R. M.). - accidental bodily injury, provided by art. 184 paragraph (2) și paragraph (4) Criminal Code related to art. 71[1] paragraph (2) Criminal Code, to the penalty of criminal fine in the amount of 80.000 lei (harmed party S. Ș. M.). În baza art. 53[1] paragraph 3 letter e) Criminal Code related to art. 71[7] Criminal Code, beside each main penalty, applies to the defendant

It was assessed in the doctrine[15] that the conviction of legal persons for committing offences is more efficient, as it can produce a very strong social impact if the decision of conviction is brought to the public knowledge, for the ones which might enter in relations with the legal persons in conflict with the criminal law without being warned by this circumstance. In this manner, the display or distribution of the decision of conviction is a penalty with positive effect in terms of the penalty's purpose, as it affects the market image of the legal person.

On the other hand it is considered that the display or publication of the decision of conviction is a complementary penalty with a considerable intimidating effect on the legal persons, affecting the image of the brand, the commercial reputation, the position of the legal person, and it can have as result the loss of the customers, the decrease of the credibility, and in certain situations might even have fatal consequences for the survival of the enterprise[16].

The general preventive effect of this sanction is argued by the authors with the fact that, by threat of losing his prestige and image, the trader "of the consumerist era!, which sees his volume of sales endangered and his possibility to find new partners limited, shall take organizational measures in order to avoid it[17].

The publication of the decisions is a special moral punishment, with a strong intimidating effect in case the legal person has notoriety in that locality, as well as in the cases in which the legal person does not benefit from notoriety, but the offences have produced a major impact in terms of interest of the public opinion, or in case the nature and seriousness of the crime raised a vivid interest for the community, as notifying to the public the offence committed by the convicted legal person certainly affects the present and future business relations. Bu we consider that in a certain measure a significant effect of the negative publicity is directly proportional with a more obvious moral connotation for the public and with the notoriety of the convicted legal person. In relation to this, we consider that the impact on the public is much higher when a legal person the consumers trusted is convicted than in the case of a less known legal person. Also, the impact is stronger if that product is known to the consumers and the offence for which the legal person was convicted is strictly related to it. In such situations, the publication of the decision has an increased effect in relation to the convicted person, and by power of example, the case can contribute to the prevention of such offences.

The Criminal Code provides this complementary penalty for the prevention of the offences to be achieved also through publication, with the power of penetration of the mass-media means (written or audiovisual media) in the conscience of the citizens, but also in relation to the moral restoration which can be granted to the harmed person, which can obtain full satisfaction, especially if the offence has been performed using also the means provided by the mass-media.

Special legal provisions, established as non patrimonial measures for repairing moral damages, but with a similar content to the one of the complementary penalty established by the Criminal Code of 1968 are found also in other special laws[18], such as Law no. 8/1996 regarding copyrights and related rights[19] which provides in art. 139 paragraph (10) letter d) that „the owners of the violated rights can request to the court of law to decide the distribution of the information regarding the decision of the court of law, including the display of the decision, as well as its complete or partial publication in the mass communication means, on the expense of the offender; in the same conditions the courts can decide additional publicity measures adapted to the particular circumstances of the case, including a large publicity".

The display or publication of the decision of conviction is established by the court of law considering the nature and seriousness of the crime, the circumstances and the person of the convict, in relation to its efficiency, for preventing the performance of such other offences.

We consider that this penalty must be applied for particularly serious offences, which bring public odium, without using the implementation attached to offences that are less serious. In case of particularly serious offences, especially when the penalty of dissolution or suspension of the activity is applied, the general interest of notifying third parties exceeds the private ones, belonging to the legal person which is criminally liable[20]. The main argument of this reasoning consists in the fact that the application of this penalty, including for the offences which are less serious has as consequence a much more difficult integration of the legal person into society, despite the positive nature of the effects had in terms of penalty purpose. We can mention in relation to this a decision issued by a French court of law, which considered that one cannot impose the sanction of displaying or

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the complementary penalty consisting in: **the display of the decision of conviction, in excerpt - on the operative part şi only in relation to this defendant (without revealing the identity of the victims), on the main access door for the patients, in section A of the head office building, for two months**.

[15] M. A. Hotca, *Drept penal. Part generală. Răspunderea penală şi sancţiunile de drept penal*, Ed. C. H. Beck, Bucharest, 2013, p. 52.

[16] C. Căşuneanu, *Răspunderea penală a persoanei juridice*, Ed. Hamangiu, Bucharest, 2007, p. 173.

[17] D. M. Costin, *Răspunderea persoanei juridice în dreptul penal român*, Ed. Universul Juridic, Bucharest, 2010, p. 441.

[18] G. Vintilă, C. Furtună – *Daune morale –Studiu de doctrină şi jurisprudenţă* – Ed. All Beck, Bucharest, citat în E. Drăguţ, *Sancţiunile aplicabile persoanei juridice în lumina noului Criminal Code*, Dreptul Magazine no. 12/2005, p. 166.

[19] Published in the Official Gazette., Part I no. 60 of 26/03/1996.

[20] M. A. Hotca, *Drept penal. Part generală. Răspunderea penală şi sancţiunile de drept penal*, Ed. C. H. Beck, Bucharest, 2013, p. 53.

publishing the decision given that, in the case, it might have fatal consequences for the existence of the enterprise[21].

In relation to this, the complementary penalty of displaying or publishing the decision of conviction is a penalty with positive effects in terms of the penalty's purpose, affecting the image of the convicted legal person. It is a penalty which also achieves a strong general prevention, considering the prevention for committing new such offences.

The punishment is applicable for both intentional offences and offences by fault and it concerns all legal persons, as there are no categories of persons subject to exceptions. The sanction is optional for the court, and according to the case it shall be assessed if it is necessary to apply it, according to the nature, seriousness of the offence, the circumstances in which it was committed and the impact of the negative publicity performed in this manner.

The court of law can decide the publication in excerpt, in a form in which the content is explicit and understandable to the public opinion, in the exposure and impact form as visible as possible (on the first page, with a certain printing format, with a certain size of the letter or of the border) on the pages of a local or national newspaper. In relation to the form of display, it is obvious that the lawmaker refers to the manner in which the legal person has the obligation to ensure the display of the decision's operative part, respectively to the format of the ad, the sizes must be so that they allow the people which read the local or national newspaper to observe and read the ad. In order to reach the purpose of sanctioning, the publication must also include a short presentation of the de facto situation, as noted by the court of law, as well as the elements of the decision's operative part. From this reason, in the doctrine[22] it was argued that the best it would be to be made in the form of a press release or a press conference[23], complying with the substance and form conditions for editing a press release. The communication is usually sent electronically to the press agencies from the written or audiovisual communication means which can take over the information that they shall use or not, according to their publishing policy, to the interest they think it shall have among the targeted public[24]. We think that in case these institutions refuse the publication of the excerpt from the decision of conviction, it is enough for the legal person to prove she steps for publication, which doesn't follow the conditions of failure to comply with the criminal sanctions and consequently does not lead to the application of a harsher penalty.

The complementary penalty of displaying or publishing the decision of conviction is performed for a period between one month and 3 months, the lawmaker describing this complementary penalty as an undetermined penalty.

But in order to be enough, between committing the offence and the application of this sanction there must not be a too long time frame. Of course, this is a condition from which depends the efficiency of any sanction, but we would be inclined to believe that in case of the analyzed penalty the passage of time has an effect which is more reduced than in the case of another sanction[25].

The publication of the final decision of conviction is performed upon expense of the legal person, without these expenses exceeding the amount applied as criminal sanction.

When the publication is made by appearance in the written media (in a local or national newspaper) or audiovisual, or by other audiovisual communication means assigned by the court, it must establish the number of appearances, which cannot exceed 10, and in case of display, its duration cannot exceed 3 months.

The display or publication of the decision of conviction must not affect the subjective rights of the victim, reason for which the identity of the victim or of other people in the file cannot be revealed. The law regulated also the case in which in the circumstances of the case there are more people, which are also protected in relation to their right to private life, and their identity cannot be revealed.

Also this penalty can be applied together with the other complementary penalties, except the dissolution.

According to art. 502 paragraph (1) Criminal Procedure Code, the penalty of publishing the decision of conviction is enforced by communicating an excerpt of the decision of conviction which regards the application of the complementary penalty, the date it remains final, to the convicted legal person, to display it in the form, place and for the period established by the court of law.

An excerpt of the decision of conviction regarding the application of the complementary penalty is communicated, the date it remains final, to the convicted legal person, to be published in the form established by the court, on her own expense, through the written or audiovisual media or through other audiovisual communication means, established by the court.

From what we can see, the lawmaker talks about to means of notifying to the public the final decision of conviction of the legal person: by displaying the decision of conviction in excerpt and by publishing the

[21] The Versailles Correctional Court, decision of 18.12.1995, JCP 1996, II, 22640, quoted in F. Streteanu, R. Chiriţă, *Răspunderea penală a persoanei juridice*, ed. a II-a, Ed. C. H. Beck, Bucharest, 2007, p. 426.

[22] E. Drăguţ, *Sancţiunile aplicabile persoanelor juridice în lumina noului Cod Penal*, Dreptul Magazine no. 12/2005, p. 167; A. Jurma, *Persoana juridică – subiect al răspunderii penale*, Ed. C. H. Beck, Bucharest, 2010, p. 174; M. A. Hotca, *Drept penal. Part generală. Răspunderea penală şi sancţiunile de drept penal*, Ed. C. H. Beck, Bucharest, 2013, p. 53.

[23] Ghe. Mărgărit – *Conceptul de răspundere penală a persoanei juridice în noul Cod Penal* – Dreptul Magazine no. 2/2005, p. 106.

[24] A. Jurma, *Persoana juridică – subiect al răspunderii penale*, Ed. C. H. Beck, Bucharest, 2010, p. 174.

[25] E. Drăguţ, *Sancţiunile aplicabile persoanelor juridice în lumina noului Cod Penal*, Dreptul Magazine no. 12/2005, p. 167.

decision of conviction in excerpt. We think it is convenient to replace the term "distribution of the decision" in the old art. 71^7Criminal Code with „publication", as regulated by the new art. 145 Criminal Code, as it is more explanatory and more exact as content.

The display, as defined by the Romanian Explanatory Dictionary means "to expose, glue a flyer, make known through a flyer, manifest ostentatiously, publicly, put in a visible place". In this respect, we understand that the court of law shall hand over to the legal person the excerpt of the decision, which must be displayed, exposed in certain places explicitly provided by the court, so that the purpose of the penalty is better achieved. The display is performed upon expense of the legal person, in the time frame established by the court.

We think that the place where the display shall be performed is very important, as one must keep into account the recipient of the publicity. It was considered in the doctrine[26], opinion we also agree with, that in case the conviction is the consequence of an offence regarding labour protection, the head office or production facility of the legal person can be chosen for display, and when the conviction is a consequence of an offence regarding consumer's protection, the selling place of the products can be chosen, for corruption offences eventually head offices of the public institutions or professional associations.

In relation to this we think that the place where the excerpt of the decision of conviction is displayed is very important, as it is necessary for it to be frequented by the possible victims, but it must be related to the offence committed by the legal person.

Also, it is considered that the display of the decision of conviction shall be preferred in case the recipient public is in a small number and is related to a certain location (for example, the employees of an enterprise convicted for a labour protection crime shall be notified about its conviction if the decision is displayed at the head office and at every lucrative facility of the enterprise)[27].

Also, the excerpt of the decision of conviction is also communicated to the police office of the jurisdiction where the display place is, in order to check that the obligation has been complied with.

According to art. 40 din Law no. 253/2013 in case that after the display but before the term established by the court, the flyer is stolen, destroyed or deteriorated, the police authority requires the convicted person to display it again, which must be performed within 24 hours.

In case of failure to comply with the display obligation or with the obligation to replace the flyer according to paragraph (2), the police authority shall inform the judge appointed with the enforcement, in order to notify the court for the application of the provisions in art. 140 paragraph (2) Criminal Code.

The publication means, according to the Romanian Explanatory Dictionary, „notifying something to everybody through printing, displaying etc.; publishing, printing books, articles, information etc., notifying a large range of people through the printer, notifying publicly, spreading, revealing". In order to execute the penalty of publishing the decision, the court shall give to the legal person am excerpt of the decision, so that it can publish it in the form established by the court, on its own expense, through written or audiovisual media or through other audiovisual communication means, assigned by the court. Also, the publication of the decision of conviction can be performed by publication in the Romanian Official Gazette, Part IV or in one or more newspapers or in one or more audiovisual communication services, established by the court.

We can't help but wonder if the two means of informing the public can be combined by the judge. We think that as long as the law does not forbid it, they can be applied and executed in a cumulative manner, ensuring the purpose of the penalty more. Also, art. 138 Criminal Code provides the possibility to apply one or more complementary penalties considering the nature and seriousness of the offence, the circumstances of the case, and also if they are necessary.

It was also considered in the doctrine[28] that the publication in a gossip newspaper of an ad edited in an official language in relation to false accounting documents might not have any impact on the image of the convicted legal person as well as the distribution in an elitist publication, to which a reduced segment of the population has access, of the operative part of the decision of conviction for an offence regarding labour protection might be useless.

Also, the foreign legal doctrine[29] considers that the simple publication of the decision in excerpt, in a technical and official language, hard to understand for the regular citizen, cannot achieve the purpose of this sanction. This is the argument for which it was considered that the ad must be as explicit as possible, easy to understand by the public, because it is addressed to the general public and not to specialized person, with as few as possible technical data and with warnings for the possible victims, such as: "the legal person X was criminally convicted by the court Y for the offence Z. Pay attention to its products/services!".

We think that the excerpt must not be too long, so it can be read easily by the targeted persons and must present the situation in a synthetic manner.

The convicted legal person presents to the enforcement court the proof of starting the enforcement of the publication for the decision of

[26]D. M. Costin, *Răspunderea persoanei juridice în dreptul penal român*, Ed. Universul Juridic, Bucharest, 2010, p. 444.
[27]A. Jurma, *Persoana juridică – subiect al răspunderii penale*, Ed. C.H. Beck, Bucharest, 2010, p. 173.
[28]D. M. Costin, *Răspunderea persoanei juridice în dreptul penal român*, Ed. Universul Juridic, Bucharest, 2010, p. 444.
[29] J. Coffe, *No SoulToDamn: No body toKick*, quoted in D. M. Costin, *op. cit.*, p. 445.

conviction, within 30 days from the communication of the decision.

Art. 41 paragraph (3) of Law no. 253/2013 provides that in case it was decided to perform the publication by displaying it on an interned page, the excerpt must be published in the term provided by paragraph (2), and the convicted person shall communicate to the appointed judge, within 5 days from the start of the publication, the proof of enforcement of the decision. The periods in which, for technical reasons, the published excerpt was not accessible are not calculated in the publication period established by the court.

The judge appointed with the enforcement periodically checks the compliance with publishing obligation according to paragraph (1), until the term established by the court.

In case it is established that the publication obligation was not complied with, the judge appointed with the enforcement shall notify the court.

The violation in bad faith of the complementary penalty of displaying or publishing the decision of conviction has as consequences:

a) the temporary application, for maximum 3 months, of the complementary penalty of suspending the activity or one of the activities of the legal person;

b) the application of the complementary penalty of dissolution of the legal person, according to the provisions of art. 139 paragraph (2) Criminal Code, if it is established, after the maximum term of 3 months, that the legal person continued to oversee its obligation of distributing or displaying the decision.

We think that the harmed party whose interests have been affected by the illicit activity of the legal person can notify the enforcement court in relation to the failure to comply with the provisions in the final decision of conviction.

The legal person is summoned, and the participation of the prosecutor is compulsory. After the conclusions of the prosecutor and of the convicted legal person, the court judges through the sentence.

Considering that in the case of publication the approval of the mass-media institution is necessary, which can be given only in case it is considered this can be interesting for the targeted audience, we think that in case of refusal, the enforcement court must not apply a harsher punishment such as the suspension of the activity or the dissolution, as it is enough for the legal person to prove the attempt to publish the excerpt and respectively the attempt to begin the execution of the decision of conviction.

3. CONCLUSIONS:

Increasing the number of the prohibitions which can be applied by the court of law and implicitly of their application field, but also the introduction of new complementary penalties, also of the complementary penalty of the publication of the final decision of conviction, proves the orientation of the criminal policy to a highlighted individualization of the penalties, by enclosing to the main penalties proper complementary penalties in relation to the nature of the penalty, the seriousness of the offence committed, the actual circumstances in which the offence was performed, but also the person of the offender with its level of responsibility, understanding, education and training, previous criminal experience or belonging to another legal culture of a different country.

In this manner we think a better suitability of the sanction is achieved in relation to the actual circumstances of the case, increasing its efficiency significantly.

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THE OBJECT OF THE ADMISSION OF GUILT

Constantin NEDELCU[*]

Abstract

This paper aims at studying how elements of negotiated justice specific to common law systems entered into the Romanian criminal procedural law system. It particularly deals with the admission of guilt and about one of its most controversial aspects – the object of recognition. The research concludes that what is recognized within this simplified procedure it is the deed and not its legal classification given by the criminal prosecution bodies.

Keywords: *criminal trial, admission of guilt, legal qualification, negotiated justice.*

1. Introduction

A prestigious scientific work shows that the specialists of law in the common law systems are often very surprised when they find out that there is no institution similar to that of the admission of guilt (pleading guilty)[1] in the (inquisitorial) law systems on the continent. The reason for which this reaction appears is that accusatorial systems developed a tradition in the sense of simplifying judicial procedures in the criminal field in the assumptions in which the defendant chooses to plead "guilty", taking on the charges brought to him. In these cases, a too brisk rejoinder from the State authorities is no longer necessary because the defendant's position is no longer a position of denying the charges.

However, at present, it is no longer possible, as noted in the specialty literature[2], to classify a criminal justice system as entirely accusatorial or entirely inquisitorial, so that *the mixed criminal trial* appeared. This trial preserves inquisitorial features in the phase preliminary to judgment, while judgment has characteristics of the adversarial form. The victim's role is a subsidiary role in relation to the prosecutor, who is regularly initiating the prosecution and exercising the criminal action, while the victim may elect to participate in the criminal trial as an injured party and/or as a civil party. In certain hypotheses strictly indicated under the law, the victim is allowed to takeover the prerogative of pressing charges, which is normally reserved for the public accuser. This phenomenon to assimilate the elements of negotiated justice in the inquisitorial systems of traditional law is primarily generated by the influence exerted on national laws by the European Court of Human Rights. Through the jurisprudence developed by this court in connection with the applicability of Art. 6 of the European Convention of Human Rights with reference to the right to a fair trial, many elements specific to accusatorial systems irradiated to inquisitorial systems, stabilizing the balance between the protection of the common interest and the protection of the individual interest.

2. Admission of guilt in Romanian Trial

Romania, as a State that ratified the European Convention of Human Rights and accepted also the jurisdiction of the Strasbourg Court, could not remain outside this trend of modernizing criminal procedural rules. Thus, once the new Criminal Procedure Code (Law No. 135/2010) is enacted, a whole series of elements specific to accusatorial systems and even some timid aspects of negotiated justice are recorded in the Romanian criminal trial. Some f these institutions could also be found in the previous Criminal Procedure Code (as is the case of the Procedure for the Admission of Guilt), while others are marked by novelty (such as the *agreement for the admission of guilt*). About such latter agreement, we shall say that it can be found in the category of the special procedures defined under Title IV of the Special Part of the Criminal Procedure Code, Arts. 478-488.

The object of the agreement for the admission of guilt consists in "the recognition of the perpetration of the deed and the acceptance of the juridical classification for which the criminal action was initiated and also regards the type and quantum of the punishment, as well as its form of execution" (Art. 479 of the Criminal Procedure Code). According to the norms included in Chapter I of Title IV under the Special Part of the Criminal Procedure Code, during the criminal prosecution, after the initiation of the criminal action, *the defendant and the prosecutor may conclude an agreement*, as a result of the admission of guilt by the defendant. The effects of the agreement for the admission of guilt are subject to endorsement by the hierarchically higher prosecutor who is also setting the limits for the conclusion of the agreement. The agreement may be initiated by both the defendant, and

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[1] Mireille Delmas Marty, J.R. Spencer, European Criminal Procedures, Cambridge University Press, 2006. P. 27.

[2] C. Dănileț, Victima infracțiunii, acuzator în procesul penal, published online *www.cristidanilet.ro*

by the prosecutor and produces effects *in personam.* However, in no case may underage defendants conclude agreements for the admission of guilt.

The conditions for the conclusion of the agreements for the admission of guilt are established under Art. 480 of the Criminal Procedure Code, providing that: it may be concluded only with regard to those crimes for which the law provides the punishment by a fine or by imprisonment by at most 7 years and only when the evidence produced revealed sufficient data concerning the existence of the deed for which the criminal action was initiated and concerning the guilt of the defendant.

The contents that the agreement should have revealed that this is not a typical element of negotiated justice, as encountered in the systems of de common law, because there is no possibility that negotiation might result in a solution of "closed case", determined by this very aspect of the conclusion of the agreement. Otherwise, Art. 482 provides that the contents of the agreement should include, *inter alia*: „d) the description of the deed forming the object of the agreement; e) the juridical classification of the deed and the punishment provided under the law;… g) the defendant's express statement whereby such defendant admits to having perpetrated the deed and accepts the juridical classification for which the criminal action was initiated; h) the type and quantum, as well as the execution form of the punishment or the solution of waiving the application of punishment or of postponing the application of punishment with regard to which the prosecutor and the defendant reached an agreement...".

After the conclusion of the agreement, it will be subject to censorship by the court which would be competent to judge the case on the merits. If the agreement for the admission of guilt lacks any of the mandatory mentions or if some of the conditions provided under the law were not observed, the court will order that the omissions should be rectified within 5 days at most and will notify in this respect the head of the prosecutor's office who issued the agreement. After remedying these deficiencies, analyzing the agreement, the court will issue one of the following solutions: to admit the agreement in full, to reject the agreement or to admit the agreement only in part (Art. 485 of the Criminal Procedure Code). The prosecutor and the defendant may file an appeal against the issued sentence within 10 days from its service.

Together with this element of novelty regulated by the Criminal Procedure Code, another one can be found, which has a correspondent in the previous Criminal Procedure Code. This is the "Procedure in Case of the Admission of Guilt" regulated by Art. 375 of the Criminal Procedure Code in force; the doctrine states about this element that it is an adaptation of the institution introduced by Law No. 202/2010 regarding certain measures for the acceleration of the settlement of lawsuits in Art. 320[1] of the Criminal Procedure Code, previously referred to as the *judgment in case of the admission of guilt*[3].

Although the legal text invoked raised numerous controversies and sometimes generated a non-uniform practice, it was appreciated that it should be maintained by equivalent in the new regulation, because it also determined positive effects on the activity of the courts of law.

Obviously, by instituting a simplified procedure in case the accused person "admits the guilt", certain causes were solved with significant celerity and, implicitly, the activity of the courts before which such a procedure was performed was relieved.

Unlike the previous regulation, the institution can no longer be found in a single text in the new Criminal Procedure Code, the elements forming the special regime being divided among several legal texts. Thus, on the strength of Art. 374, para. (4) of the Criminal Procedure Code, in the cases in which the criminal action does not target a crime which is punished by life imprisonment, the chairman will draw to the defendant's attention that such defendant may request that the judgment should take place only based on the evidence produced during the criminal prosecution and based on the writs submitted by parties, if the defendant fully admits the deeds with which he is charged, informing him of the provisions of Art. 396 para. (10) of the same code. The text to which reference is made provides that, in case the judgment was carried out according to a simplified procedure, the punishment limits provided under the law in case of the punishment by imprisonment will be reduced by one third, and –in case of the punishment by a fine- by one quarter.

Furthermore, it is also specified that even when the defendant's request that judgment should take place according to a simplified procedure was rejected or when the judicial inquiry took place according to the usual procedure, *and the court retained the same factual situation* as that described in the writ of summons and acknowledged by the defendant, the effect of punishment reduction will be maintained. The hypothesis envisaged the provision of Art. 375 of the Criminal Procedure Code in accordance with which the admission of the request for judgment according to a simplified procedure is not mandatory, the court ruling on it after hearing the defendant, the prosecutor and the other parties.

What we would like to highlight further on in our study, particularly in this context of the facultative nature for the court of the request for judgment according to a simplified procedure, is composed of the conditions which should be met for such request to be admitted. The doctrine underlines that, for the request to follow a simplified procedure to be admitted, it is required that the court should verify: a) whether the deed retained in the indictment is not

[3] A. Zarafiu, Procedură penală, Beck Publishing House, Bucharest, 2014, p. 385.

punished by life imprisonment. When verifying the fulfillment of this condition, the court will not consider also the provisions of Art. 39 para. (2) of the Criminal Code in accordance with which, in case of concurrence of crimes, when several punishments by imprisonment were established, if, by adding to the higher punishment the increase of one third from the total of the other established punishments by imprisonment, the general maximum of the punishment by imprisonment were exceeded by 10 years or more, and for at least one of the concurring crimes the punishment provided under the law is the imprisonment for 20 years or more, the punishment by life imprisonment can be applied. The punishment which will be taken into account is the punishment provided under the law for each and every crime; b) if the request is complete, in the sense that it includes the two expressions of will referred to in Art. 374, para. (4) of the Criminal Procedure Code, with regard to the full admission of the deeds with which the defendant is charged, respectively to the acceptance of the circumstance that judgment is carried out only based of the evidence produced in the stage of criminal prosecution and, eventually, based on the writs produced by the parties; c) the request was made in person before the court, the doctrine[4] stating that such expression o wills cannot be made even by means of the lawyer that has a special mandate in this respect; d) if the request was made within the term provided under the law, namely until the initiation of the judicial inquiry; e) if the evidence produced within the criminal prosecution is sufficient to find out the facts and the fair settlement of the cause.

From the conditions indicated previously, the one requiring certain clarifications is that referring to the full admission of the deeds with which the defendant is charged. This requirement envisages the factual context, as it is retained through the arraignment. It is, thus, mandatory that the defendant should assume the perpetration of the deed, but not the legal classification proposed by the prosecutor's office. The conclusion is very clearly revealed also from the provisions of Art. 377 para. (4) of the Criminal Procedure Code ordering that, if the court finds, *ex officio*, upon the request of the prosecutor or of the parties, that *the legal classification given to the deed through the writ of summons should be changed*, the court os bound to raise the new classification for discussion and to draw to the defendant's attentions that the defendant is entitled to request the postponement of the cause. In this case, the defendant's possibility to benefit from the punishment reduction generated by the benefit of a simplified procedure is not compromised if the new legal classification of the deed as established by the court is different than the one from the indictment, which had been initially accepted by the defendant. The reason for adopting this solution is exactly that by the acceptance of the guilt, the deed is what is admitted, and not the legal classification of the deed. The solution is the same even if the one challenging the legal classification is the defendant himself. In case that the change of the legal classification leads to the establishment of a legal classification envisaging a crime that requires the prior complaint of the injured party, the court of law calls the injured party and asks such party if it intends to file a prior complaint. Should the injured party file a prior complaint, the court continues the judicial inquiry, or it may otherwise order the cessation of the criminal trial.

The same solution of accepting the fact that, under the conditions of Art. 374 para. (4) of the Criminal Procedure Code, what should be admitted is the deed and not its legal classification is also indicated by the comparison between the institution of the admission of guilt and the institution of the agreement for the admission of guilt. As previously underlined, in case of the agreement, the legal classification proposed by the Prosecutor's office and even a punishment should be admitted, including in terms of the method of its execution. In this respect, with regard to the agreement for the admission of guilt, Art. 479 of the Criminal Procedure Code expressly indicates that the object of the agreement is formed of "the admission of the perpetration of the deed and the acceptance of the legal classification for which the criminal action was filed and regards the type and quantum of punishment, as well as the form of its execution". Differently, Art. 374 para. (4) of the Criminal Procedure Code, regarding the procedure of the admission of guilt provides that: "…the chairman draws to the defendant's attention that the defendant may request that judgment takes place only based on the evidence produced during the criminal prosecution and based on the writs submitted by the parties, if the defendant fully admits the deeds with which the defendant is charged …". Even the interpretation of the names of the two institutions: the agreement for admission of *guilt*, respectively the procedure in case of the admission of the *accusation* comes to support the same conclusion.

When, for establishing the legal classification or when, after changing the legal classification, it is necessary to produce other evidence, the court, taking the conclusions of the prosecutor and of the parties, orders the performance of a judicial inquiry according to the usual procedure, without affecting the occurrence of the effect of punishment reduction referred to in Art. 396, para. (10) of the Criminal Procedure Code .

Another issue deriving from the object of the admission of guilt is that regarding the possibility to adopt solutions of non-conviction further to the performance of a simplified procedure. Given the application of the previous Criminal Procedure Code, jurisprudence indicated that "The provisions of Art. 320^1 para. (7) of the Criminal Procedure Code

[4] A. Zarafiu, op.cit., p. 387.

referring to the issue of decision to convict in case the simplified procedure is followed, shall not exclude the application of the provisions of Art. 18[1], because a decision to convict may only be issued if the deed admitted by the defendant presents the social hazard degree of a crime; otherwise, we are in the presence of a deed provided by the criminal law and not in the presence of a crime." On the other hand, in the same decision, the High Court of Cassation and Justice indicated the fact that: "The only grounds for acquittal which is compatible with the simplified procedure are those provided in Art. 11, item 2 letter a) related to Art. 10 letter b[1]) of the Criminal Procedure Code, all the other grounds for acquittal provided in Art. 10 of the Criminal Procedure Code imposing the performance of the judicial inquiry which should establish the existence of the deed, whether the deed is a crime and whether it was perpetrated by the defendant"[5]. In other words, if the texts from the previous legislation were applied, an acquittal solution, for instance, could not be issued, because it was considered as incompatible with the specific nature of the simplified procedure for the admission of guilt.

When the new Criminal Procedure Code is applied, exactly because the deed, and not the guilt or the provisional legal classification proposed by the Prosecutor's office in the writ of summons addressed to the court, forms the object of the admission of guilt, solutions may be very different. Thus, on the strength of Art. 396, para. (10) of the Criminal Procedure Code, when the judgment was carried out under the conditions of a simplified procedure, and the court retains the same *de facto* situation as that described in the writ of summons and admitted by the defendant, the solution of *conviction* or of *postponing the application of punishment* (which is a non-conviction solution) may be issued. We also believe that, after performing this procedure, the court may also order the solution of ceasing the criminal trial (for instance, in the assumption in which the intervention of a special cause for non-punishment is ascertained). This can happen, for instance, in the assumption of the special cause for non-punishment applicable in case the perjury is withdrawn. In the respective case, the author admits the perpetration of the deed and withdraws the perjury made, for which reason the only possible solution in the criminal side of the cause is the cessation of the criminal trial, on the strength of Art. 396 para. 6 of the Criminal Procedure Code related to the provisions of Art. 16 letter h) of the same code. To an equal extent, we believe that it is possible to resort to the acquittal solution, which is no longer considered by jurisprudence as incompatible with the procedure of the admission of guilt (Art. 375 of the Criminal Procedure Code)[6]. This because, as the court indicates, "unlike the provisions of Art. 320[1] para. (8) of the Criminal Procedure Code of 1968 providing that the court shall reject the request when the evidence produced during the criminal prosecution is not sufficient to establish the existence of the deed, is a crime and was perpetrated by the defendant, from the provisions of Art. 349 para. (2) of the Criminal Procedure Code related to Art. 374 para. (4) of the New Criminal Procedure Code the court retains that the request to apply the abbreviated procedure is admissible from these points of view if the produced evidence is sufficient to find out the facts and to fairly settle the cause. Such rewording corroborated with the phrase used by the lawmaker in Art. 396 para. (10) NCPP, respectively *in case of conviction* forms the court's belief that, within the procedure provided by Art. 375 of the New Criminal Procedure Code any of the solutions provided by Art. 396 of the New Criminal Procedure Code, including acquittal, is possible."

Elements of admission appear in the Romanian criminal trial also in connection with the civil side of the cause. Thus, according to Art. 23 of the Criminal Procedure Code, during the criminal trial, with respect to civil claims, the defendant, the civil party and the party whose civil liability is entailed may conclude a settlement agreement or a mediation agreement, according to law. The defendant, with the consent of the party whose civil liability is entailed, may admit, in full or in part, the claims made by the civil party. In such cases, the court shall bind [*the defendant*] to pay damages only to the extent of admission.

3. Conclusions

We have set out hereinabove the most important issues related to the object of the admission of the criminal charge. The attack launched by the elements of accusatorial law versus the performance rules of the Romanian criminal trial is obvious, especially in relation to the provisions of the new Criminal Procedure Code, and the most important mechanism through which this is made is the jurisprudence of the European Court of Human Rights. The one which was particularly subjected to analysis was the procedure in case of the admission of guilt, especially in terms of its object. The fact that this procedure generated a series of positive effects is beyond any doubt. Firstly, it allows the criminal trial to be carried out with a significant celerity, which has a positive influence on the level of compliance with the principle of guaranteeing the right to a fair trial in terms of the reasonable duration of judicial proceedings. This effect has a particular importance, especially in terms of the fact that our country is subject to the justice monitoring procedure, and it is doubled by another beneficial effect, which is not at all to be ignored in the context of the financial recession – the decrease in the

[5] ICCJ, Criminal Sentence, Decision No. 343/2012, www.scj.ro

[6] Sector 6 Bucharest Court of Law, Criminal Division, Criminal Sentence No. 389/2014, quoted in M. Udroiu, Procedură penală, Partea specială, C.H. Beck Publishing House, Bucharest, 2014.

costs occasioned by judicial proceedings. Even under these circumstances, it is ascertained that the guarantees of observing all the fundamental rights of a person who is subject to the procedure, including in the performance of the simplified procedure, are maintained active.

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WITHDRAWAL OF PREVIOUS COMPLAINT. A COMPARISON OF THE OLD AND THE NEW CRIMINAL CODE. PROBLEMS OF COMPARATIVE LAW

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Abstract:

In criminal law previous complaint has a double legal valence, material and procedural in nature, constituting a condition for criminal liability, but also a functional condition in cases expressly and limitatively provided by law, a consequence of criminal sanction condition. For certain offenses criminal law determines the initiation of the criminal complaint by the introduction of previous complaint by the injured party, without its absence being a question of removing criminal liability. From the perspective of criminal material law conditioning of the existence of previous complaint ,its lack and withdrawal, are regulated by art. 157 and 158 of the New Penal Code, with significant changes in relation to the old regulation of the institution . In terms of procedural aspect , previous complaint is regulated in art. 295-298 of the New Code of Criminal Procedure. Regarding the withdrawal of the previuos complaint, in the case of offenses for which the initiation of criminal proceedings is subject to the existence of such a complaint, we note that in the current Criminal Code this legal institution is regulated separately, representing both a cause for removal of criminal liability and a cause that preclude criminal action. This unilateral act of the will of the injured party - the withdrawal of the previous complaint, may be exercised only under certain conditions, namely: it can only be promoted in the case of the offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint; it is made exclusively by the rightholder, by legal representatives or with the consent of the persons required by law for persons lacking legal capacity or having limited legal capacity;it must intervene until giving final judgment and it must represent an express and explicit manifestation. A novelty isrepresented by the possibility of withdrawing previous complaint if the prosecution was driven ex officio, although for that offense the law requires a previous complaint in the sense that the withdrawal takes effect only if it is appropriated by the prosecutor.

Keywords: *crime, previous complaint, criminal action, withdrawal of previous complaint.*

1. Introduction. Previous complaint. General considerations.

Legal order and civic discipline in a state of law are established and maintained by means of rules of law. These rules prescribe rules of conduct, which must be obeyed by the community members as well as sanctions to be applied in case of their violation.

The rules of conduct – most of them - are expressed in a particular form: the law[1] in a wider sense (including any normative act).

The great philosopher, lawyer and orator Cicero (106 BC-43 BC) said more than two millennia before that "we are slaves to law in order to be free".

The establishment by law of the facts constituting crime, as well as of the criminal sanctions framework, has a dual role: first to show the members of society which are the deeds prohibited by criminal law and also to warn them about the consequences of committing such deeds , thus fulfilling the function of general prevention and secondly to ensure the correct framing of the facts that infringed the penal law, and a fair sanction for those who committed such acts, with a special preventive function.

In Article 1 of the Criminal Code, the law provides the acts constituting offense, the penalties that are applied to offenders and the measures that can be taken when committing such acts.

Commiting an offense, even when it is discovered and proved by the administration of evidence, adduced against infringers, does not require the automatic application of punishment. In order to reach punishing the offender criminal justice is required, meaning his conviction by the competent court on a trial.

The necessity of restoring the rule of law infringed by committing crimes led to the establishment of the rule that initiation and development of criminal proceedings are made ex officio (principle of officialdom of criminal trial). In the case of minor offenses or those involving relationships between people or their personal life, the Criminal Code and other laws with criminal provisions stipulate that criminal action can be initiated or exercised only if the injured person expressed his/her will of prosecuting the perpetrator by introducing a previous complaint to the courts.

Previous complaint is a criminal institution, its absence representing a cause of removing criminal liability (art. 157 New Criminal Code).

The institution has a procedural aspect which has a direct impact on the possibility of exercising criminal action and implicitly on criminal responsibility.

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[1] I. Gorgăneanu - Criminal proceedings, Scientific and Encyclopedic Publishing House Bucharest, 1977, p. 13.

From the point of view of criminal law ,previous complaint is a condition of punishability and in terms of procedural criminal law a condition of procedurability[2].

As outlined, in the case of the offenses for which the law provides the necessity of previous complaint of the injured person , criminal action can not be exercised in the absence of such complaints, art. 295 Code of Criminal Procedure.

Criminal law determines the cases when for the exercise of criminal action, previous complaint is required, starting from the circumstance that these offenses are among those which by their nature concern social relations limited especially to the personal interests of the parties.

In such cases, it is considered that the injured are able to determine whether to start a criminal trial, criminal action being conditioned by the manifestation of an exclusive right of the injured person[3]. Against the will of the injured criminal trial it can not take place.

Justification of the exception consisted either in a lower degree of abstract social danger of these facts or in the circumstance that their bringing to court, with the advertising involved by the trial, could be a source of discomfort or distress to the injured person or would give rise to various conflicts between people belonging to the same family or to the same social environment[4].

Since its legal support - criminal proceedings - in this case is characterized by availability, judicial authorities cannot exercise their duties ex officio.

Conditions of form and substance that must be fulfilled by previous complaint to produce its effect refers, inter alia, to the proprietor of the previous complaint, so, who can introduce previous complaint, the term in which it is introduced, what items previous complaint should include, these being provided by art. 295 para. 3 Code of Criminal Procedure in relation to art. 289 Criminal Procedure Code.

In terms of procedural aspect the institution of previous complaint is to be found in the Special Part of the New Criminal Procedure Code in Title I - Prosecution - Chapter II. art. 295-298, and in terms of substantive law in the general part of the New Criminal Code under Title VII - causes removing criminal liability - art. 157-158.

Therefore, previous complaint can be defined as a manifestation of the will of the injured person embodied in a revocable procedural act requiring criminal liability of the person who committed an offense against him/her for whom the commissioning of criminal action can only be achieved in this way.

Previous complaint, as a notification, is unlike any other ordinary acts referral[5] of the prosecution (denunciation, complaint,ex officio notification) its character necessary and indispensable as a condition for criminal proceedings, as well as through its exclusive character, previous complaint being the only way of valid notification referral[6] for criminal proceedings for certain offenses, which can not take place if there was a common complaint.

The previous complaint must be made by the injured person under the provisions of art. 157 New Criminal Code. It follows therefore that the injured person is the holder of the right to cause the initiation of criminal proceedings by introducing previous complaint.

According to the provisions of art. 158 New Criminal Code, the withdrawal of the previous complaint is , as well as the lack of previous complaint, a cause of the removal of criminal liability. Withdrawal of previous complaint is a unilateral act of will, manifested by the injured person who makes a prior complaint and then returns by withdrawing the complaint he made, and which must be real[7] and indeterminate by fraud or violence[8].

In judicial practice it is questionable which is the procedural remedy where previous complaint was withdrawn due to an error of consent, since the Criminal Procedure Code and the Criminal Code have express provisions on this.

We appreciate that in such a situation the procedural solution must be varied depending on when the withdrawal of prior complaint occurs due to an error of consent.

If viciated withdrawal of previous complaint occurs during the investigation or during the trial in first instance the injured party has the opportunity to inform the appropriate judicial authorities about this issue, promotion or filing a complaint against the solution of classification or ,respectively against promoting ordinary means of attack .

The problem which finds no firm and explicit solution is when the viciated withdrawal of prior complaint occurs before the final court as a jurisdiction degree pronouncing a final decision without the injured party being aware of the existence of the defect at the time of consent (dol) or was objectively unable to proceed otherwise due to the violence exerted on him.

We believe that by ferenda law this situation should be regulated as to provide procedural remedy in the circumstance when the withdrawal of prior complaint was determined by fraud or violence, and in the meantime a final decision was pronounced.

Withdrawal of previous complaint must be total and unconditional, namely to concern both the criminal and the civil part of the trial.

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[2] Milea T. Popovici, Prior complaint in regulating the present Code of Criminal Procedure, RRD No.9 / 1969, p.23.
[3] C.Bulai, Criminal Law, General Part, University of Bucharest, 1987, p.469.
[4] I.Neagu, Criminal Procedure Law, Special Part, vol. I, Oscar Print Publishing House, 1994, p.152.
[5] Carmen Silvia Paraschiv etc., Criminal Procedure Law, Bucharest, Lumina Lex Publishing House, 2004, p.397.
[6] I.Neagu, work cited., p.431.
[7] I.Neagu, work cited, p.153.
[8] N.Volonciu, Treaty of Criminal Procedure, Special Part, volume II, Paideia Publishing House, Bucharest, 1994, p.116.

In other words, the injured person can not renounce criminal proceedings and can not condition the withdrawal of previous complaint by granting civil damages.

As I specified, the withdrawal of the previous complaint must be made within a certain period of time which is situated between its submission and the intervention of the final decision of the court. According to the provisions of the Criminal Code, the withdrawal of the previous complaint has as a legal effect the removing of criminal liability.

Injured person's right to make a prior complaint is a personal right, indivisible and non-transferable in principle.

The exercise of this right may be made, however, by an authorized agent. In this case the mandate should be special and the procuration should be attached to the complaint.

In judicial practice it was established that lack of procedural capacity of the person lodging the prior complaint to the competent body for the injured person is not covered by a mandate given after overcoming these phases of the process, its lack causing the termination of criminal proceedings under Art. 17 Code of Criminal Procedure in relation to art. 396 para. 6 combined with art. 16 para. 1 letter e Code of Criminal Procedure.

Regarding subjects that can introduce previous complaint to the competent bodies we are to see that the legislator has provided the possibility that anyone other than its holder can file a complaint[9], respectively the legal representatives (parents, guardian or curator) when the injured person is a minor or under a disability.

According to art. 157 paragraph 4 of the Criminal Code, if the injured is a person lacking legal capacity or with limited exercise capacity, criminal proceedings are initiated ex officio. Therefore, in the case provided by art. 157 para. 4 Criminal Code functions both the principle of availability on criminal action and the principle of officialdom. In this regard, we consider that initiating criminal action is made ex officio only in the subsidiary, namely only in the event that those entitled by law have not introduced previous complaint to the competent bodies.

According to the New Criminal Code previous complaint can also be introduced or withdrawn by the legal person where he is the victim of a crime for which criminal action implementation is made only in such a way, for example, the crime of destruction provided and punished by art. 253 para. 1 and 2 of the Criminal Code.

For the legal person previous complaint will be stated and implicitly withdrawn in its name and interest through the legal representative, because as long as there are duties and responsibilities , correlatively there are rights.

A special situation can arise when the legal person, victim of a crime where the criminal proceedings shall be initiated upon previous complaint, is in dissolution or liquidation procedure when we consider that this approach will be achieved by the legal representatives of the company of insolvency . To reason logically and legally otherwise in the sense of a restrictive interpretation of the term " injured person –legal representative " would reach infringement of free access to justice, a right belonging to the legal person too and which is guaranteed by Art. 21 of the Romanian Constitution and art. 6 § 1 Thesis I of the European Convention for defending human rights and fundamental freedoms.

2.1. Comparison between the Old and the New Criminal Code

In the light of new legislation are outlined some new conditions in which withdrawal of the previous complaint removes criminal liability, marking significant differences to the concept promoted by the Criminal Code of 1969, as well as some conditions required under the previous regulation remain valid (some of which being currently established by law, others only reported in the doctrine). Conditions of withdrawal of previous complaint are: intervening in case of offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint - art. 158 para. (1) NCP [but, when the prosecution was initiated ex officio, under the law, the withdrawal of the previous complaint must be appropriated by the prosecutor - art. 158 para. (4) NCP]; being made by the rightholder [injured party / other person who has the necessary capacity -art. 158 para. (3) NPC reported to art. 289 para. (2) NCPP]; constituting an express and explicit manifestation of renounciating previous complaint lodged (special mandate, authentic documents); intervening until giving a final judgment [art. 158 para. (1) NCP].

Offences pursued in previous complaint are in the New Criminal Code largely the same from the Old Criminal Code , respectively offenses which generally concern patrimonial or or non-property rights of the person as well as some offenses against the person (193, art. 206, art. 208, Art. 218 para. 1 and 2 Art. 219 para 1 etc ..) crimes against property (Art. 238, Art. 239, Art. 240, Art. 241, etc.), offenses against family (art.378 art. 379, etc.) , thereby without being exhausted procedural valences of this institution whose extension is recommended by the Council of Europe, as a way to retributive - restitutive justice

In the introduction to these considerations we defined previous complaint as a unilateral manifestation of the will of the victim embodied in a revocable procedural act requiring criminal liability of the person who committed an offense against it for whom initiating criminal action can only be achieved in this way.

[9] I. Neagu, work cited., p.571.

As it is revocable procedural act ,the previous complaint formulation does not remove the injured person's right of having in the future the fate of the criminal proceedings. as provided by law,

The main way to revoke the previous complaint is its withdrawal. It can be said that in this area usually the rule of symmetry works, according to which previous complaint may be withdrawn in offenses for which it is required, but only in the case of these crimes. Exceptions are cases where the law also allows promoting criminal action ex officio, and judicial bodies were self-informed.

We believe that the withdrawal of the complaint can be made by authentic statement (or even certified by lawyer), which is submitted to the case file. If the declaration of withdrawal has reached the court registry on the day of trial , but by an error of officials it did not join the file, because being in the appeal, the only solution is to promote an abatement legal dispute (extraordinary means of attack) .

Therefore, we can define previous complaint withdrawal as a unilateral manifestation of will, express, explicit, total , irrevocable and unconditional of the injured person embodied in a procedural act which in relation to criminal offenses for which initiation of criminal action is made to previous complaint requesting the removal of criminal liability on the person who committed such acts ,in any stage of the criminal process, but before the final verdict is pronounced .

Under art. 284 former Code of Criminal Procedure previous complaint had to be lodged within two months from the day the injured party knew the perpetrator, and according to art. 296 New Code of Criminal Procedure previous complaint must be lodged within three months from the day the injured party learned of the offense committed. Legislative amendment aimes at both increasing the term of formulation of previous complaint and the time when the term starts running, the new regulation "on the day injured person learned about committing the crime " being apt to induce removal of the subjective element in assessing the institution. This moment is easily determined on the basis of objective elements , outside the will of the person injured.

The former regulation leaves the possibility of runing a relatively undetermined period in which the injured party is not obliged to resort to the competent authorities to identify the perpetrator, after a long period he could say he learned who the perpetrator was and introduce previous complaint.

Unlike the time he learned who the perpetrator was, as provided by previous legislation; according to par. (3) art. 296 NCPP, if the offender is the legal representative of the injured party, the period runs from the date of appointment of a new legal representative. In long term offenses (continuous, continued, progressive) the term of three months will run from the time of consuming or the date on which the holder of the right knew about it and if the two moments do not coincide, and not from the date of its exhaustion.

Under the old rules and the new rules if the injured person is unable (without legal capacity or with limited legal capacity) previous complaint is made by her legal representatives (parent, guardian, curator), respectively, with the consent of the persons referred by civil law; In these cases, criminal proceedings may be initiated ex officio.

Specifying as a novelty in agreement with the High Court of Cassation and Justice - Criminal Division (for example: Decision no. 464/2009) the provisions of art. 157 para. (5) NCP provide that, if the injured person died (regardless of cause of death) or legal person was liquidated before the expiry of the term provided by law for the introduction of previous complaint, criminal proceedings may be instituted ex officio; the initiation of criminal proceedings ex officio may be made, in this case, both before and after the expiry term of previous complaint formulation; in this case the prosecuting authority is not bound by the term of previous complaint formulation for disposing beginning of criminal action .

We believe that the criminal proceedings shall be initiated ex officio also if, throughout the period of formulating previous complaint, the injured party was in an objective impossibility of formulating previous complaint, which is directly related to the offense, dying as a result of the offense after the expiration of the previous complaint term (for example, if the offenses are inextricably connected and consistential at a time after the commission of an offense prior to the complaint, the perpetrator tried to kill the victim, leaving her in a coma ; if the comatose state extends throughout the term of formulating preliminary complaint, the victim dying after this period, criminal proceedings may be instituted ex officio).

If the death or liquidation occur immediately after the expiration of the previous complaint formulation, and the victim was not in an objective impossibility to file a previous complaint , criminal proceedings can not be initiated ex officio.

In applying the provisions of the Criminal Code of 1968 it was stated that in case of death of the injured person in which previous complaint had to be made and it wasn't , this right is not transmitted to heirs and exercise of criminal proceedings can not be disposed ex officio[10]. Also in applying the provisions of the Criminal Code of 1968 it was stated that if the victim died after the previous complaint was lodged the criminal trial continues to be called into question heirs, but only to be a civil part[11] , the criminal proceedings being exercised ex officio[12].

[10] E. Ionăseanu, Prosecution procedure, Military Publishing House, p.122-123.
[11] Supreme Court of Justice., criminal judgment. no.3067/1995.
[12] L. C. Lascu, Prior complaint procedure. The death of the victim. Continuing Criminal, Pro Law Publishing House no. 2/1992, p. 191.

If non-transferability to heirs of the right to make previous complaint is maintained under the new Criminal Code, in the event that the injured person has died or the legal person was liquidated before the expiry of the period prescribed by law for the introduction of the complaint, the New Criminal Code provides that criminal proceedings may be instituted ex officio (157 para 5).

The aforementioned provision is not likely to clarify the exercise of criminal action in case of death of the injured party , on the contrary it can lead to further confusion.

The fact that criminal proceedings may be instituted ex officio means that there is an obligation for the Public Ministry to pursue prosecution. Justification of ex officio exercise of criminal action could be explained only by the existence of a public interest (pas d'interest, pas d'action) and not by the applications of the heirs whose interests would have been better defended by themselves, if the legislator had granted them this right.

Similarly is regulated the institution of active and passive indivisibility of criminal liability for the application of previous complaint.

Rule of active indivisibility applies where by committing the offense there are several people injured, meaning that the right to enter previous complaint belongs to any of these and the criminal liability of the offender will be drawn even if the previous complaint is made by only one injured party (Art. 157 para. 2 new Criminal Code, Art. 131 para. 3 old Criminal Code).

Rule of passive indivisibility applies where the offense was committed by several natural or legal persons (authors, instigators, accomplices), meaning that they will be held criminally liable even if the previous complaint was made only for one of the participants (Art. 157 para. 3 new Criminal Code, Art. 131 para. 4 old Criminal Code).

Under the old Penal Code withdrawal of previous complaint can only be effective if it was withdrawn on all offenders (opera in rem)

The new Criminal Code renounced this rule with reference to the principle of passive indivisibility in case of withdrawal of previous complaint; this solution being justified by the fact that the institution of reconciliation, which takes effect in personam, has been redesigned and is incidental only for crimes that criminal proceedings shall be initiated ex officio in which the law provides such a possibility of extinguishing criminal conflict and not under the assumption of offences for which criminal proceedings are initiated on the injured person's previous complaint.

Thus, according to art. 157 para. (2) The new Criminal Code, withdrawal of previous complaint removes criminal liability of the person on which the complaint was withdrawn. It is therefore possible to withdraw previous complaint only on one or some of the participants to committing the crime (produces effects in personam, not in rem), the criminal trial being to continue on suspects or defendants regarding to whom the complaint has not been withdrawn.

If the withdrawal of previous complaint occurs during prosecution, the prosecutor disposes classification, and if this occurs during the trial, the court orders the suspension of criminal proceedings.

Other changes with reference to the institution of withdrawal of previous complaint can be found in the mediation law (no. 192/2006):

Thus, according to art. 67 para. (2) of this act "in the criminal process, provisions on mediation shall apply only in cases of offenses for which, by law, the withdrawal of previous complaint or reconciliation remove criminal liability."

It is noted that the mediation agreement establishes a reconciliation between the offender and the injured party as a distinct means of mitigating the conflict between them in relation to criminal-law institutions represented by withdrawal of prior complaint, respectively of reconciliation [according to art. 16 para. (1)letter g) NCPP], without representing a new cause of removal of criminal liability.

Another procedural provision is required by art. 69 para. (2) of the same law, namely that the period prescribed by law for the introduction of previous complaint shall be suspended during the course of mediation. If the warring parties have not reached an agreement, the injured party may introduce previous complaint within the same period, which will resume its course since the date of the writing of the minutes closing the mediation procedure, also considering the time elapsed before the suspension.

In case of withdrawal of the previous complaint, the suspect or the accused may request further criminal proceedings under Art. 18 NCPP with a correspondent in the old Criminal Procedure Code Art. 13 Code of Criminal Procedure in order to be able to prove his innocence, for the purposes of acquiting, and if this is not achieved, it is preserved the benefit of withdrawal of previous complaint, respectively ceasing the proceedings.

According to both provisions the withdrawal of previous complaint removes both criminal liability and civil liability, even if it is made by the legal person through his legal or conventional representatives and it is possible as long as there is a pending criminal trial or preliminary acts are performed. After issuing a final solution the withdrawal of previous complaint can not be done any more because of the lack of prosecution.

Also unchanged are the provisions under which the injured persons lacking capacity, the withdrawal of previous complaint is made only by their legal representatives. In the case of an injured person with limited legal capacity, the withdrawal is made with the approval of persons prescribed by law; in such cases, the withdrawal of previous complaint may be void as criminal proceedings can also be instituted ex officio.

The new Criminal Code has introduced an additional condition for the offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint, but prosecution was driven instituted ex officio in accordance with the law (in cases where the injured person is: a natural person lacking capacity, an individual with limited legal capacity or a legal person represented by the perpetrator); in these cases the withdrawal of complaint produces effect only if the complaint is appropriated by the prosecutor, thus limiting the right of disposal of the injured person just to ensure a more effective protection of those persons who are in a vulnerable position; in these situations, if the injured person withdraws his complaint , but prosecutor does not appropriate this manifestation of will (for example, if there is reasonable suspicion to believe that the withdrawal of previous complaint is nullified by an error of consent), criminal proceedings will continue under the principle of officialdom. (Art. 158 para. 4 new Criminal Code).

It is noted that the provision laid down in art. 158 para. 4 new Criminal Code establishes the situation when criminal proceedings was initiated ex officio, under the law [ie, art. 158 para. (3) or art. 199 para. (2) The New Penal Code], an optional attribution of the prosecutor who can refuse to accept the withdrawal of the previous complaint and the criminal trial to continue.

A legislative inconsistency problem is noted on the crime of domestic violence. Thus, according to art. 199 para. (2) The New Criminal Code offenses referred to in art. 193 New Criminal Code (beating or other violence) and art. 196 New Criminal Code (culpable bodily accident) committed against a family member, criminal proceedings may be instituted ex officio and reconciliation removes criminal liability. This text is contrary to the provisions of art. 158 para. (4) that the New Criminal Code according to which offenses for which the initiation of criminal proceedings is subject to the introduction of a previous complaint, but prosecution was instituted ex officio in accordance with the law, the withdrawal of complaint shall take effect only if the complaint is appropriated by prosecutor. Corroborated interpretation of art. 199 para. (2) The New Penal Code and art. 158 para. (4) The New Criminal Code seems to hint that in those cases of domestic violence should be possible both the reconciliation and the withdrawal of previous complaint (if it is appropriated by the prosecutor).

However given the distinct nature of the two institutions, as well as the fact that reconciliation is stipulated by the provisions of the special part of the New Criminal Code, we believe that the only institution that can operate in such a case is that of reconciliation.

If we have detailed above the main differences and similarities between the two regulations we also appreciate that are necessary the following comments in regard to the withdrawal of prior complaint.

These specifications cover issues that are the creation of jurisprudence which shall remain valid and other legislative provisions of the old regulation unchanged by principle.

When the injured person is deaf and dumb, the withdrawal of previous complaint lodged with a statement recorded in conclusion is not valid, if it was not done through an interpreter or a filed document (Supreme Court, Criminal Division, Decision no. 1397/1992, in Problems law ... 1990-1992, p. 436).

Holder of prior complaint is the person - natural or legal - injured by the offense that requires criminal liability.

Previous complaint must meet certain requirements of substance and form, whose not meeting attracts lack or invalid complaint.

Submitting a complaint to an incompetent judicial body does not affect its validity because the incompetent body must send the petition to the organ that has by law, empowerment to address.

Although the law doesn't specifically provide this, previous complaint brought before judicial bodies should be based on fact, namely the one who submits it should rely on facts occurring in the objective world.

We believe that if the previous complaint is made in bad faith, the applicant may be held criminally liable for the offense of misleading the judicial bodies provided and punished by art. 268 new Criminal Code or slanderous denunciation provided and punished by art. 259 Old Criminal Code. With regard to this observation judicial practice and doctrine were not and are not consistent and there is also the substantiated opinion that the crime of slanderous denunciation of the Old Criminal Code with a correspondent in the new Criminal Code offense of misleading the judicial authorities does not concern crimes for which initiation of criminal action is made at prior complaint since the legal text refers only to "the notification made by denunciation or complaint" the prior complaint without being mentioned.

Filing a previous complaint by a general representative does not meet the legal requirement so that the complaint is considered non-existent. For the validity of the complaint, the mandate must be special (ad litem) and the procuration is attached to the complaint. Previous complaint may be drawn up and signed by the attorney if the injured party gave him a special mandate reflected in the content of lawyer's empowerment.

If the injured party is a person without legal capacity or who has limited legal capacity, the previous complaint is not actually necessary because the judiciary organs can notify.

Restoring the term operates if during the criminal proceedings the legal classification is changed for an offense involving the formulation of the previous complaint, when the injured party is called and asked if he wishes to lodge a criminal complaint. From the date when the judicial body announced injured party, it has a period of 3 months.

A special situation exists in the case of flagrant offenses punishable upon previous complaint of the injured party, in which case the criminal investigation body is obliged to establish its commitment even without previous complaint. After establishing flagrant crime, the criminal prosecution body calls the injured party and if he declares that he lodges a prior criminal prosecution continues. Otherwise, the criminal investigation body forwards the concluded documents and the dismissal proposal to the prosecutor.

If within the period of introducing a previous complaint, but before formulating it, there is a law that gives amnesty to the offense provided by the criminal law, the judicial shall order the enforcement of clemency act. The solution will be maintained even if later, within the period prescribed by law, the injured party lodges complaint, because it was consumed a cause that doesn't leave prosecution without a purpose. The possibility of an equality between amnesty and lack of previous complaint is excluded because, if the complaint was not filed within the prescribed term it is missing, and if submitted within the term the above solution is applied.

Contesting the attack by a parent of the withdrawal of the complaint made by the other can not take place because both parents exercise parental rights.

According to art. 25 para. (5) NCPP with a correspondent in the old regulation in art. 346 para. 4 Code of Criminal Procedure, in the case of the withdrawal of the previous complaint the criminal court leaves civil action unresolved.

2.2. Problems of comparative law

In all legal systems there is the question of knowing if when committing an offense under the criminal law, this act constitutes a crime or not, who is the author and the punishment that is to be applied to the latter in case the person is guilty of committing that crime. To solve these problems it is necessary first to conduct prosecution on that act.

As for the author of the prosecution, some authors of comparative law[13] show that four systems are possible: action emanating from the victim or his heirs (private prosecution); action emanating from all citizens, acting on behalf of the society (popular charge); action that emanates from the very judges (criminal action ex officio); Finally, action emanating from specialized officers such as magistrates from the Public Ministry (public prosecution) or the officials from certain public institutions.

Let's see, then, how these systems are reflected in the different legislations of the countries of the world.

1. Anglo - Saxon (American) Law.

The English system is quite complex, the basic text being Prosecution offences. Act 19852, which refers to the prosecution of offenses.

In principle, all citizens can express their will for criminal investigation in connection with a crime, but in fact, most often, the judiciary police bodies initiate public action .

From this point of view it was brought an attenuation consisting of a specialized service in judicial action: in 1879, was created the Director of Public Prosecution (DPP), ie Department of public and judicial action and in 1985, the CPS, meaning the Crown prosecution service, the first of these two institutions holding the lead. This service has the essential mission to continue or to terminate prosecution initiated by judicial police authorities[14].

Specifically, the Crown Prosecution Service checks the record of the police , if they decided prosecute and decide whether the evidence is sufficient to order continuation of prosecution their insufficiency resulting in the case dismissal. But if the police decided not to pursue ,if they just addressed the defendant a warning, they will not send any file to the Crown Prosecution Service and the latter will not be able to exercise prosecution.

The secondary mission of CPS (Crown proecution service) is to decide on prosecutions launched by individuals: in effect, such a criminal action may be contrary to the public interest.

In a word, CPS can only finish prosecution already started by the police or by an individual.

Finally, in principle, CPS shows which are the exceptions to the rule mentioned above. Thus, there are situations in which the criminal proceedings are not initiated ex officio or on prior complaint of the victim, but require notification or authorization of public institutions. So things are with taxes, customs (for illegal importing of drugs). Health services are competent in terms of fraud benefit offenses in these areas.

Following the investigation, the findings thus made and cumulated in a report made by the criminal investigation bodies, can allow launching of criminal trial.

The American system is very different from the English one and much easier. Originary from the USA, it is separated from the traditional English which is still founded on the idea of ex officio prosecution and previous complaint of the injured person. Also in the USA there is a public service, a veritable Public Ministry possessing monopoly of prosecution: prosecutors of the United States for federal offenses, regional prosecutors and municipal prosecutors for state offenses.

2. German law.

The German law covers, with some differences, the same stages as the Roman criminal proceedings: a preliminary phase of criminal action, followed by the

[13] Jean Pradel, taken by Pierre Legrand- Comparative Law, Lumina Lex Publishing House, Bucharest, 2001.
[14] CPS can also give advice to the police;

trial phase and ends with the execution of criminal decision.

Prosecution may begin at a notification ex officio, by complaint or by denunciation.

Like the Roman law system for certain offenses such as mild violence, the victim has a specific action: he can act with the same title as the Public Ministry, which is an injury to the monopoly of the latter.

This specific action is the previous complaint, regulated in Book V (art. 374-406h)[15] of German Code of Criminal Procedure, dedicated to the injured person's participation in court.

Previous complaint (Privatklage art. 374-94 Criminal Procedure Code. German) may be exercised for the following offenses: breaking into residence, violating the secrecy of correspondence, personal injury, threat, giving or taking bribes in commercial circuit, destruction and crimes related to intellectual property (Art. 374 para. 1 Criminal Procedure Code. German).

Besides the injured person, holders of previous complaint may be all the people who may lodge a criminal complaint: the family, the legal representative in case of incapacity in civil and superior procedural sense.

If more people were injured by an offense that can lead them to previous complaint, they can act independently of each other. However, if one of the persons injured formulated previous complaint, the others are forced to join the process started, without having to exercise a previous complaint by each. In any case, the effects of a decision favorable for the accused are also opposable to the injured persons who have not participated in the proceedings (art. 375 German Criminal Procedure Code.).

Contents of the previous complaint is the same as the criminal complaint. Preliminary complaint holder is obliged to pay a bail under civil procedural law (art. 379 German Criminal Procedure Code). Making a complaint is not subject to any term.

In relation to the proceedings, previous complaint is not exclusive, so if public interests require, the prosecutor may pursue criminal action. Also, the criminal complaint is not a subsidiary of criminal action (Art. 376-377 German Criminal Procedure Code).

Judgment presents some particularities. Before the judgment itself, it is mandatory for some deeds[16] to attempt to reconcile the parties by an appointed mediator (Suhneversuch: art. 380). If the parties are not reconciled, the injured person formulates, in writing or orally before the court a previous complaint, accompanied by evidence showing that preliminary procedure of reconciliation was achieved.

If the complaint meets the legal requirements, the court orders its communication by the accused, who is required to formulate explanations within a given term(art. 382 German Criminal Procedure Code).

The court decides on the opening of the trial, by a conclusion. If the degree of guilt of the perpetrator is low, the court shall order the termination of the trial (art. 383 German Criminal Procedure Code).

Notification act (concluding opening of judgment) is read by the judge (art. 384 German Criminal Procedure Code). The holder of prior complaint can not study the documents in the file other than through a counsel. Otherwise, the law gives the injured person a procedural position equivalent to the prosecutor's (art. 385 German Criminal Procedure Code). Also, this procedure can not be ordered safety or educational measures.

By the time of closing the judicial investigation, the accused in turn may make complaint against the injured person, who will be judged together with the original complaint[17].

Previous complaint may be withdrawn after hearing the accused only with his consent (art. 391 German Criminal Procedure Code). In any case, once withdrawn ,previous complaint can not be reformulated. In case of death of the victim, it can be continued (art. 392 German Criminal Procedure Code).

Along with the prosecutor, in the court may participate in some cases the injured person, to protect its interests or for the supervision of the prosecutor's activity. The way the injured person can participate is called Nebenklage (complaint below)[18].

This complaint may be exercised, in addition to cases in which previous complaint may be formulated , and attempted murder victim or the person who had recovery of judjement in the complaint against the solution to end the prosecution (art. 395 par. 2 pt. 2 and 5 German Criminal Procedure Code).

Its procedural position is different from that of the holder of previous complaint by the following features: it can be represented or heard as a witness (art. 397 German Criminal Procedure Code) and may exercise remedies independently from the prosecutor (art. 401) German Criminal Procedure Code), and during the prosecution may file a complaint against the solution of not suing at law (art. 400 German Criminal Procedure Code).

Intention of participation can be expressed at any time[19] during the trial through an application before the court or the prosecutor, in writing or orally. The application runs without effect on initiating criminal action. Upon request the court will decide, after

[15] Book V - Participation injured person judgment, is divided as follows: Section I. - prior complaint; Section II - Complaint accessory; Section III. - Compensation for the injured person; Section IV. - Other rights of the injured person.

[16] Breaking and entering, violating the secrecy of correspondence, personal injury, threat and destruction.

[17] Withdrawal initial complaint by the holder thereof has no effect on the complaint made by the accused (Art. 388 para. 4).

[18] Settlement is to be found in art. 395-402.

[19] The holder of the complaint will state the procedure is (art. 392);

hearing the prosecutor and the accused (art. 396 German Criminal Procedure Code).

In case of death of the holder of the complaint, it remains without effect. (Art. 402 German Criminal Procedure Code).

Repair of damage caused to the injured person by offence is in kind or by worth. To this end, the injured person or his heirs make a request before the court by closing of criminal investigation. The application may be withdrawn until the judgment is pronounced(art. 403 and art. 404 German Criminal Procedure Code).

The court will resolve the application for compensation in the following ways: either not to pay compensation if the application is inadmissible or leads to the extension of the trial of the criminal case; this solution can be imposed at any time during the process (art. 405 of the German Criminal Procedure Code Thesis II.); either to grant the application in whole or in part (art. 406 German Criminal Procedure Code) or not to pay damages when the defendant has not committed the act or the application is unfounded (art. 405 Thesis I German Criminal Procedure Code.); These solutions can be pronounced after the debates. In this case, the court may approve the temporary execution, possibly giving a bail.

If the application is not accepted, the injured person can resort to civil action in court.

Against the decision on the application for compensation only the accused can resort to appeal (art. 406A and art. 406c Criminal Procedure Code. German).

Compelled execution follows according to the provisions of civil proceedings (Art. 406h Criminal Procedure Code. German).

Other rights granted to the injured person are provided in art. 406d-h German Criminal Procedure Code).

Thus the injured person is entitled, on request, to be communicated the development of the trial after the decision becomes irrevocable (art. 406d German Criminal Procedure Code).

It also has the right to study, through counsel, the documents in the file, if there are no conflicting interests of the accused with other persons (art. 406e German Criminal Procedure Code.) and the right to be assisted by a defender (art. 406f German German Criminal Procedure Code). The holder of the attached complaint also benefits from this right (art. 406g Criminal Procedure Code).

A right of the heirs is acknowledged by the German Criminal Code Article 77 para. 2 which states that "If the injured person dies, the right to bring a complaint in cases provided by law, passes to the husband / wife and children. If the injured party had no husband / wife, or children, or they die before the deadline for submission of the complaint, the complaint goes right input on parents; and in case they die before the deadline for submission of the complaint, the right of introducing complaint passes to brothers / sisters or grandchildren of son / daughter. If a family member participates in the offense or his relationship with the injured party relationship ceases, he is excluded from taking over the right to lodge a complaint. This right may not be taken by anyone, whether prosecution is contrary to the desire of an injured person".

3. Latin law.

In the Spanish system, criminal action can of course be initiated by the Public Ministry. But what is original, is that all individuals can set initiate it equally. Under Article 101 LECRIM (Royal Decree for approving the Code of Criminal Procedure) criminal proceedings are public. All Spanish citizens will be able to exercise it in accordance with the provisions of law; Article 102 LECRIM excludes the incapables, those who have already been convicted twice for false allegations and judges. Article 101 is reinforced by Article 270 of the same Code, according to which "all Spanish citizens, who were victims of a crime or not, may lodge a complain exerting public action referred to in Article 101 LECRIM".

Also, foreigners may file a complaint for offenses relating to their person or their loved ones.

This general consecration of public action has besides foreigners, a constitutional basis because, under Article 25 of the Constitution, "citizens will be able to exercise public action".

In some cases however, there is a private prosecution system. Thus, in the case of offenses punishable only upon previous complaint of the victim,only it can act (art. 104 par. 2 LECRIM). But the importance of this system is reduced, because this rule applies only to a limited number of offenses which show a lower degree of social danger (such as insult and libel offenses against individuals); finally, through the obligation of the victim to attempt a reconciliation before submitting the complaint (Art. 278 LECRIM).

The Italian system is relatively distant from that of Spain. For ordinary crimes only Public Ministry may act. For minor offenses which are also called private offenses, prosecution can take place only upon previous complaint of the victim (eg for violence that do not cause distress, inability for more than 20 days).

In the Portuguese system, can act both the Public Ministry and the injured person. In Portuguese law, the concept of victim is original: it includes ,on the one hand, the injured person who has suffered damage and who holds civil action (art. 74 Portuguese Criminal Procedure Code), on the other hand, a character who can quote, call offend, insult and who holds the rights protected by law and violated by the offense and that can be an injured party (art. 68 par. 3 Portuguese Criminal Procedure Code). Those harmed may constitute an injured party, but only in the case of crimes traceable at the previous complaint. For these offenses, the victim may initiate prosecution. For other offenses, they are confined for the Public Ministry. Compulsorily, the injured party must be represented by a lawyer and may also require legal assistance.

In the French system, the rule is that the criminal proceedings are initiated ex officio. This can be triggered indirectly by the person injured, but the exercise of this action is essentially entrusted to the Public Ministry, which plays the role of a party in criminal proceedings. He is not an investigating judge (though, in training, he may have a more important role than the defendant or civil part).

But there are a number of offenses that pose a low degree of social danger (eg., In case of insult or defamation art. 48 of Law 29/1881, injury to privacy Art. 226-6 new French Penal Code) in which the criminal proceedings are initiated upon prior complaint of the victim. Lack of this previous complaint constitute a cause for removal of criminal responsibility and also an obstacle in the trial.

Unlike German law, as long as the complaint was not filed, the Public Ministry can not proceed with the investigation. But this preliminary complaint is not a sufficient condition, because even in its presence, the Public Ministry is not required to initiate criminal action (unless the complaint is accompanied by the application of constituting as civil party)[20].

We also mention that in all cases where prior complaint is a prerequisite of prosecution its withdrawal is a cause of extinction of criminal action.

Apart from these cases that remove criminal liability (lack and withdrawal of prior complaint), criminal action can be also extinguished by the repeal of the criminal law (the new law being far more , indulgent is applied immediately), through the death of the defendant (eg police, criminal action is extinguished only regarding the offender, not in terms of the co-authors and accomplices) by amnesty by res judicata and the prescription of criminal liability.

Like the Romanian legal system, French legislation regulates the special procedure for the settlement of flagrant crimes, in which case it is no longer required a previous complaint of the victim, the criminal investigation bodies only find their perpetration.

As for flagrant offenses in the French legal system, they can have two types of consequences: they cause to rise among people evidence of committing crimes , desire for revenge, and limit the risk of error for justice. These consequences imprint their mark on the procedure for the resolution of cases of flagrant offenses.

Criminal investigation bodies, which have previously notified the prosecutor in charge of the supervision of prosecution, start investigation . Prosecution authorities may prohibit any person to be removed from the scene until the end of operations (to verify their identity). They also can perform certain acts, namely: searching and seizing, especially in the presence of the suspect. For urgent findings, criminal investigation bodies may resort to any qualified person (usually an expert in the field of medicine)., may proceed with the examination of witnesses, may decide on the measure of preventive arrest of the accused.

Apart from detention on suspicion, police can detain the flagrant offender and lead him to the prosecutor. In these cases of flagrant offense, any person can catch the offender and lead him to the nearest headquarters of the criminal prosecution. The prosecutor himself may carry out criminal prosecution and order law enforcement agencies to continue the investigations (as often happens). He has broader responsibilities than criminal investigation bodies.

Thus, in case of a flagrant offense, if the court has not yet been notified, the prosecutor may issue a summons and interrogate the person brought before him. If this person is naturally presented in front of him as a defender , he can be heard only in his presence.

In case of flagrant offense (punishable with imprisonment), if the court was the prosecutor, if he considers that a piece of information is not needed , he may resort to immediate appearance in court.

Also, the court may carry out acts of criminal investigation so that prosecution authorities should require them to continue investigation); if so, the court will extend detention on suspension.

Following the investigation, the findings thus gathered and made into a report by the criminal investigation bodies, can enable initiation of criminal trial.

We note, therefore, that not only in our legal system, but also in the legislations of other states is provided the right of the injured person by an offense that shows a lower degree of social danger, to introduce a previous complaint to the prosecution authorities in order to establish the offense committed, bringing to criminal liability of the perpetrator and repairing the damage. The lack of such complaints is a cause for removal of criminal liability, the victim understanding not to manifest his will towards punishment for the offense committed , under criminal law.

The injured person's right to file the preliminary complaint, in the case of the offenses for which initiation of criminal action is subject to its introduction, and also means a guarantee of protection of fundamental rights and interests of any individual.

Moreover, in the last decade, under the influences deriving from some trends generated by the Council of Europe recommendations and theories which , starting from different bases, predict a repeated dejuridicization of criminal liability on account of promoting solutions that facilitate the reconciliation between the victim - offender, most modern laws are extending cases and situations limiting public action officialdom.

[20] Jean Larguier, taken by Victor Dan Zlatescu - Private Law comparative Oscar Print Publishing House, Bucharest, 1997, p. 104.

3. Conclusions

In conclusion, the withdrawal of the previous complaint appears as an institution that give legal expression to social-political interests regarding the initiation and the extinction of criminal trial. It is an institution that is considered an exception to the principle of formality and consists in the possibility offered by law to the injured person to decide whether or not further he should impose criminal liability of the perpetrator of a crime that is investigable on prior complaint by the competent authorities.

This exception was allowed by the legislator because, following factual and legal analysis of the situation and also the low level of social danger of certain offenses he can only decide his attitude to criminal liability.

There is an essential difference between the complaint as a way of notification by criminal prosecution bodies, which may be substituted by an ex officio notification or denunciation, and previous complaint, which is the only document required by law for some crimes, without the one who has committed such crimes will not be held responsible and which is, at the same time, a condition of punishability and procedurability.

As a proposal for improvement of the previous complaint procedure, regarding the term of filing previous complaint it should be noted above all the legal nature of this term .

At first glance, as otherwise considered in the specialized literature, it is a decline term.

Thus, if the injured person has not brought the previous complaint within the period provided by law and can not plead interruption of this procedural term, by claiming circumstances beyond his will, which prevented to introduce it , then he can not promote previous complaint and obtain criminal liability of the offender.

If we consider the effects of non-introduction of previous complaint within the period provided by law, we conclude that the time limit for the previous complaint is actually a special term prescription of criminal liability to be subject to the rules of this institution and not only a decline term . Also,we do not see what effect would have the exercise of criminal action ex officio in the case of a liquidated legal person. Who would benefit from such an action?

If all authors of codes were inspired by many European codes (French, German, Italian, Spanish, etc.),they could have chosen a better solution than the one found in the provisions of paragraph 5 157, which refers only to the situation in which the injured party died or the legal person was liquidated before the expiry of the period prescribed by law for the introduction of the complaint, but does not refer to a situation where the injured person has died or the legal person was liquidated during the criminal trial . Does anyone else have the possibility of withdrawing the prior complaint?

As we appreciate in the introduction to this material previous complaint if the legal person is in liquidation proceedings will be formulated and implicitly withdraw from the legal representative of the firm's insolvency, but in this way it does not answer the question above, namely what happens if the legal person was removed from the Trade Register?

Can criminal action ex officio still be exercised automatically in this situation? An affirmative answer would mean an interpretation of the law by analogy, but analogy in mala partem (the solution being obviously against the defendant) is not allowed

What solution will the prosecutor dispose during prosecution or the court during the trial?

For all these reasons we believe that the text of article 157 paragraph should be reworded in an unequivocal sense either assigning heirs exercise of criminal action in view of their economic interests, or providing that criminal proceedings shall be extinguished upon the death or deletion of the injured person (natural or legal person).

The new Criminal Code differs from the Criminal Code of 1968 and the solution proposed by the 2004 Criminal Code not only by regulating in a separate article of withdrawal of previous complaint but also through the effects that this manifestation of the will of the injured person has.

It was desirable, in the code authors's view , to renounce the parallelism between the causes of removing criminal liability determined today by the existence of the withdrawal of previous complaint, that is the reconciliation of the parties, opting for one of the two, respectively by the institution of withdrawal of the complaint, but the final version was also reintroduced reconciliation, but with different effects from those acknowledged by the old Criminal Code.

We consider that this new regulation managed to upset a legal institution well stabilized in legal practice, with certain restorative values, equally banning the right of the injured party, without any justification of criminal policy, invoking an alleged parallelism , inexisting otherwise, between the withdrawal of previous complaint and reconciliation between the parties, so that finally it should maintain both, distorting their effects.

There is no justification, neither logical, nor of criminal policy, so that the withdrawal of the previous complaint, which is a manifestation of will against the complaint (contrarius actus) should have symmetrical effects, under the symmetry principle of legal documents.

Moreover, we consider that it is inconceivable that the withdrawal of the previous complaint can be carried out prior to a final judgment (Art. 158 para. 1 new Criminal Code), and the reconciliation of the parties can be accomplished only by the reading of notification act(Art. 159 para. 3 new Criminal Code). The law ferenda is necessary, correlating the two institutions and in this respect, or rather the modification of the procedural time of the possibility

of operating reconciliation between the parties so as to provide that this can be achieved until the decision remains final.

Finally, what we have expounded will certainly not clarify controversial issues arising from the withdrawal of the previous complaint being merely an attempt to address this institution, but we believe that it can help the legal practitioners in some way to clarifying novel situations encountered, which will certainly not be few , determined by the new criminal legislation .

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LEGAL FRAMEWORK OF EDUCATIONAL MEASURES INVOLVING NON-DEPRIVATION OF LIBERTY IN ROMANIAN CRIMINAL LAW

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Abstract

In case of minors with age between 14 and 18 year old, who have committed a criminal offense and are liable from the criminal point of view, Romanian Criminal Code establishes a specific system of criminal penalties entitled educational measures.

The following study aims to analyze the educational measures involving non-custodial of liberty.

Keywords: *educational measure; minors; Romanian Criminal Code; sanctions.*

1. Introduction

Due to the physical and intellectual stage development in which they find themselves, the juvenile offenders are not able to realize the seriousness of the crimes committed, as well as their socially dangerous consequences, thereof the adjustment of a differentiated sanctioning regime imposed itself, a regime which should guarantee children rights and support.

The current criminal provisions represent a real progress resulted from a long historical legislative process and their main goal is to prevent and combat the manifestations of minors who, through their actions or lack of them affect the social values protected by the criminal law.

The justification of the scientific approach has as a reason the idea that with the entry into force of the new Criminal Code on February 1, 2014, the provisions that regulated the juvenile criminal liability regime has undergone many changes which may raise serious difficulties in judicial practice.

Therefore, we consider that the present interest of the topic is obvious since the aim of the paper is the examination in a manner as detailed as the new criminal provisions in relation to the comparative criminal law.

2. General Considerations

With the in force entry of the current Penal Code, the Romanian legislature has given up the mixed enforcement regime which consisted of punishment and educational measures provided by the old penal settlement, in favor of a sanctioning regime exclusively consisting of educational measures.

Unlike penalties, educational measures are punitive sanctions which apply only to minor offenders which have the ability to lead to their education and rehabilitation.

Besides this, educational measures are characterized by the fact that their application cannot attract disqualification, prohibition or incapacity which could affect the minor reintegration into society.

In order to sanction juvenile offenders, it is necessary to know whether, at the moment of the criminal offense completion or depletion, these ones had or not criminal capacity. Thus, the minor:

a) Under 14 years old benefits from presumption *iuris et de iure* as he presumably has no judgment capacity and therefore cannot be committed to criminal liability;

b) Aged 14 to 16 benefits from relative presumption of lack of criminal capacity , which means that he can be held criminally liable only if, based on a forensic psychiatric expert valuation, it has been proved that he was responsible for his actions;

c) Who is 16, can be held criminally responsible.

Consequently, it can be argued with full justification that, in order to hold a juvenile offender criminally responsible and implicitly, in order to apply an educational measure, it is necessary to meet the criteria regarding age and discernment. Therefore, the minor under 14, even if he has discernment, is not criminally responsible, those aged between 14 to 16 must meet the condition referring to the existence of discernment, and those who are already 16 are criminally responsible.

In addition to this, the minors who are not criminal responsible, benefit from the provisions of the art. 27 of the Penal Code, which settles minority as the cause of non- imputation.

From the perspective of criminal law, discernment has no legal definition but it appears to be the minor's capacity to realize the dangerous social character of his actions and to consciously manifest his will as referred to a real fact.[1]

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[1] George Antoniu et. al., *Preliminary explanations of the New Penal Code*, (Ed. Universul Juridic, Bucharest, 2011), 332.

Art. 114. Para (1) of the Penal Code establishes the rule that non-custodial educational measures apply to minor offenders aged between 14 to 18.

The field of action of the above foresights is limited by the provisions of par (2) which adjusts the situations when custodial educational measures can be taken, namely:

a) If he has committed a crime for which an educational measure has been applied, this one being executed or whose execution began before the offense for which he is judged;

b) When the punishment provided for the offense is imprisonment for 7 years or more or life imprisonment

With regard to point a), we consider that the purpose of the provisions is to punish persistent juvenile offenders in criminal activity or those to whom the custodial or non- custodial educational measures had no effect.

Consequently, if a minor commits two or more crimes before a judgment of conviction for any of them, and, if the penalty prescribed by law does not exceed 7 years, the court is bound to apply a non-custodial educational measure.

For hypothesis from b), we would like to emphasize that through the punishment prescribed by law we mean special maximum established by the legislature which indicts the act committed in consumed form, without taking into account the causes of reduction or increase of penalty.

The doctrine[2] includes some opinions which claim that in the case of an attempt committed by a minor, in order to take a custodial educational measure, we must take into account the punishment resulted from reducing to half the punishment of the consumed crime.

We assert that the attempt, as well as the mitigating or aggravating circumstances are causes of the reduction or increase of the punishment and, as a result,, according to art. 187 of the Penal Code, they don't produce effects on the special maximum foreseen by the norm of criminalizing an offense.

However, the above mentioned causes are taken into consideration in order to identify a proper educational measure and have no effect on the limits prescribed law for every educational measure in part[3].

On the contrary[4], some authors argue that in the case of mitigating or aggravating circumstances, the limits of the educational measures modify, more precisely, they are reduced by one third or, the duration of the measures established by the court can be increased up to the special maximum.

We have some reservations on this opinion because in the case of mitigating circumstances, according to art. 76 of the Penal Code, their effect is produced on the limits of the punishment and, in the case of aggravating circumstances, art. 78 of the Penal Code establishes the possibility of applying the special maximum provided and, if this is insufficient, a bonus of up to 2 years can be applied.

Therefore, we affirm that, in the case of mitigating or aggravating circumstances, a reduction or an increase of the duration of the educational measures will be operated, within the limits established by the legislature.

Thus, for example, if the court establishes the educational measure consisting of daily assistance for a period of three months and finds the incidence of mitigating circumstances, the extension of the measure will consist of 3 months instead of 1. However, in the case of the given example, if the court finds only the existence of aggravating circumstances, we appreciate that the measure of assistance can be imposed to the minor for its maximum period prescribed by law, more precisely, for 6 months.

We also want to emphasize the fact that, if the juvenile offender is in any of the cases provided for in subparagraph a) and b) of paragraph (1) of art. 114 of the penal Code, the court may establish a non-custodial educational measure to the detriment of a custodial measure if it considers that the former one has the ability to lead to the education and social reintegration of the minor.

The provisions of article 115 of the Penal Code include the two types of educational measures which can be applied to infantile offenders who commit offenses, including the non-custodial ones (civic training, supervision, recording on week-ends and daily assistance) as well as the custodial measures (hospitalization in an educational center, internment in a detention center).

Non–custodial educational measures can be considered as genuine community measures, as they meet all three requirements set by the European definition provided by The Glossary Recommendation R 16/1992 of the European Commission, namely: the sentence must be served in society, it can be associated with a judicial control consisting of the obligations under art.121 paragraph (1) of the Penal Code and it is under the supervision and coordination of the Probation Service[5].

To choose one of the educational measures, the court, in compliance with Art. 114 of the Penal Code, will consider art.74 of the Penal Code under which the establishment and duration of a sanction is commensurate with the gravity of the crime committed and the offender's dangerousness which is to be assessed on the following criteria:

- The circumstances and the way in which the crime was committed and the means used;
- The state of peril created for the protected value;
- The nature and severity of the result produced or

[2] Petre Dungan *The regime of criminal liability of minors in the new Criminal Code* ,("Journal of Criminal Law" nr. 4, Bucharest, 2011) , 55.
[3] To the same effect Mihail Udroiu, *Criminal Law records:general part*, (Ed. Universul Juridic, Bucharest, 2014) , 213.
[4] George Antoniu et. al., 359.
[5] Teodor Dascăl, *Romanian minority in Criminal Law*, (Ed. C.H. Beck, Bucharest, 2011), 301.

other consequences of the offense;

- The reason of the offense as well as the purpose;
- The nature and frequency of offenses that constitute criminal history of the offender;
- The conduct after committing the crime and during the criminal trial;

The Level of education, age, health, family and social situation. Besides, in accordance with Article 116 of the Penal Code, with a view to assess the minor , according to the criteria laid down in art.74, the court will ask the probation service to compile a report which will include reasons of the proposals regarding the nature and the duration of the social inclusion programs that minors should follow, as well as other obligations that may be imposed on him by the court.

The assessment report is designed to provide to the judicial body data on the minor from the psycho-behavioral perspective and may contain reasoned proposals on the educational measures which may be ordered.

3. The non-custodial educational measures regime

The place of the material regarding the non-custodial educational measures is represented by chapter II of Title IV of the Criminal Code, governing them in ascending order in relation to their gravity.

3.1. The civic training stage

The civic training stage, taken from French Criminal Law, has no counterpart in the previous Criminal Code and may be considered as being a measure whose purpose is to remove some small gaps in educating juvenile offenders.

The causes of behavioral deviance are the most varied, starting from disorganized family environment and ending with dubious social relationships with other people who have committed crimes.

By civic training we understand a complementary process of the education of the juvenile delinquent which passed on his intellectual and volitional plan, by transmitting information and preparing civic projects in order to gain amplified ability to identify his position as a member of the society.

The provisions of Art. 117 of the Penal Code establish that, by applying the measure of civic training stage, the minor is required to participate in a program with a program of 4 months at the most, in order to help him realize the social consequences to which he exposes in the case of committing a criminal offense and to make him responsible regarding his behavior in the future.

We believe that the court may apply the measure under consideration, only for crimes whose immediate consequence is to produce a result or create a state of danger which affects in a minimal way the legal object.

In this regard[6], judicial practice considered sufficient to impose the measure of civic training on a maximum period for the juvenile defendant who committed two offenses of battery or other violence that caused injuries which required medical care for up to 20 days. Also, in another case[7], the measure provided for in art. 117 of the Penal Code was applied for a period of one month for a criminal offense of theft.

The legislator has provided only the upper limit of the educational measure, namely, 4 months at the most leaving to the courts the freedom to assess the minimum period of application according to each situation.

The doctrine[8] stated that, although the law doesn't provide a minimum of the training civic stage, this one may not be less than 15 days since, otherwise, it would violate the provisions referring to minimum penalties.

We appreciate as unfounded the opinion above as the lower threshold of 15 days is specific only to imprisonment, according to art. 60 of the Penal Code, and it cannot be extended to the educational measure of the civil training stage as it would be an *malam partem* analogy.

Therefore, we hold that the court may hypothetically order the measure even for one day if, after reviewing the assessment report, it believes that this will produce significant positive changes in the behavior of the minor.

The organization, the ensuring of the participation and the supervision of the juvenile delinquent during the civic training stage are made under the supervision of the probation service without affecting the minor's school or vocational program. During the internship set by the court a number of 8 hours per month of civic training are to be taken into consideration.

We manifest some reservations regarding the effectiveness of the measure foreseen by article 117 of the Penal Code, as we consider that 8 hours of training per month may prove insufficient to change into better a juvenile delinquent behavior that tends to oscillate between conformism and deviant manifestations.

We consider as being fully justified the legislature option to protect the educational and professional curricula which are ongoing because their role is to develop skills and competences which promote the education and rehabilitation of the infant offender and implicitly this leads to his reintegration into the community.

Within 60 days at the most after the execution of the judgment, the minor must be included in a civic

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[6] Maramureş Law Court, Criminal decision 26/ 2014 - http://portal.just.ro/100/SitePages/Dosar.aspx?id_dosar=31900000000007550&id_inst=100 .

[7] Moineşti Courtroom, Judgment in criminal case 84/2014 - http://portal.just.ro/260/Lists/Jurisprudenta/DispForm.aspx?ID=864.

[8] Costel Niculeanu, *The legal regime of non-custodial educational measuresin the light of the Criminal Code*, (Journal „The law" no. 8/2012), 110.

training stage, the probation officer or, where applicable, the designated person from the institution in the community having the obligation to organize, ensure the participation as well as the supervision of the beneficiary during the civic training stage.

The educational measure of civic education is systematized in the form of continuous or periodic sessions and materializes into programs which contain elements of moral, civic and legal education as well as into community service projects.

Its content must be adapted on a case by case basis for each juvenile offender according to its specific peculiarities depending on the age and their degree of intellectual and affective development as well as in relation to the offense committed.

The synapses of the civic training educational measure created at the community level by interlocking the program adapted to the minor's needs and the criminal act committed, come to help the individual and allow a better rehabilitation by creating a network of support which acts on the assumption that the foundation of change of the juvenile delinquent involves a corrective action consisting of several plans such as: the beneficiary's internal moral principles, his relationship with the society, and his involvement in support programs.

Along with other authors[9], we consider as unfortunate the legislature failure to establish the fact that the probation officer has the responsibility to assess the juvenile convict during and at the end of the educational activities in order to analyze the functionality of the educational programs and to optimize the results.

The preamble of the new Penal Code states that the adjustment of the measure provided by Article 117 of the Penal Code is inspired by the Ordinance no. 45-174 of 2 February 1945 on juvenile delinquency[10] in French law.

According to the above mentioned law, the criminally liable minors are subject to a mixed sanction regime consisting of educational measures, educational sanctions and punishments.

Unlike the Romanian Penal Code which states that the civic training course is an educational measure, the French provisions settles the civic training course as being an educational penalty.

Educational penalties[11] are an intermediate category between punishment and educational measures and are considered as tools to combat juvenile delinquency which distinguishes itself by educational and coercive character. Thus, they become incidents if the court, at the time of deliberation, considers that an educational measure is insufficient to the minor's correction, whereas imposing a penalty would be too severe a sanction.

According to art. 15-1 of the Ordinance, to a minor aged between 10 to 18, the court may, by reasoned decision, apply the civic training stage as a single sanction or with other educational sanctions, with a view to reintegrate him into society.

By art. 1 of Decree no. 2004-31 of January 2004[12], the civic training stage is defined as the training activity which helps the juvenile offenders become aware of both criminal and civil liability effects and their duties towards the society.

The duration of the civic education course cannot exceed one month and both the Juvenile Court or The Juvenile Assize Court must take into account the academic obligations of the minor and the social situation of his family.

Also, the French legislature establishes that judicial protection services of the young organizes continual or periodic internship sessions of collective work of no more than 6 hours per day, consisting of training modules that are tailored according to the age and personality of the juvenile delinquent.

Thus, for example, the court may impose to the minor offender to attend civic training courses for a period of 30 days, and the youth protection services can create a program of work of 6 hours per day, unless this affects his academic obligations or the social situation of his family.

Therefore, we hold that the social impact of the civic training courses on deviant behavior of the juvenile delinquents, provided by the French Law, may produce visible results in terms its intellectual and moral plan.

The service of judicial protection of the youth is under an obligation to inform the minor and his parents or, where applicable, the tutor or the head of the institution having the custody of the minor, about the objectives of the civic training course before its enforcement.

Also, they are reminded that, in case of non-compliance to the enforcement conditions, the juvenile delinquent may be applied the educational measure required by art 15 of the Ordinance, i.e. the placement into an empowered institution of education and professional training, be it public or private.

We consider that the provisions relating to the civic training stage of the French Law provides sufficient similarities with the Romanian Law, but they are better structured and have a higher ability to remove any impulses of juvenile criminal behavior.

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[9] Vasile Dobrinoiu et al., *The new Criminal Law –annotated*, (Ed. Universul Juridic, Bucharest, 2012), 668.

[10] http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=522FDC5B1C9D8B598B9C8692B15DE00F.tpdjo13v_2?cidTexte=JORFTEXT000000517521&dateTexte=20110811 .

[11] The educational sanctions were introduced in Ordinance no.45-174 of 2 February 1945 - article 13, no. 2002 -1138 , Law of September 9, 2002 - http://www.legifrance.gouv.fr/eli/loi/2002/9/9/2002-1138/jo/texte .

[12] Decree no. 2004-31 of 5 January 2004 on the application of the Ordinance art 15-1 . 45-174 of 2 February 1945 on educational sanction of civic training stage http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000431473&dateTexte= .

3.2. Supervision

Supervision represents a new measure introduced by The Romanian criminal law with an educational – preventive effect which can be taken against juveniles who have committed criminal acts with a view to improve their behavior and inclusion in society.

Although at first glance, the supervision measure has as a correspondent in the previous Penal Code the educational measure of supervised freedom, provided by art. 103, the two regulations have some fundamental differences. Thus, for example, the new provisions establish that the duration of the measure is shorter, the obligations which may be imposed to the minor are different and the responsibility to coordinate the educational measure lies with the Probation Service.

According to art 118 of the Penal Code, the surveillance activity results in a control and guidance activity of the juvenile delinquent in his daily program lasting between two and six months.

The control and guidance of the infantile offender in the execution of the educational measure is fulfilled by the parents, tutor[13] or the one who adopted him, and if these ones cannot provide satisfactory supervision the court will order the child custody to be taken by a trustworthy person, preferably a close relative[14].

It is noteworthy that by the above provisions, the legislature has complied with the Council of Europe Recommendation no. 2008/11[15] which requires the involvement of parents and legal guardians in the enforcement of sanctions and measures imposed, except the case in which this is not in the minor's advantage.

According to art. 79 of law no. 252/2013[16] the person who is responsible with the minor's supervision is required to submit to the probation officer a plan of the daily program of the juvenile offender for approval or revision where appropriate.

The achievement of acceptable conditions of insuring supervision can be verified by the court upon the receiving of the assessment report of the juvenile delinquent as this one must contain data on family and social environment of the child.

Thus, if the probation officer's assessment report emphasizes that the family environment is disorganized or discovers that there is lack of parental authority, we consider that the court may not grant the supervision of parents or guardian of the juvenile delinquent.

Besides, if the minor at the time of committing the offense which led to taking the measure provided by Article 118 of the Penal Code was or should have been under the supervision of the parents, of the tutor or the adopter, we consider that the court should dispose that the supervision of the infant offender be made by another trustworthy person.

If the above mentioned persons say they cannot provide the supervision of the minor, although the court finds that the conditions are satisfactory, we believe that they will dispose to have the minor supervised by another person.

During the execution of the educational measure of supervision, the probation officer has control on the supervising process both on the minor's performance measure as well as on the performance of duties of the person exercising supervision.

By taking non – custodial supervising educational measures, the aim is to ensure participation of the juvenile delinquent at school or vocational training courses and to prevent carrying out activities or getting in touch with certain individuals that might affect the correction procedure.

We consider that the effective supervision of the minor can be extended to various professional activities carried out routinely, with or without remuneration. In these circumstances, I propose *de lege ferenda* to reformulate and extend the provisions of article 118 of The Penal Code in the following way. "The educational measure of supervision consists in controlling and guiding the minor during his daily program for a period between 2 to 6 months, under the supervision of the probation officer, to ensure participation in school courses, training or *professional activities* and preventing the carrying out of activities or the contact with certain persons that could affect the correction process."

If the juvenile offender is not enrolled in school or training activities we consider that the court must impose him to follow one of these activities under article 121 paragraph (1) letter a). The probation officer, based on the assessment report and after consulting the minor will decide the course to be followed and the institution in which it is to take place.

Also, we argue that for the effective prevention of conduct of illicit activities by the juvenile and to prevent its contact with persons that could affect its correction procedure, it is necessary during the execution of the educational measure, that the court may order enforcement of obligations provided by Article 121 paragraph (1) b) –d).

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[13] According to article 110 of The Civil Law „Guardianship of minors is set when both parents are, where appropriate, deceased, unknown or deprived of the exercise of parental rights, or criminal penalty of nanning parental rights was imposed, placed under judicial interdiction, legally declared dead or missing and if at the end of the adoption the court decides that it is in the minor's interest to be provided with guardianship."

[14] Art. 67 para. (2) of Law no. 253/2013 on the execution of sentences, educational measures and other non-custodial measures ordered by the court in criminal proceedings published in the Gazette no. 513 of August14, 2013.

[15] http://anp.gov.ro/documents/12412/136658/REC%282008%2911.pdf/e2bc76f6-9e39-4ffa-85ff-3178c61f8217.

[16] Law no. 252/2013 on the organization and operation of probation, published in the official Gazette, Part 1, no.512 of 14 August 2013.

Unlike the civic training course, the educational measure of supervision may be imposed if the crime severity increases. Thus, judicial practice[17] found to be sufficient for the education of the infantile delinquent and taking into consideration the seriousness of the offense, the application of the six-month period measure covered by article 118 of the Penal Code, against juvenile defendants who committed the offence of aggravated robbery under Article 234, paragraph (1) c) " a masqued, disguised or transvestite person."

The preamble of the Criminal Code states that non-custodial educational measure governed by article 118 is inspired by the Spanish Organic[17] Law no. 5 of 12 January 2000 on the criminal liability of minors.

The Spanish legislator, unlike the Romanian one, considered necessary to regulate the criminal liability of minors in a distinct *corpus iuris* containing rules of material and procedural criminal law derogating from the common law.

In this respect, the provisions of article 19 of the Spanish[18] Penal Code emphasize that criminal liability of offenders under the age of 18 is subject to regulatory Organic Law.

Also, the scope of the instruments mentioned above can be extended to persons aged between 18 and 21 years old who committed offenses under article 69 of the Spanish Penal Code[19].

Just like the Romanian penal settlement, the system of penalties applicable to juvenile delinquents is unique, consisting of custodial and non- custodial educational measures.

To choose an educational measure, the juvenile judge will consider the personal circumstances and the maturity of the offender as well as the nature and severity of the minor's actions. In exceptional cases the court may require the execution of two educational measures.

As opposed to Romanian provisions, the Spanish Organic Law establishes that the juvenile offender is assisted throughout the criminal trial by a technical team which consists of a social worker, a psychologist and an educator.

According to Article 7, paragraph (1) of the Organic Law, by requiring the release under supervision of the juvenile delinquents, the activity of the minor offender is monitored, as well as his participation in school, training center or workplace, as appropriate, in order to help him overcome the factors that led to the offense.

However, the minor must follow the socio-educational models established by the responsible public entity or by the designated professional regarding the juvenile delinquent's development and approved by the judge. The person subject to this measure will also be obliged to report to meetings and interviews established by professionals and to respect one or more obligations imposed by the judge, namely:

a) The obligation to attend regularly the appropriate educational course, if the juvenile delinquent is in the period of compulsory schooling and prove to the judge that he meets this requirement and to explain any absence by reason;

b) The obligation to undergo cultural, educational, professional, lucrative, sex education, self education training or other.

c) Prohibition of going to certain places, businesses or performances;

d) The prohibition of leaving home without a prior legal authorization;

e) The requirement to reside in a particular place;

f) The obligation to appear in person before a judge for minors or the professional designated by him, to bring information about activities and to justify them;

g) Any other duties that the ex officio judge or at the request of The Public Ministry considers necessary for social reintegration of the condemned, respecting dignity.

The public entity, after the judgment of conviction, has to indicate immediately or within 5 days to the professional responsible for the execution of the measure covered by Article 7 paragraph (1) letter h) of the Organic Law and to inform the court about appointment made.

Unlike Romanian provisions, the Spanish ones established that during the execution of the supervised freedom measure established by the court, the juvenile delinquent is monitored by qualified personnel in order to acquire skills and capacities necessary for the personal and social development.

In this regard, the professional designated with supervision will meet the child in order to draw up an immediate plan for the implementation of the measure which will consist of:

1. An overview of the situation;

2. An analysis of the personal, family, social, educational, training or employment in order to identify the causes which determined the offense.

3. Socio-educational model established by public entity to be followed.

Besides, the professional will propose minimum frequency of interviews with the child through which monitoring and control of the supervised freedom method will be achieved.

The measure can be ordered against juvenile offenders who commit fault (faltas) for a period of 6 months. For offenses committed by juveniles, the Spanish legislature sets the duration of the method for

[17] Arad Courtroom, Criminal sentence no. 1929/2014 -http://portal.just.ro/55/SitePages/Dosar.aspx?id_dosar=5500000000164208&id_inst=55.

[18] http://noticias.juridicas.com/base_datos/Penal/lo5-2000.html.

[19] http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444 .

those aged between 14 to 16 years which will be 3 years and 6 years for those aged between 16 and 18 years old.

If the minor commits an offense for which the law prescribes imprisonment of 15 years or more, we may apply:

a) The measure of the closed regime for a period of 1 to 5 years of supervised release and measure up to 3 years if the juvenile offender is aged 14 or 15 years.

b) The measure of the closed regime for a period of 1 to 8 years of supervised release and measure up to 5 years if the offender is aged 16 or 17 years.

The juvenile judge is able to interrupt the execution of the measure, reduces its duration or replaces it with another if it considers the change is in the interest of the infant offender.

After analyzing the Spanish provisions we claim that the measure of supervised release presents a high severity degree giving a tighter control than the surveillance measure program of the Romanian law.

We also appreciate that the provisions of Article 7, paragraph (1) letter h) of the Organic Law were the source of inspiration for the Romanian legislature in the regulation of the daily non –custodial educational measure.

3.3. Weekends consignment

Weekends consignment is a non-custodial educational measure with no correspondent in previous criminal law which can be imposed to minor offenders with an antisocial behavior.

According to Article 119 of the Penal Code, the weekends consignment measure consists in the juvenile delinquent obligation not to leave the house on Saturdays and Sundays during 4 and 12 weeks, unless, in this period he has an obligation to participate in certain programs or carry out certain tasks imposed by the court.

The minor's interdiction to leave home operates in the time between 0:00 to Saturday and until 12pm on Sunday.

By "home" we mean any building freely chosen by a person to effectively carry out privacy. We consider that it is irrelevant whether it is the same or not with the domicile or the residence of the minor or whether it is permanent or temporary.

Thus, the housing may be a juvenile delinquent room, for example the room of an apartment or of a house, the tent in a resort, a room in a hostel or a hotel.

Therefore we hold that the child can spend every weekend in different houses insofar as it benefits from the probation officer surveillance and the person designated as such.

To overcome such situations, we propose *de lege ferenda* supplementing the provisions of article 68 of Law 253/2013[20] with the following provisions: "The court or judge in consultation with the probation officer must individualize the house in which the minor serves the educational measure provided for in article 119 of the Penal Code."

By imposing the measure of weekend consignment a dual purpose is achieved, satisfying the preventive effect of educational measures, so as the minor should avoid contact with certain persons or his presence in certain places which could predispose to the manifestation of criminal behavior.

Unlike other educational measures examined above, the weekends consignment affects the constitutional right to free circulation[21] regulated in article 25 thus influencing the minor's behavior through both physical and moral constraint.

According to Article 68 paragraph (4) of Law no. 253/2013, the execution of the measure provided by Article 119 of the Penal Code usually takes place under the supervision of the adult living with the child or of another adult designated by the court during some weekends in a row, except the case in which the court or the mandatory judge, under the proposal of the probation officer, disposes otherwise.

We manifest some reservations about the provisions above because we argue that familiar environment can contribute a greater share in the education and training of minors having in view their inclusion in society.

Also, the Council of Europe Recommendation no. 2008/11 on the European rules for juvenile offenders requires to include parents or a tutor in procedures for the execution of sanctions or educational measures.

Therefore, we propose *de lege ferenda* that the supervision of law enforcement should primarily be the responsibility of parents, adopter or guardian of the juvenile delinquent and where this cannot be done by them, the supervision should be done by an adult designated by the court.

Similar to the educational measure provided for in Article 118 of the Penal Code, and in the case of the weekend consignment, the supervisory control is the responsibility of the probation officer both on the execution of the measure by the minor, as well as the performance of duties by the person exercising supervision.

During the execution of the educational measure regulated in Article 119 of the Penal Code, the juvenile delinquent may follow a program of social reintegration, whether as a result of the disposition by the court of this obligation in the content of the educational measure, or as a result of the establishment of this activity by the probation counselor as part of the weekend consignation. The probation officer will establish the type of program or course, according to the particularities of the minor.

It is important to emphasize that the measure of weekends consignment is considered more severe than

[20] Law no. 253/2013 on the enforcement of sentences, of educational measures and other non-custodial measures ordered by the court in criminal proceedings published in the Official no. 513 of 14 August 2013.

[21] Romanian Constitution, published in the Official no. 767 of October 31, 2003.

other analyzed educational measures and may be imposed on juvenile delinquents that commit more severe offenses.

Thus, in judicial practice[22] the court held as sufficient the measure provided by Article 119 of the Penal Code which is to be applied for a period of 5 respectively 10 weeks to minor defendants who committed the crime of robbery provided by Article 229, paragraph (1), letter b) concurrent with the destruction incriminated in Article 253 paragraph (1) of the Penal Code.

The preamble of the Criminal Code states that the non-custodial educational measure regulated by article 119 of the Penal Code has as a correspondent the educational measure of permanence at weekends from the Spanish Organic Law no 5 of January 2000 on the criminal liability of minors.

According to Article 7 paragraph (1), letter g) of the Organic Law, the minors subject to such a measure must remain at home or in a special center from Friday afternoon or evening to Sunday evening for a maximum period of 36 hours, except for the time they need to devote to socio-educational tasks imposed by the judge, tasks which are to take place outside the place of detention.

Measure can be ordered against juvenile offenders who commit fault (faltas) for a period of 4 weeks.

For offenses committed by juveniles, the Spanish legislature provides that the duration of the measure for those aged between 14 and 16 years old will be 12 weeks or 16 weeks for those aged between 16 and 18 years old.

The professional responsible for coordinating the execution of the measure, after receiving the decision of the court by which the number of weeks and appropriate hours is established, will meet to draw up a plan[23] for individual implementing. In this regard, it will be established:

a) each weekend day during which the measure will be implemented as well as the place of detention;

b) the socio-educational tasks that can be imposed on juvenile offenders, the place where these will take place and the time required for them.

It can be seen that the Spanish penal provisions qualifies the permanence measures on weekends as a gravity lighter than the extent required by Article 119 of the Romanian Penal Code, which led to the easing of the application.

3.4. Daily assistance

Daily assistance, taken from the Spanish criminal law, has no counterpart in the previous Criminal Code and is considered the most severe non-custodial educational measure that can be imposed on juvenile offenders.

According to Article 120 of the Penal Code, daily assistance consists in the obligation imposed on juvenile to comply with a schedule set by the probation service, which contains the schedule of activities and their conditions as well as the restrictions imposed on the minor. The duration of the measure is between 3 and 6 months, and the supervision is coordinated by the probation service.

It is important to emphasize that the Romanian legislator, like the Spanish, states that the program must be the result of a consensus between the probation counselor and parents, guardian or other person in whose care the minor is, in consultation with this one.

In case of disagreement, the appointed judge has the obligation to fix the program content, through a motivated and final agreement, after hearing those interested.

By including parents or guardian in procedures for the execution of sanctions and educational measures, it is made a transposition into national law of the provisions of Council of Europe Recommendation no. 2008/11 on the European rules for juvenile offenders.

If the court decides against the minor the measure required by Article 120 of the Penal Code, without imposing obligations under Article 121 of the Penal Code, we consider that their absence may be supplemented by restrictions imposed in the schedule by the probation officer.

Finding long-term strategy to restore a new socio-educational trajectory to rehabilitate the juvenile delinquent is based on the need to have a constant at all levels: family, community, education.

By conducting an educational program we follow the harmonious development of the child's personality, through his involvement in activities which suppose social networking, organizing leisure mode and enhancement of his skills.

According to Article 90, paragraph (1) of Law 253/2013, the minor for whom the daily assistance measure was imposed, may follow a social reintegration program or a school or training course, as a result of the disposition by the court of this obligation as part of the educational measure, or as a result of the establishment of this activity by the probation officer assisting the daily plan.

The daily assistance measure can be applied only if the court considers that other non-custodial educational measures are insufficient for the education and reintegration into society of the minor. Thus, for example, in judicial practice[24] it was ordered the

[22] Suceava Courtroom,Penal Decree no. 486/2014- http://portal.just.ro/39/SitePages/Dosar.aspx?id_dosar=21700000000013354&id_inst=39.

[23] Art. 28 of Decree 1774/2004 approving the Organic Law Regulation 5/2000 - http://www.boe.es/buscar/act.php?id=BOE-A-2004-15601&tn=1&p=20040830&vd=#s2.

[24] Bucharest, Courtroom, sector 6, Penal sentence no. 18/2015 http://portal.just.ro/303/SitePages/Dosar.aspx?id_dosar=30300000000207251&id_inst=303

educational measure regulated by article 120 of the Penal Code, for a period of 6 months against the minor who committed two offenses of robbery indicted in article 233 of the Penal Code in formal competition.

As stated in the subsection dedicated to the surveillance measure, the provisions of Article 7, paragraph (1) h) of the Organic Law, referring to the measure of supervised release, were the source of inspiration for the Romanian legislature in the regulation of the non-custodial educational measure of daily assistance.

After examining the above provisions, we conclude that daily assistance made by the probation service meets all the needs of the juvenile offender, giving it the much needed transition in the context of an offense, to a higher level where it will receive specialized support in an organized way.

4. Conclusions

In our opinion, we consider that the new Code of Criminal legislature manages to provide the court a large variety of criminal sanctions that have the ability to lead to the education and rehabilitation of the minor.

In this paper, we consider that we were able to analyze in detail the new non-custodial educational measures in relation to international criminal provisions applicable and to highlight their role and importance.

We conclude by saying that the examination of such issues of interest for both legal, sociological and psychological domain due to the specific characteristics of the juvenile delinquent.

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COMPARATIVE ASPECTS REGARDING THE SETTLEMENT UNDER THE CODE OF CRIMINAL PROCEDURE OF 1969 BY THE HIGH COURT OF CASSATION AND JUSTICE OF AN APPEAL AGAINST AN UNREASONED CONVICTION SENTENCE DELIVERED BY THE COURT OF APPEAL SUBSEQUENT TO THE ACQUITTAL DECISION ISSUED BY THE TRIAL COURT

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Abstract:

This article examines, in relation to the national law (the Code of Criminal Procedure of 1969) and the provisions of the European Convention on Human Rights, the judgment of an appeal filed against an unreasoned sentencing decision delivered by the appellate court subsequent to a decision for acquittal rendered by the first-instance court (trial court). The article approaches this issue in light of the domestic and the international case law, with a highlight on several sentences that are deemed illegal due to their superficial reasoning or to a reasoning that fails to describe the circumstances, the evidence adduced and the grounds based on which the sentencing was ordered, as well as by reference to cases where the higher courts, after reassessing the evidence and the facts established by the lower court, delivered a decision to sentence, yet without reexamining the evidence that had been deemed sufficient by the first-instance judge to question the reasonableness of the charge and to render a sentence of acquittal. The author further illustrates the importance given by the Romanian legislator, and in particular by the European Convention on Human Rights, to the duty of the law courts to state the reasons of their sentencing decisions, particularly in cases where the trial court delivered a judgment of acquittal.

Keywords: *failure to give reasons, reassessment of evidence, appeal, fair trial, retrial.*

I. Introduction

The right to a fair trial, as guaranteed under Article 6 paragraph 1 of the European Convention on Human Rights, means, inter alia, the right of the parties to the proceedings to present the observations which they regard as relevant to their case. This right can only be seen to be effective if the observations are duly considered by the trial court.

Article 6 of the Convention establishes the duty of the law court to conduct an effective examination of the submissions, the arguments and the evidence adduced by the parties to the proceedings.

Moreover, a fair trial requires that a higher court should give extensive reasons for its decision instead of just limiting itself to upholding the reasoning of the lower court, and to conduct a thorough examination of the key issues that are brought before it, such obligation being constantly acknowledged by the case law of the European Court.

II. Content

Having regard to Article 383 (1) of the Code of Criminal Procedure of 1969, the decision of the appellate court, which makes the object of our consideration, should have contained in its recitals the grounds in fact and in law which have led to the delivery of the sentence, including an actual and effective examination of the submissions and evidence adduced by the parties in the case during the three stages of the trial (prosecution, trial on the merits and appeal), as well as of the offenses the defendant(s) is are charged with.

Failure of the appellate court to fulfill its duty described above represents an infringement of the mandatory provisions of Article 356 (c) of the Code of Criminal Procedure of 1969, which establishes both the obligation of the court to "*consider (a) both the evidence that served as the basis for judging on the criminal aspect of the case, and the evidence that were dismissed ...",* as well as the appellate court's duty to "*examine (a) any elements in fact based on which the decision delivered is grounded".* These obligations are also stipulated in Article 403 (1) (c) of the new Code of Criminal Procedure (enacted on 1 February 2014 by Law no. 135/2010, with further amendments and additions).

Under the provisions of article 383 (1) of the 1969 Code of Criminal Procedure, the decision of the appellate court should have included in its introduction the references provided for in Article 355 of the 1969 Code of Criminal Procedure, and in its recitals, the factual and legal grounds for admission of the appeal and the reasons that led the court to deliver its decision, as specified in article 379 (2) (a) of the 1969 Code of Criminal Procedure (admission of the appeal, cancellation of sentence and retrial of the case by the court of first instance).

It is worth mentioning that, according to the provisions contained in Article 384 of the Code of Criminal Procedure of 1969, judging of the case by the

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court of appeal is regulated by the provisions contained in the special part, Title II, Chapters I and II of the Code.

Consequently, the judgment of the case on the merits, conducted by the court of appeal after cancellation of the sentence, is governed, according to the reference mentioned above, by the specific rules of judgment applicable to a court of first instance.

Thus, articles 356 (b) and (c) of the 1969 Code of Criminal Procedure provide that the recitals of court decision delivered in the case should contain:

- a description of the offense subject to accusation, specifying the time and place of the offense and the legal classification of the offense under the complaint,

- the examination of the evidence that served as a basis for the settlement of the criminal aspects of the case, including evidence that were dismissed by the court, as well as the examination of any facts on which the decision is grounded.

In the case of a conviction sentence, the recitals have to also describe the offense or every offense the court finds the defendant to be guilty of, as well as the form, degree of guilt, aggravating or mitigating circumstances, repeated offense (if any), the amount of time to be deducted from the punishment imposed and the acts determining its length.

In addition, in the event that the appellate court failed to actually check the judgment appealed against based on the evidence administered during the examination by the court of first instance (Article 379 (1) of the 1969 Code of Criminal Procedure), and ruled only formally and contradictory to the court of first instance with regard to the grounds for appeal (Article 379 (3) of the 1969 Code of Criminal Procedure), the appellate court was deemed to have violated the procedural obligations that are currently contained in Article 420 (8) (1) of the new Code of Criminal Procedure.

The content of a court judgment should describe not only the decision per se, but also the grounds and the legality of the decision delivered by the court.

This is exactly why the main duty of the judge (judges) called upon to decide in a criminal matter is to ground his (their) judgment on the evidence adduced in the case before them and to examine it in accordance with Article 63 of the Code of Criminal Procedure of 1969, following a thorough assessment thereof, such assessment to be clearly reflected by the sentence delivered.

To this end, the entire evidentiary material must undergo an unbiased examination and any contradictions in the conclusions drawn from the substance of every piece of evidence adduced should be subjected to the deliberations of the court, which are designed to review and evaluate the evidence by confrontation, so that truth may come out, which is the primary function to be properly fulfilled in all the stages of the criminal lawsuit.

Insofar as "*to state the reasons means to demonstrate, to highlight the concrete facts that, used as premises, lead to formulation of a logical conclusion",* and "*the mere assertion of a conclusion without indicating concrete facts […] or reference to […] the acts the case in general does make a proper reasoning"* (High Court of Cassation and Justice, Criminal Division, decision 656/2004), the court's failure to give reasons is obvious in the case of the decision analyzed herein.

There may be situations where the judgment appealed against suffers from an obvious lack of an effective and comprehensive examination of the evidence adduced, despite the fact that the decision of the lower court, which was cancelled, had been an acquittal decision, and in spite of the fact that the specific circumstances of the case brought before the court had demonstrated the complexity of the facts and the need for an extensive reasoning with regard to both the admissibility of Prosecution and the delivery of the sentencing decision (including the length of imprisonment).

Failure to state the grounds of the decision is an issue regulated by the provisions of article 6 § 1 of the European Convention on Human Rights.

Seen from this perspective, the lack of reasoning is a circumstance which should automatically lead to cancellation of the unreasoned decision and the sending of the case for retrial back to the first-instance court.

In the case under our consideration we are not dealing with a failure to give sufficient reasons, but with a total lack of reasons for the criminal sentence delivered by the judge of the trial court.

In a situation where the criminal proceedings were been virtually eliminated before the court of first instance, the court of appeal would be required to directly censor the judgment of the first instance, which is an aspect that was not contemplated by the legislator, and the defendant would be deprived of the legal and conventional right of the double degree of jurisdiction in criminal matters (Article 2 paragraph 1 of Protocol 7 enshrines the right of the person convicted of a criminal offense by a court to require the examination of the statement of guilt or of the sentence of conviction by a higher court), all the more as the scope of the circumstance of cassation has been drastically narrowed by the amendments brought by Law no. 2/2013.

The intention of the legislator to speed up the settlement of criminal cases by removing undue decisions to send back the case for retrial should not be deemed as the complete cancellation of the stage of judgment of the case in the court of appeal, as it happens in such a case.

Besides, a sound reasoning of the judgment is an imperative obligation that cannot be neglected in favor of speed.

It should be noted that, according to Article 6 § 1 of the European Convention on Human Rights,

everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which decides on the grounds of any charges brought against him/her. The same article stipulates in point 3 (c) that everyone charged with a criminal offense has the right to defend himself against all charges brought against him.

According to the unanimous opinion expressed in the specialized literature, the reasoning of the judgment should be relevant, complete, grounded, uniform, compelling and accessible. The reasoning is also of essence for any court decision and represents the guarantee for the parties to the proceedings that their applications are properly analyzed.

In this regard, the practice of the Supreme Court has constantly held that the absence of reasoning leads to cancellation of the unreasoned decision and to retrial of the case by the court violating the legal provisions governing the obligation to give the grounds of the court decision.

The same conclusion can be drawn from the Case Law of the European Court of Human Rights, regarding the right to a fair trial.

For example, in its judgment of July 1 2003, delivered in the case *Suominem v. Finland*, the Court held that Article 6 requires that any judgment be reasoned so that the litigant may know which of his submissions were accepted and the reasons why some of his defenses were dismissed.

In the case *Garciz Ruiz v. Spain*, the judgment of 21 January 1999, the Court noted that judgments of the court should adequately state the reasons on which they are based.

In the case *Boldea v. Romania*, judgment of 15 February 2007, the Court ruled that there had been a violation of article 6 § 1, noting that the Romanian court decisions had failed to give adequate reasons and that the applicant had not been given a fair hearing in the proceedings that had led to his conviction. In the considerations of its judgment, the Court recalls that the right to a fair trial guaranteed by article 6 § 1 of the Convention includes, inter alia, the right of the parties to bring before the court any submissions as they may deem relevant to their cause. The Court further recalls that the Convention is not intended to guarantee rights that are theoretical or illusory, but rights that are practical and effective (*Artico v. Italy of 13 May 1980*), and this right can only be seen to be effective if the observations are really "heard", this is to say are duly considered by the trial court. In other words, Article 6 § 1 implies in particular the duty of the court to conduct a proper examination of the submissions, arguments and evidence adduced by the parties (*Perez v. France, Van der Hurk v. Netherlands).*

Lack of reasons for the court judgments has been sanctioned by the ECHR in the cases *Albina v. Romania*, judgment of 28 April 2005, and *Dumitru v. Romania*, judgment of 1 June 2000, when the ECHR held that Article 6 § 1 was violated, with the Court emphasizing the fact that any judgment should be reasoned in response to the arguments adduced by the parties to the proceedings.

We are in a similar situation in this case, unless the court of appeal hears the defendants and the witnesses, despite the fact that it proceeds to reinterpretation of the evidence and, hypothetically speaking, to determining of a different state of facts than that upheld by the court of first instance.

I believe that in the situation described above we are dealing with an infringement of the right of the defendants to a fair trial, guaranteed by Article 6 (1) of the Convention. Moreover, the European Court of Human Rights has held that "*when a court is called upon to examine the case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence […] that question could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant - who claimed that he had not committed the act alleged to constitute the criminal offe*nce" (judgment of 26 May 1988 in the case *Ekbtani v Sweden*, Series A no. 134, p 14, § 32, and *Constantinescu v Romania*, no 28871/95, § 55, ECHR 2000-VIII).

ECHR case law has consistently held that whenever the issues a court is called upon to consider have a deeply factual character, which is likely to call for a new assessment of the evidence and in particular of the statements, the right solution is the reassessment of the evidence.

In other words, if the appellate court bases its decision essentially on a new interpretation of the evidence adduced during the trial in the first instance, a new hearing of the defendants and of the witnesses that are relevant to the case is required, all the more as the trial court was the only court that had conducted the inquiry, being the only court that had administered the evidence and that can assess directly the submissions, witness declarations and other evidence adduced by the defendant in the case file.

Undoubtedly, the appellate court is entitled to interpret the information provided by the evidence, holding that the defendants are considered guilty, but it also has the duty to reconsider the same evidence that was sufficient for the trial judge (first-instance judge) to question the grounds of the charge and to render a decision of acquittal.

In the same line of reasoning is the by decision no. 1687/20, of May 2013, rendered by the High Court of Cassation and Justice, Criminal Division, stating that "*It appears that, in spite of the fully devolution effect of the appeal, which is provided under article 371 (2) of the Criminal Procedure Code, and despite the obligation of the court to proceed to hearing the acquitted defendants, the Court has limited itself, in a totally unjustified manner, to record in its conclusions only the legal standing of the defendants, after which, without assessing any further evidence and dismissing all the requests made in this regard by the defense, except for the circumstantial documents, and*

thereafter to find the defendants guilty, ruling on the several issues of a deeply factual nature, by a new interpretation of the evidence adduced during the criminal investigation and the inquiry.

Firstly, there is an infringement of article 378 (1)[1] of the Criminal Procedure Code, according to which, during the judgment in appeal, the court is obliged to hear the defendant present in court according to the provisions of the special part Title II, Chapter II, if the defendant was not heard by the trial court and when the trial court has not rendered a sentence of conviction against the defendant.

*The text was introduced following the convictions of Romania by the European Court of Human Rights, with the European Court ruling that, when a court is called upon to examine the case as to the facts and the law and to make a full assessment of the question of the applicant's guilt or innocence […] that question could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant - who claimed that he had not committed the act alleged to constitute the criminal offe*nce.

As such, the direct assessment of the evidence adduced by the defendants cannot be achieved by simply acknowledging the upholding of their previous statements and of the fact that they are innocent, because such a hearing does not meet the requirements of article 378 (1)[1] of the Code of Criminal Procedure and the provisions of Article 6 (1) of the ECHR, the appellate court having the duty to hear them in detail, according to the procedure laid down in Articles 323 and 324 of the Code of Criminal Procedure (to which even of article 378 (1)[1] of the Code of Criminal Procedure refers), because such a legal standing is not equivalent to the exercise of the right to remain silent.

Secondly, the High Court finds that, indeed, the appellate court has based its decision on a new interpretation of the evidence, including the witnesses' statements, the defendants being found guilty on the basis of the same evidence that led to the delivery by the first instance of a decision of acquittal under Article 10 (a) of the Criminal Procedure Code.

It is true that, according to article 378 (1) (2) of the Criminal Procedure Code, the court verifies the judgment under appeal, based on the work and material in the case file, including any further piece of evidence, being able to give a new assessment of the evidence adduced in the first instance court. But these procedures, which allow the appellate court to make a fresh assessment of the evidence, can only be interpreted in conjunction with Article 6 of the Convention and the case law of the European Court in this matter, which has direct application in the legal order of the Contracting States.

The High Court holds that, even in cases handed down against Romania, the European Court held that the manner of application of Article 6 in the courts of appeal or recourse depends on the status of the appeals procedure. When the internal procedure allows the court of appeal or the court of recourse to reassess the evidence of the facts established by the lower courts, article 6 applies in full to them, too. In this regard, the Court has consistently found violations of the right to a fair trial where the appellate court rendered a conviction sentence based on a new interpretation of the declarations of the witnesses heard in the court of first instance, the same declarations which had led the first-instance judges to doubt the merits of the allegations and deliver a sentence for acquittal.

The fact that, given the decision of acquittal rendered by the first instance, the applicants did not specifically request further evidence to be taken by the court, is considered by the Court as irrelevant, insofar as article 6 of the Convention does not preclude that court from taking positive measures to ensure the right to a fair trial (Constantin and Stoian v Romania).

Under these circumstances, the failure of the Court of Appeal to hear witnesses in person and the failure of the Supreme Court to remedy the situation by sending the case back to the Court of Appeal for a new examination of evidence has substantially reduced the applicant's rights to defend himself. The Court reiterates that in its case law it has pointed out that one of the requirements of a fair trial is to give the accused to chance to confront witnesses in the presence of a judge who must decide in the case before him, because the judge's observations as to the behavior and credibility of certain witnesses may have certain consequences for the accused. Previous considerations are sufficient to lead the Court to conclude that in this case the national courts have failed to comply with the requirements regarding a fair trial."

We therefore consider that, in this case, all the considerations above call for the one obvious decision: admission of the appeal, cancellation of the Decision of the court of first instance and the retrial of the case by the Court of Appeal, with the hearing of the defendants and of the witnesses in this case under the provisions of article 385 index 16 (c) of the Code of Criminal Procedure of 1969, in relation with Article 6 (1) and 3 (c) of the European Convention on Human Rights.

III. Conclusions

The duty to state reasons for court judgments is the result of the requirements arising from the Convention. In this regard, the conventional text enshrines, on the one hand, the right of every person to present arguments and defense before the court, but, on the other hand, requires the Courts to examine the parties' submissions effectively. In this regard, it is noted that the obligation to state reasons for the judgment of the court is the only means to check compliance with the rights of the parties, but it is at the same time a requirement which helps to ensure

compliance with the principle of sound administration of justice.

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THE PLEA BARGAIN AGREEMENT

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Abstract

Alongside major changes in Romanian criminal law, the plea bargain agreement gave a new approach on the mechanisms of criminal procedure in national law, thus creating a series of problems and divergent interpretations of the content and limits of this mechanism in solving criminal litigation.

What motivated us in our scientific analysis was the novelty of the issues that arose both in the doctrine and interpretation of the legal provisions and in the practice of prosecution offices and national courts, the high impact that the new proceedings can have on criminal policy and the need for clear and efficient provisions that can ensure legal certainty.

Our paper is divided in four major parts: the nature and object of the agreement, the conditions of plea bargain, the prosecutorial phase, court validation and appeal procedure, in each of these sections taking into account the legal provisions, analyzing working hypothesis, identifying probable issues and problems and providing our opinion on possible solutions.

Our findings prove the fact that the novelty aspect of this procedure determined a number of gaps in the law, aspects that can dramatically influence the result of the criminal case and the guarantees that the parties have in criminal law. Moreover it will underline the unclear provisions that make the new law inapplicable in certain cases and leave a number of situations without any lawful solution.

Keywords: *plea bargain, minor offences, admissibility conditions, admission of guilt, superior prosecutor's approval, changing legal qualification, individualizing the penalty, notifying the court, court assessment, invalidating the plea bargain.*

1. Introduction

I. Introductory remarks. The plea bargain agreement is a special procedure which is new in the criminal legislation in Romania, being regulated in Title IV of the Special Part of the Criminal Procedure Code adopted by Law 135/2010 as subsequently amended and completed by Law 255/2013. The relevant provisions are given by article 478-488 of the Criminal Procedure Code.

According to the recitals of the Criminal Procedure Code, introducing this special procedure targeted to reduce the duration of the case trial, to simplify the activity within the criminal prosecution stage and to save money and human resources within the legal procedures.

The Romanian lawmaker was inspired by the French and German criminal law systems, but the procedure exists – in similar ways – also in other European countries.

II. The nature and object of the agreement.

The plea bargain agreement appears as a procedure which is derogating from the common law procedure applicable to certain small crimes, having as main feature the possibility granted to the defendant to participate in the decision making process and to negotiate the penalty which is going to be applied to him.

This special procedure is not confused with the one of arraignment acknowledgement stated by article 374, paragraph 4, articles 375 and 377 of the Criminal Procedure Code, whereas there are several differences between these two.

- while arraignment acknowledgement can occur only during the trial, the plea bargain agreement is only concluded during the criminal prosecution stage;
- the plea bargain agreement involves a negotiation carried between the prosecutor and the defendant in regard to the individualizing the penalty (the penalty's type, quantum, type of enforcement, waiving the application of the penalty or delaying its application), whereas the result engages the obligation of the judge under certain conditions. The arraignment acknowledgement does not have such feature, and the judge has the exclusive task of individualizing the penalty in the case in which he orders a conviction solution.
- the admissibility conditions of the two procedures are different (for example, under the aspect of the cases in which they can occur, the plea bargain agreement is more restrictive, being allowed only for the crimes for which the law provides the punishment with prison for more than 7 years, while the arraignment acknowledgement is excluded only in the case of crimes which are punishable with life in prison);
- although both procedures are abbreviated procedures, the trial is much shorter in the case of the plea bargain agreement. Therefore, in case of the arraignment acknowledgement, though the criminal

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trial is simplified, the documentary evidence is allowed (article 375, paragraph 2 and article 377, paragraphs 1-2 of the Criminal Procedure Code); at the time when the judge solves the arraignment acknowledgement, there are no evidence administered. The trial in the case of the arraignment acknowledgement has a stage reserved for debates and for the last word of the defendant, a situation which the plea bargain agreement solving does not provide for.

According to article 479 of the Criminal Procedure Code, the object of the agreement is that the defendant admits the crime he committed and the legal grounds on which the criminal investigation was started. The two aspects do not form an object of negotiation, yet they are elements that the defendant is obliged to comply with in order for the agreement to be admissible.

III. The conditions of the agreement.

The analysis of the legal provisions shows that for the admissibility of the plea bargain agreement requires the compliance with the following conditions:

a) The case must be in the criminal prosecution stage, with the criminal action already started (article 478, paragraph 1 of the Criminal Procedure Code). The suspect cannot sign a plea bargain agreement. If the procedures already reached the trial stage, this special procedure can no longer be used as a resort, but the defendant may still opt for the arraignment acknowledgement, under the conditions of article 374, paragraph 4 of the Criminal Procedure Code. The plea bargain agreement is also possible in the case of reopening the criminal prosecution under the conditions of articles 335, 341 paragraph 6 letter b) or article 341, paragraph 7, item 2, letter b) of the Criminal Procedure Code and after reinitiating the criminal prosecution in case of restitution made by the preliminary chamber judge, under the conditions of article 334 of the Criminal Procedure Code (in all situations, after initiating the criminal proceedings). We also consider that this procedure can be resorted to after a first approval was dismissed by the court and the file was returned to the prosecutor for the purpose of continuing the criminal prosecution, according to the conditions of article 485, paragraph 1, letter b) of the Criminal Procedure Code;

b) The penalty stated by the law for the crime which forms the object of the case is a fine or prison for 7 years at most (article 480, paragraph 1 of the New Criminal Procedure Code).

The meaning of the notion "penalty stated by the law" is the one shown by the article 187 of the Criminal Procedure Code: the penalty stated in the text incriminating the fact committed in its consumed state, without considering the causes for lowering or increasing the penalty.

In light of this condition, no plea bargain agreements can be signed for crimes punished by law with life in prison or with the detention for a special maximum time of imprisonment of 7 years (for example in the case of murder, manslaughter causing the death of two or more persons, strikes or injuries causing death, human trafficking, trafficking minors, rape, armed robbery, bribery, counterfeiting, treason or espionage). The special procedure is admissible though in the case of a considerably larger number of crimes (for example murder at the request of the victim, manslaughter in the types stated by article 192, paragraphs 1-2 of the Criminal Procedure Code, strikes or other types of violence, standard bodily injury, bodily injury by negligence, mistreatment of juveniles, fetal injury, illegal deprivation of liberty, threat, blackmail, standard pandering, crimes that harm homes and private lives, theft, standard robbery, crimes against the patrimony by the misuse of trust, frauds committed by means of IT systems, vandalism, crimes against the accomplishment of justice, bribery, influence trafficking and purchase, work related crimes, document forgery, violation of the regulations upon weapons and munitions, electoral crimes).

In our opinion, conditioning of the plea bargain agreement to the punishment stated by the law for the crime forming the object of the case is objectionable. Considering that the defendant accepts the legal qualification given to the action by the prosecutor and participates to the process of individualizing the crime, we consider that it is natural for the incidence of the special procedure to depend on the limits of punishment resulted from the legal qualification. The relation that the lawmaker made with the "punishment stated by the law", a phrase referring to a consumed action, ignores the fact that during the legal qualification the prosecutor takes into account that the action either remained an attempt or it was consumed, and that the defendant is a recidivist or not, if there are legal mitigating or aggravating circumstances; whereas, these influence the special penalty limits within which the individualization takes place. Thus, the admissibility of the procedure gets to be determined by the abstract level of the social danger of that action and not by the concrete dangerousness that the perpetrator shows, whereas this generates certain inequities. For example, a defendant who committed a simple robbery crime during a post-execution relapse may sign a plea bargain agreement though – as an effect of article 43, paragraph 5 of the Criminal Procedure Code – the limits within which the punishment is negotiated are of 3 years and respectively 10 years and 6 months. Instead, because the special maximum punishment stated by the law exceeds 7 years of prison, a plea bargain agreement cannot be signed by the one committing an attempt of armed robbery in the version stated by article 229, article 3 of the Criminal Procedure Code or an attempt of armed robbery stated by article 234, paragraph 1 of the Criminal Procedure Code, though in both situations, the negotiation of the punishment would be done within the special limits cut to half, meaning a minimum of 1 year and 6 months and a maximum of 5

years of prison.

In *lex ferenda*, we consider that this condition should be reformulated as follows: *"The plea bargain agreement may be signed only if the penalty resulted from the legal qualification given to the action and accepted by the defendant is a fine or prison for 7 years at most".*

When it is intended to negotiate a solution for waiving the application of the penalty, the condition stated by article 80, paragraph 2, letter d) of the Criminal Procedure Code must be met, such as the crime to be sanctioned by law with a penalty of maximum 5 years of prison. If the negotiated solution is delaying the application of the penalty, considering the provisions of article 83, paragraph 2 of the Criminal Procedure Code, the penalty stated by the law for the crime forming the object of the case must be prison for 7 years at most.

c) The defendant must admit that he committed the crime and he must accept the legal qualification for which the criminal proceedings were initiated (article 482, letter g) of the Criminal Procedure Code). The acknowledgement must be shown in an express statement of the defendant, such as there will be no need for the prosecutor to deduce or interpret it.

It is debatable in our opinion if the acknowledgement must target the legal qualification given to the crime by the resolution for starting the criminal proceedings. We consider that in fact the reference is made to the legal qualification at the time of the acknowledgement statement, which, after changing the legal qualification (article 311 of the Criminal Procedure Code) can be another than the initial one. Still, related to the qualification at the time of the acknowledgement, the condition upon the penalty limits must also be considered.

In order to sign the agreement, the defendant is obliged to accept the legal quantification given by the prosecutor to the act committed even if that qualification is a wrong one. The legal qualification does not form the object of the negotiation; it is accepted or not by the defendant. We believe though that nothing stops the defendant, before the initiation of the special procedure, to ask the prosecutor personally or by defender, to change the legal qualification when it is considered that it is not the correct one.

We believe that the acknowledgement statement can be made by the defendant personally or by an authentic document.

The provisions of article 483 paragraph 2 of the Criminal Procedure Code show that when the defendant is prosecuted for a complex of offenses, the acknowledgement and the acceptance may be stated only regarding some of the acts. We consequently notice that in this special procedure, the law does not impose that the acknowledgement include all the acts, as requested in the case of the arraignment acknowledgement, during the trial (article 374, paragraph 4 of the Criminal Procedure Code).

An issue raised is related to whether the acknowledgement statement given by the defendant in order to conclude the agreement is revocable or not. We believe that at least until the agreement is solved by the first court, the defendant must have the right to withdraw his acknowledgement statement given during the criminal prosecution. However, it is hard to imagine how the court could issue a conviction solution based on an agreement which was withdrawn and which is not acknowledged anymore by the defendant, after a procedure which was lacked contradictory nature and immediacy, without administering again the evidence submitted during the criminal prosecution and without debates.

d) Enough data must exist regarding the existence of the act based on which the criminal proceedings were initiated and related to the guiltiness of the defendant;

The conditions imposed by the lawmaker is logical in relation to the procedural moment when the plea bargain agreement appears as an option, respectively after the initiation of the criminal proceedings.

e) the prosecutor and the defendant must reach a consensus regarding the type and quantum of the penalty and regarding the way the penalty will be executed or, depending on the case, if the penalty will be waived or delayed;

The simple acknowledgement of the act under the legal quantification given by the prosecutor does not lead automatically to the conclusion of the agreement because the defendant may have a divergent opinion regarding the penalty or regarding the way it will be executed. For example, though he admits that he committed the crime, the defendant proposes waiving the application of the penalty and the prosecutor does not accept this solution.

IV. The procedure of the agreement.

The owners of this guilt acknowledgement are the prosecutor and the defendant. The initiative may belong to any of them, whereas the defendant must be informed by the legal authority on the right to sign an agreement (article 108, paragraph 4 of the Criminal Procedure Code). When the case is being instrumented by the criminal prosecution authority, the agreement can only be signed by the prosecutor who supervises the file. In such situation, the criminal prosecution authority will make justified proposals (article 286, paragraph 4 of the Criminal Procedure Code).

While perfecting the agreement, the injured person plays no part. The law does not even state the obligation of the prosecutor of consulting the injured party.

Though he has initiative in this special procedure, the prosecutor is obliged to comply with the previous and written approval of the superior prosecutor who fixes the limits of the agreement (article 478, paragraph 4 of the Criminal Procedure

Code). It is noticed that the superior prosecutor cannot forbid the initiation of this procedure, whereas his attributions are circumscribed under the law exclusively to setting the limits of negotiating with the defendant. According to article 478, paragraph 2 of the Criminal Procedure Code and the effects of the plea bargain agreement are submitted to the approval of the superior prosecutor.

An issue raised is whether the superior prosecutor may or not refuse the second approval in the situation in which the approval is concluded within the limits for which he granted the initial approval (legal qualification, type of the penalty, quantum of the penalty, the way the penalty will be executed etc.). It could be argued that the effects of the approval cannot be invalidated so long as they fall within the limits of the initial previous approval, but only if they exceed them. We believe though that since the second approval targets the effects of the approval and these effects include the informing of the court, the attributions of the superior prosecutor at the issuance of this approval should be symmetrical with the ones at the verification of the legality and validity of the indictment document. Consequently, we consider that the superior prosecutor could refuse the approval of the agreement's effects under the conditions, for example, where the new interpretation of the documentary evidence in the file, he considers that there are no sufficient data resulted upon the existence of the crime or of the conditions needed to engage the criminal liability.

The law states that minor defendants cannot conclude plea bargain agreements (article 478, paragraph 6 of the Criminal Procedure Code). Though this provision was sometimes criticized, we consider that the impossibility of concluding a plea bargain agreement by a minor defendant is resulted from the specific features of negotiation, which regard – according to article 479 of the Criminal Procedure Code – "the type and quantum of *the penalty* (authors' note)"; yet, according to the Criminal Code, minors are not applied penalties, but correctional measures.

Based on the same argument, we consider that the plea bargain agreements cannot be concluded also by adult defendants for facts committed while being minors. This is because, according to article 134 paragraph 1 of the Criminal Procedure Code, the provisions of Title V of the General Part of the Criminal Code regarding minority is applied to adults who at the date of committing the crime were between 14 and 18 years old, which means that they also shall be applied only correctional measures and not penalties.

The defendant may conclude a plea bargain agreement also in the case of committing a crime after becoming an adult, if his action is concurrent with a crime committed while he was a minor. Obviously the approval will only concern the crime committed during the time when he was an adult and it can be concluded only under the conditions of admissibility. Out of the hypotheses stated by article 129 paragraph 2 of the Criminal Procedure Code, the plea bargain agreement is excluded only in the hypothesis stated under letter c) which states that the penalty applied for the crime committed as adult is life in prison (which means that the crime is punished by law with a penalty imposing imprisonment for longer than 7 years). It was sometimes considered that the agreement is not possible also in the hypothesis stated by article 129, paragraph 1, letter d) of the Criminal Procedure Code, because in this case only the liberty deprivation correctional measure is executed. We observe however that no legal text impedes the defendant to perfect an agreement in this case, regarding the crime committed after becoming an adult. We can neither state that the defendant could not have an interest in this regard (in considering the circumstance that the penalty for the fine which is going to be applied is going to be executed), because – at least in the case of crimes for which law states as penalty alternatively imprisonment and fines – he cannot know previously whether after the regular trial procedure he will be sanctioned with a fine and not with prison for the crime committed as an adult. Yet the two hypotheses are different; if the defendant would be sanctioned with prison for the act committed as an adult, the provisions of article 129, paragraph 2, letter b) of the Criminal Procedure Code would be applicable, so the increased penalty with prison would apply to him for a period equal with at least a fourth of the duration of the correctional measure, or from the rest of the penalty which remained unexecuted at the date of committing the crime after becoming the legal adult age, which means that his situation would be much harder, whereas the liberty deprivation penalties are much harsher than correctional measures. Consequently, for the crime committed as an adult, the defendant would be interested in concluding a plea bargain agreement in the hope that he will be applied only a fine and so he will know that for the crime he committed while he was a minor he will be applied a correctional imprisonment measure, increased with 6 months at most, that he will execute. It can also be noticed that by concluding an agreement and obtaining a fine for the crime committed as adult, the defendant will know that the correctional measure that he will execute can be increased by at most 6 months, yet if he does not conclude an agreement and he is applied an imprisonment penalty, he cannot control the penalty's increase percentage, whereas the provisions of article 129, paragraph 2, letter b) of the Criminal Procedure Code refers only to the minimum of this percentage.

When in the case more defendants are being prosecuted, a plea bargain agreement can be concluded with all of the defendants or only with a part of them. The provisions of article 478, paragraph 5 of the Criminal Procedure Code show that if several defendants wish to resort to the special procedure, each of them will conclude a separate agreement. The provision is amended though by article 485, paragraph

2 of the Criminal Procedure Code, according to which "the court can approve *the plea bargain agreement only regarding some of the defendants* (authors' note)". This contradiction of the law should be corrected; in our opinion, at least in theory, the possibility to conclude one single agreement for all the defendants should not be excluded, since this would not harm the presumption of innocence for the defendants who did not wish to conclude an agreement, as stated by article 478, paragraph 5 of the Criminal Procedure Code, nor would it harm the presumption of innocence for the defendants who concluded the agreement, for the acts that they did not admit to. We believe that it is essential for the negotiation process for the penalty to be carried out separately with each defendant (having thus a personal nature), while recording the results of all negotiations in one single agreement, a fact which would not impede the procedure. Also, there is no obstacle for the situation where several agreements were concluded in the same case, for the court to be notified upon all of them, where the competence is going to be determined according to article 44 of the Criminal Procedure Code.

Yet, even if all the defendants admit all the acts that they are accused of, separate agreements will be concluded if the acknowledgement statements are submitted at different times. If a defendant admits at the same time on several acts, a single agreement will be concluded on all of them. It is possible though that the acknowledgement of each act to come at different times, which requires by the nature of things the conclusion of different agreements.

The negotiation between the prosecutor and the defendant is carried in relation to the following aspects:

a) The type and quantum of the penalty. Since the law does not distinguish it, both the main penalty and the complementary ones are targeted.

The main penalty cannot be something else but a fine or imprisonment, because in the case of crimes for which the law provides life in prison, the approval is not admissible. Also, the provisions upon the possibility of applying the penalty of life in prison is not applicable in the hypothesis stated by article 39, paragraph 2 of the Criminal Procedure Code, since a condition for this hypothesis is that for one of the concurrent crimes, the penalty stated by the law shall be imprisonment for 20 years or more.

By the decision 25/2014, the Supreme Court of Cassation and Justice – the panel for solving criminal law matters decided that in the application of the provisions of article 480-485 of the Criminal Procedure Code, the prosecutor cannot apply in the criminal prosecution stage, in the plea bargain agreement procedure, the provisions of article 396, paragraph 10 of the Criminal Procedure Code, with direct consequences on lowering the penalty limits stated by the law for the crime committed. Nothing impedes though within the negotiation that the prosecutor and the defendant convene upon a penalty which will not exceed two thirds of the special maximum stated by the law (such limitation could be also indicated by the previous approval of the superior prosecutor). The aspect seems natural to us at least in the case where the defendant completely admits to his actions. If the prosecutor would not negotiate the penalty under the special maximum reduced by a third (or in the case of a fine by a fourth of the penalty), the defendant would not be motivated to conclude the plea bargain agreement, knowing that he can resort during the first instance trial to the arraignment acknowledgement procedure, and the lowering would become compulsory based on article 396, paragraph 10 of the Criminal Procedure Code.

The analysis upon the provisions of article 479 and article 492, letter h) of the Criminal Procedure Code, we note that the safety measures don't form an object of the negotiation, whereas their situation is not mentioned however in the contents of the plea bargain agreement. The court notified of the agreement is obliged though to issue a decision upon it, because – according to article 487, letter a) of the Criminal Procedure Code – the decision must also include the observations stated under article 404 of the Criminal procedure Code and this includes the observations upon the safety measures.

These conditions raise the question related to how the court could decide upon the safety measures. For example, how could the special seizure measure (article 112 of the Criminal Code) apply so long as the assets targeted are not indicated in the agreement? How will the court take a safety measure which is not imperative (for example hospitalization – article 110 of the Criminal Procedure Code), if the prosecutor and the defendant did not negotiate and if they did not reach an agreement over it and, moreover, the procedure before the court is not contradictory? If the prosecutor would request taking such measure and the defendant would oppose it, logically the procedure should include ordering and performing a psychiatric medical-legal expertise and the judge should grant the defendant the right to formulate conclusions. We opine that this problem should be clarified by the lawmaker.

b) The way how the penalty is executed, waiving the application of the penalty or delaying the application of the penalty.

In regard to the way in which the penalty is executed, the prosecutor and the defendant will negotiate also upon the possibility of suspending the execution of the penalty under supervision, under the conditions stated by article 91 and by the following articles of the Criminal Procedure Code.

While perfecting the agreement, the legal assistance of the defendant is compulsory. In lack of an opposing provision, we consider that the legal assistance is not compulsory before the court which will solve the agreement (except for the hypotheses stated by article 90 of the Criminal Procedure Code)

The agreement reached by the prosecutor and the

defendant must have a written shape and its content will be the one stated by article 482 of the Criminal Procedure Code (we consider that this agreement must also include observations upon the preventive and precautionary measures).

The action of notifying the court is the plea bargain agreement.

If an agreement is concluded upon some of the actions or only with some of the defendants and for the other actions or defendants the indictment is made, the court will be notified in separate documents. In such a situation the case must be separated. It was estimated with reason that in such situations application difficulties will appear. In the cases with several crimes and several defendants, the notification of the court can reach to be made by an indictment document for some of the defendants and by a plea bargain agreement for the others. It is possible that for the same defendant that the notification will be done by an indictment document for some of the crimes and by a plea bargain agreement for other crimes. The situation could get even more complicated: for example, if there are several defendants and only some of them sign agreements on different dates, the notification of the court will be done by indictment document for some of them and by plea bargain agreements for the others, yet also for the others a notification will be sent by plea bargain agreements in successive moments, at the time of concluding each of those agreements. It is hard to presume if the court or courts were informed on different dates, whether the cases concerning the agreements could be united, whereas the celerity of the procedure makes it improbable to meet the conditions stated by article 44 of the Criminal Procedure Code. If we add to it the possibility that a part of the ones notified by indictment will resort to the arraignment acknowledgement procedure, a new separation will be applied during the trial stage, which means that we will have during the same trial an excessive fragmentation of the file, and negative consequences upon the validity and legality of the solution will be probable.

Additionally, when the same defendant is investigated for several concurrent crimes, if for some of them a plea bargain agreement is concluded, being approved by the court, and for the others he is sent to trial and definitively convicted, the merge of the penalties will always be done in the procedure stated by article 585 of the Criminal Procedure Code.

At the same time with the plea bargain agreement, the court will also be submitted the criminal prosecution file. If the agreement regards only some of the facts or only some of the defendants, the prosecutor will submit to the court only criminal prosecution documents referring to those acts and persons. If the defendant, the civil party and the civil accountable party have signed a transaction or a mediation agreement regarding the civil claims, this transaction or mediation will also form the object of a notification sent to the court.

The solving of the plea bargain agreement will also be made by the court which will have the competence of judging the case in substance. If the criminal prosecution was done for several defendants or for several crimes for which the competence belongs to different courts depending on the personal or material quality, the agreement will be solved by the court which is competent in relation to the facts or persons it refers to and not in relation to the ones for which an indictment was concluded. This conclusion results from the interpretation of article 483, paragraph 2 of the Criminal Procedure Code, because, so long as the agreement will be accompanied exclusively by those crimes concerning the facts and persons it refers to, the court could not verify its competence in relation to the facts and persons within the indictment, who remain unknown for it.

If the notification of the court by agreement is made only regarding certain facts or defendants, it is possible that it will be followed by a declination of competence ordered by the prosecutor. For example if in the case several defendants are prosecuted and only one or some of them sign an agreement, and the competence was given by their quality, after notifying the court, the prosecutor will request the separation and he will decline his competence for the continuation of the criminal prosecution regarding the other suspects or defendants, because the provisions of article 44, paragraph 2 of the Criminal Procedure Code do not apply during the criminal prosecution stage (article 63, paragraph 2 of the Criminal Procedure Code). For example, if for manslaughter a senator and a person with no special quality are investigated, the criminal prosecution will be done by the General Prosecutor's office attached to the Supreme Court of Cassation and Justice. Only the defendant who is a senator signs a plea bargain agreement and the court is notified upon this agreement. For continuing the criminal prosecution against the defendant with no special quality, first there is a need to order the competence declination to the prosecutor's office attached to the court. This situation could be practically avoided only by taking over the case based on article 325 of the Criminal Procedure Code.

In lack of a contrary provision, the composition of the panel which will solve the agreement is the one stated by the law for the first instance trial.

The special procedure does not know the stage of the preliminary chamber, which means that the task of checking the competence and the lawfulness of notifying the court, the legality of the evidence administration and the other criminal prosecution documents falls under the responsibility of the court. Though the law does not stipulate anything, we appreciate that the court could not decline this activity, because this activity forms the grounds for the validity and legality of the solution it will issue. For example, if the court finds that some evidence were not obtained legally, they must be excluded (article 102 of the Criminal Procedure Code) which can lead to the non-fulfillment of the condition of admissibility of the

agreement stated under article 480, paragraph 2 of the Criminal Procedure Code. Also, the verification of competence is essential, since the material and personal lack of competence are cases of absolute nullity when the trial was done by an inferior court (article 281, paragraph 1, letter b) of the Criminal Procedure Code).

According to article 484, paragraph 1 of the Criminal Procedure Code, if the plea bargain agreement lacks one of the obligatory observations or if the conditions stated under articles 482 and 483 of the Criminal Procedure Code were not complied with, the court orders covering the omissions during 5 days at most and it notifies the head of the prosecution office which issued that agreement. In our opinion the text of the law is vaguely formulated. For example, if the conditions stated by article 483, paragraph 1 of the Criminal Procedure Code upon material competence were not complied with, it is natural that the court must decline its competence, even if it risks a competence conflict, and not notify the prosecutor. Additionally, it is not very clear which those obligatory observations that could be missing are in fact, others than the ones stated under article 482 of the Criminal Procedure Code; probably the lawmaker wanted to refer to the lack of the approvals of the superior prosecutor regarding the limits and effects of the agreement.

The 5 days deadline is decadence and not a recommendation one, such as in the case of noncompliance the solution is to dismiss the agreement based on article 485, paragraph 1, letter b), of the Criminal Procedure Code.

The trial is public. Because the court was notified by agreement, the procedure is not contradictory. The criminal trial, the debates and the last word of the defendant are missing. The law states that the prosecutor, the defendant and his lawyer, as well as the civil party if it is present will be heard. Due to the specifics of the procedure we believe that they will have the exclusive word on the admissibility of the agreement and for the justification of the solution reached by negotiation, including under the aspect of the concordance between the solution proposed and the gravity of the fact and the dangerousness of the criminal.

In light of the law's silence, we consider that the injured person should not be cited or heard.

A question raised is if the court can raise itself the problem of the legal qualification given to the fact and mentioned in the agreement. In lack of contrary provisions, we consider that the court may change the legal qualification, after discussing it with the prosecutor and with the defendant; it is unconceivable that the judge is impeded by a legal qualification convened upon by the defendant and the prosecutor, when it considers that it is wrong. It must be analyzed though what solution will the agreement have in such case. Two situations are possible:

(i) Changing the legal qualification is made due to insufficient evidence regarding a part of the state. For example, this agreement showed the mitigating circumstance of being provoked or another mitigating legal circumstance and the court considered that there are no sufficient data justifying them; or an act composed by two material actions was qualified as a continued crime and the court considers that one of them is not shown by the evidence existing in the case and it changes the legal qualification into the simple form of the crime. In such case, we consider that the agreement should be dismissed based on article 485, paragraph 1, letter b) of the Criminal Procedure Code, for the failure to comply with the condition stated under article 480, paragraph 2 of the Criminal Procedure Code;

(ii) It could happen that the change of the legal qualification appears based on the same factual state, due to the different interpretation of its concordance with the incrimination regulation. For example, though the factual state shown in the agreement remains unchanged, the court considers that the crime is not theft but robbery.

In this second case, more problems arise. For example, the penalty stated by the law in relation to the new legal qualification can be different or it can be the same as for the crime initially shown in the agreement. If the penalty related to the new qualification is different and it equals at most 7 years of prison, it can happen that the concrete penalty reached by agreement is not located within the special limits stated by the law and for the new legal qualification. It is possible that for the new legal qualification a previous complaint is needed from the injured person, a complaint which was not needed for the action shown initially in the agreement. It might also happen that the change of the qualification determines the competence of another court, superior to the one notified by the agreement.

The law is not clear on the solution which will be adopted in such situations. We believe that this should be always dismissed at least for the reason that the negotiation between the prosecutor and the defendant and because the individualization of the punishment was grounded on a different incrimination regulation than the correct one, determining implicitly an erroneous application of the provisions of article 74 of the Criminal Procedure Code. Additionally, article 485, paragraph 1, letter a) of the Criminal procedure code shows that by admitting the agreement, the court will order one of the solutions stated under article 396 paragraph 2-4 of the criminal procedure code, which means that the fact exists and it is a crime; consequently, the judge deliberates also upon the legal qualification.

On the agreement, the court will state one of the following solutions:

a) Admitting the agreement and convicting the defendant, waiving the application of the penalty or delaying the application of the penalty.

Out of the systematic interpretation of the provisions of article 485 of the Criminal Procedure Code, it results that this solution is ordered when the

following conditions are met:

- the court finds that the conditions stated by articles 480-482 of the Criminal Procedure Code regarding all the actions held under the liability of the defendant, forming the object of the agreement are met;
- the solution reached by agreement is not disproportionately gentle related to the gravity of the crime and with the dangerousness of the criminal.

According to article 485 paragraph 1 letter a) of the Criminal Procedure Code, when the agreement is admitted, the court cannot create for the defendant a harder situation than the one stated in the agreement. We therefore deduce that the judge is compelled as a maximum limit by the solution convened upon by the prosecutor and the defendant in regard to the type and quantum of the penalty and in regard to the way it will be executed, because it can order a more gentle solution for the criminal. Consequently, the individualization of the penalty is partially the responsibility of the judge. In lack of contrary provisions, the judge may issue even a smaller penalty than the negotiation limit imposed by the agreement of the superior prosecutor who signed the agreement.

It can also be observed that though the solution of the law, in case the agreement is admitted, we are not actually in the presence of an agreement, whereas the judge orders a solution that the prosecutor did not accept.

An issue is raised regarding what solution should be issued when the court considers that there are sufficient data regarding the existence of the action for which the criminal proceedings were initiated, and regarding the guilt of the defendant, but in the mean time a case liberating them from the criminal liability appeared. For example, after notifying the court by agreement, an amnesty law was adopted. The court must dismiss the agreement and send the file to the prosecutor or it must admit it and order the ceasing of the criminal trial? On one hand, the conditions of article 480 paragraph 2 of the Criminal Procedure Code are met ("there are enough date regarding the existence of the *action* – authors' note") so the dismissal of the agreement is not possible anymore; on the other hand, the solution regarding the approval of the agreement and the ceasing of the criminal trial is not stated by article 485, paragraph 1, letter a) of the Criminal Procedure Code.

The same question is raised when after notifying the court by agreement a law appears discriminating the action, like when despite the defendant accepts the legal qualification set by the prosecutor, the action admitted upon, though it exists as it was noticed and described in the notification document, is not stated by the criminal law.

In our opinion, the logical solution – which is not stated by the law though – would by that in such cases the ceasing of the criminal trial should be ordered, or the acquittal, as the case may require. We believe that the formulation of article 480, paragraph 2 of the Criminal procedure Code should have been different, respectively:" [...] there is enough date regarding the existence of the *crime* for which the criminal proceedings were initiated and regarding the guilt of the defendant, *and he will be criminally liable for them"*

In *lex lata* though, in the cases above, the court cannot do anything else but dismiss the agreement and return the case to the prosecutor, who will order closing the case.

Once the agreement is approved, the court issues a decision in this regard acknowledging also the transaction or the mediation agreement signed between the parties regarding the civil proceedings. If the parties concluded no transaction and no mediation agreement, the court leaves the civil proceedings unsolved. In this case, according to article 27, paragraph 2 of the Criminal Procedure Code, the civil party may start a case on the dockets of a civil court.

b) Dismisses the plea bargain agreement and sends the file to the prosecutor for continuing the prosecution.

This solution is ordered in two hypotheses:

- if the conditions stated under articles 480-402 of the Criminal Procedure Code are not met, regarding all the crimes of which the defendant is accused and which formed the object of the agreement. It is notable that when the agreement is concluded on several crimes, it will be completely dismissed even though the admissibility conditions are not complied with regarding only one or some of the crimes;

The judge who dismissed the plea bargain agreement for this reason does not become incompatible if the court is notified by a new agreement or by a new indictment, except for the situation when the decision by which he rejected the first agreement stated the existence of the crime and the guilt of the defendant; in this situation there will be an incompatibility case which is stated by article 64, paragraph (1), letter f) of the Criminal Procedure Code.

- if he considers that the solution which formed the base for the prosecutor and the defendant to reach an agreement is unjustifiably gentle related to the seriousness of the crime or to the dangerousness of the criminal. We consider that this second situation is subsidiary to the first, because the problem of the way in which the penalty was individualized is not raised except for the situation where it is found that the actions exist, they are crimes, they were performed by the defendant and he is criminally liable.

An issue is also raised upon how the prosecutor should act in this situation. According to article 485, paragraph 1, letter b) of the Criminal Procedure Code, the sending of the case is done "in light of *continuing the criminal prosecution*" even if the decision of the court is only grounded on the disproportion between the solution in the agreement and the seriousness of the crime or the dangerousness of the criminal. Logically, the prosecutor should only restart the negotiation with the defendant for adapting the solution to the

circumstances of the court, only that the defendant – being a new agreement based on which the situation will be unavoidably harder compared to the initial one – is not obliged to accept it. On the other hand, we ask ourselves if the prosecutor could somehow be obliged to restart the negotiation even if the defendant would agree to it; in lack of any remark of the law upon this aspect, we consider that he is not obliged to such thing. Consequently, the simple renegotiation is possible, followed by a new agreement, with a harder solution than the initial one, as well as the continuation of the criminal prosecution, finalized with a trial by indictment.

We consider that if there are no new evidence obtained after continuing the criminal prosecution, the prosecutor is obliged to send the case to trial (if he does not sign a new agreement with the defendant). This is resulted from the circumstance that by the initial solution of dismissing the agreement, a judge found that the action exists, it is a crime and the defendant is criminally responsible, and the prosecutor must consider this point of view. If there are new evidence though, the prosecutor may order any solution, including the closure of the file (for example if resulted that the action is not mentioned by the criminal law or if there is a justifiable case or a non-attributable crime case) or waiving the criminal prosecution (new evidence may show a lower dangerousness of the action and of the perpetrator than initially thought).

If after continuing the criminal prosecution, the prosecutor informs the court upon a new agreement or upon an indictment, the judge who dismissed the initial agreement will be incompatible with judging upon this (article 64, paragraph 1 letter f) of the Criminal Procedure Code).

When the notification was made based on the same documentary evidence (the criminal prosecution did not provide consequently new evidence) there lies the question whether the court is related to the definitive decision by which the initial agreement was rejected based on the fact that the penalty was too gentle. We consider – at least in the case of the notification by indictment – that the answer is negative, and the determining argument is related to the different evidence standard between the regular and the special procedure. Though the definitive previous decision by which the agreement was dismissed determines the fact that the action exists, it is a crime and it was committed by the defendant, it is grounded still only on "enough data" (the minimum condition for concluding the agreement), while the solution of convicting according to the regular procedure requires findings "beyond any reasonable doubt". Consequently the judge notified by indictment cannot be compelled to issue the conviction on the substance, done by another judge, where the evidence standard was much looser. On the other hand, the procedure where the court issued a decision upon the plea bargain agreement lack contradictory aspects, while the procedure based on the notification by indictment enjoys all the guarantees attributable to the trial.

A problem which may appear in practice is related to the value of the plea bargain statement, if the agreement is dismissed. Should it be limited exclusively at the conditions of the special procedure or can it have the value of documentary evidence when the criminal prosecution continues? In lack of a law text regulating this, we choose the last meaning (including with the possibility of withdrawing the acknowledgement), as being at the choice of the prosecutor and of the judge, in the process of analyzing the evidence, if maintained or removed, as corroborated or not with the general view of the documentary evidence in the case.

The law does not state what solution is given to the civil action in case of dismissing the agreement. By analyzing the provisions of article 486 paragraph 2 of the Criminal Procedure Code, we believe that the only logical solution – not stated by the law though – is that the civil action remains unsolved. The civil party cannot address the civil court (after the definitization of the decision upon the agreement) based on article 27 paragraph 2 of the Criminal Procedure Code, because once the agreement is dismissed, the court sends the file to the prosecutor in order for the latter to continue with the prosecution, which means that the civil party will continue to be in the criminal trial, and the civil proceedings are going to be solved by the criminal court notified by indictment.

By the decision solving the plea bargain agreement, the court will also apply properly the provisions of article 396 paragraph 9 (referring to the payment of the criminal fine from bail), article 398 (on the trial expenses) and article 399 of the Criminal Procedure Code (on the precautionary measures).

V. The appeal.

The decision issued on the plea bargain agreement can be challenged by an appeal.

According to article 488 paragraph 1 of the Criminal Procedure Code, the persons who can appeal are only the prosecutor and the defendant. The solution of the lawmaker is debatable. Under the conditions where the court issues a decision and in the case of trial expenses, we don't see why for example the defender (the legal assistance being compulsory) or the interpreter – whose presence in court is compulsory if the defendant does not speak or understand Romanian or he may not express his messages (article 12 paragraph 3 of the Criminal Procedure Code) – could not appeal that part of the decision regarding the charges or the fees related to them when they are not satisfied. Also, if the court accepts the agreements but fails to acknowledge the transaction between the defendant, the civil party and the party which is accountable from a civil perspective, why couldn't the last two make an appeal against the decision?

In regard to the injured party, so long as it was

opted for the solution of neither being cited, nor heard on substance, the lawmaker correctly excluded it from the initiators of the appeal.

The appeal deadline is of 10 days and it starts from the communication.

Solving the appeal, the court may decide to:

a) Reject the appeal as being late, inadmissible or ungrounded and maintaining the sentence (article 488, paragraph 4 letter a)

b) Accept the appeal and:

- cancel the decision by which the plea bargain agreement was only accepted on the way and quantum of the penalty or the way in which the penalty is executed and issuing a new decision, proceeding according to article 485 paragraph 1 letter a) of the Criminal Procedure Code, which is applied accordingly (article 488 paragraph 4 letter b) of the Criminal Procedure Code);

In our opinion, both hypotheses for accepting the appeal are superficially conceived.

Thus, the solution stated by article 488 paragraph 4 letter b) is corroborated with the provisions of article 488 paragraph 2 of the Criminal Procedure Code, according to which against the decision by which the acknowledgement agreement was accepted, an appeal may be submitted only regarding the type and the quantum of the penalty or regarding the way the penalty is executed. Practically, only the prosecutor may challenge this decision, when the first court accepted the agreement and issued a much easier solution for the defendant. The defendant would have no interest in challenging such a decision which is favorable for him.

In this case, according to the above cited texts, the court of appeal proceeds to the new individualization of the penalty or of the way it is executed, stating a much harsher solution for the defendant, because of the prosecutor's appeal and not the defendant's one. The solution cannot be harsher though than the one initially reached in the agreement, because the provisions of article 485 paragraph 1 letter a) of the Criminal Procedure Code are applied correspondingly. Practically, the court of appeal has two possibilities: *(i)* either it applies the solution reached by an agreement; *(ii)* or it applies a different solution than the one reached to by an agreement, much harsher than the one in the decision, but in any case not harsher than the one stated by the agreement.

The above presented may show that in the special procedure, the appeal submitted against the decision of approving the agreement does not have the general effect of devolution stated under article 417 paragraph 2 of the criminal procedure code (according to which "the court is obliged outside the reasons invoked and the requests submitted by the holder of the appeal, to examine the case under all the factual and lawful aspects").

If this was actually the wish of the lawmaker we consider that we are in the presence of a serious mistake. Two hypotheses seem eloquent to us.

Firstly, it may happen that the court of appeal considers that the approval should not be admitted by the first court, considering for example that there are no sufficient data upon the existence of the crime or of the defendant's guilt. In other works, it could consider that the appeal is grounded, but for other reasons than the ones invoked by the prosecutor. How should the judges invested for solving the appeal proceed in this case? Out of the way in which article 488 paragraph 4 letter b) of the Criminal Procedure Code is conceived, it results that they are obliged by the considerations of the first court regarding the existence of the crime and the guilt of the defendant. But what if the judges of the appeal have doubts that the crime was committed by the defendant? If they dismiss the appeal, they maintain against their beliefs a conviction solution (or, as the case may require, waiving the application of the penalty or delaying the application of the penalty). If they would accept the appeal, they should issue a much harsher solution than the one of the first court, again against their beliefs upon the validity of the solution.

Secondly, the lawmaker forgot that the decision of accepting the appeal could be given in violation of provisions sanctioned with absolute nullity. It is for example possible that the court which approved the agreement was not competent in terms of matter or quality of the person or it is possible that the legal assistance of the defendant was not provided. According to article 281, paragraph 3 of the Criminal Procedure Code, absolute nullity derived from the lack of material or personal competence when the trial was done by an inferior court to the legally competent one, may be invoked in any state of the trial. Also, according to article 281 paragraph 4, letter c) of the Criminal procedure Code, violating the provisions upon the compulsory legal assistance of the defendant may be invoked at any stage of the trial, regardless of the moment when the violation appeared (*authors' note – so even if it was recorded during the criminal prosecution*), when the court was informed upon the plea bargain agreement. Moreover, the absolute nullity can be found also ex officio (article 281, paragraph 2 of the Criminal Procedure Code). We ask ourselves how these flaws could be invoked "in any stage of the trial", as stated by the above mentioned tests and what effects does this have if the decision for accepting the agreement can only be challenged by appeal regarding the type and the quantum of the penalty or regarding the way in which it is executed, and in case the appeal is accepted, canceling the decision is limited exclusively to the same three aspects?

We appreciate that such situations are inadmissible. Though the law does not state it, we believe that also in the case of the plea bargain agreement, the general devolution effect of the appeal stated under article 417 paragraph 2 of the Criminal Procedure Code must be applied.

And the solution stated by article 488 paragraph 4, letter c) of the Criminal Procedure Code is objectionable. Also here, the aspects signaled above

regarding the absolute nullity of the decision (the dismissal of the agreement) are valid. We believe that in the cases of absolute nullity, a retrial must be ordered to be made by the court with the cancelled decision or, in case of lack of competence, a retrial made by the competent court, as stated by the provisions of article 421, item 2, letter b) of the Criminal Procedure Code.

Again, we don't believe that this special procedure was meant to avoid the general devolution effect of the appeal.

We consider that a much simpler and clearer solution would have been the corresponding application in the procedure of the agreement, of the general provisions in the matters of appeal.

VI. Conclusions.

The novelty feature of the institution of the plea bargain agreement generated unavoidably inadvertences among the applicable procedural regulations, starting on one hand from changing the nature of the actions leading to the issuance of a solution by the court, from the conflict regulations to the negotiation ones and on the other hand starting from changing the standards regarding the evidence, the active role of the court and the application of the principle of contradictory nature and of the principle of immediacy. These amendments to the mechanism by which the judge of the case makes decisions and to the dynamics of the criminal trial generated problems related to taking and using the procedures upon the control of solutions and the possibilities of the judge to deliberate and decide, being absolutely necessary to create own regulations for the special procedure and move away as much as possible from the traditional constructions involving the development of a simplified trial stage.

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THE FUNDAMENTS OF EXPLANATORY CAUSES

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Abstract:

The new Criminal Code in the specter of the legal life the division of causes removing the criminal feature of the offence in explanatory causes and non-attributable causes. This dichotomy is not without legal and factual fundaments and has been subjected to doctrinaire debates even since the period when the Criminal Code of 1969 was still in force. From our perspective, one of the possible legal fundaments of the explanatory causes results from that the offence committed is based on the protection of a right at least equal with the one prejudiced by the action of aggression, salvation, by the legal obligation imposed or by the victim's consent.

Keywords: *legal fundament, explanatory causes, anti-legality, typicality.*

1. Introduction

The current study aims the fundamental analysis of the explanatory causes, necessary because the new Criminal Code makes a new distinction of the causes removing the criminal feature of the offence, by dividing them into explanatory cases and non-attributable causes.

Why was it necessary such different approach? By what is justified materially, formally or legally?

The new Criminal Code does not define the explanatory cases, in general, just enlists them, defines them each other and reveals their effects. According to it are explanatory causes the self-defense (Art 19), the state of emergency (Art 20), the exertion of a right or the fulfilment of an obligation (Art 21) and the victim's consent (Art 22), the latter one being of absolute novelty in the Romanian criminal legislation, while the exertion of a right or the performance of an obligation was stated before by our previous codes, namely the one from 1864 and 1937.

According to Art 18 of the new Criminal Code, an action is not an offence if it is committed under the conditions of one of the explanatory causes. Thus, the main effect, criminally speaking, of keeping one of the explanatory causes is represented by the consideration of the offence as anti-judicial, tort, as not being an offence, because, though it is stated by the criminal law, it has in that context, a just feature. Therefore, unlike the previous legislation, self-defense or the state of necessity are no longer causes removing the criminal feature of the offence because the offence is not committed with guilt, but because it has a just feature; as a conclusion, in these cases, the perpetrator commits the criminal offence conscious of his actions and their effects, but, nevertheless, the criminal law understands to approve such behaviors, by considering them justified (allowed and licit), for the reasons which shall further exposed[1].

2. The notion of offence and the new concepts of typicality and anti-legality

According to Art 15 Para 1 of the new Code Penal, it is offence the action stated by the criminal law, committed with guilt, unjustified and attributable to the person who has committed it. Thus, from the definition, it results that are considered, in the present, features of the offence, the lack of stating the offence in the criminal law (the legality aspect of incrimination and thus of typicality – Art 1), the absence of guilt and the imputable feature (Art 16) and the unjustified feature[2]. When even one of these features is absent, the action is no longer an offence, a criminal sanction not being applicable. This is why, in our opinion, unlike that of other criminal doctrinaires of very high value[3], the explanatory causes are just one of three types of causes which can remove the criminal feature of an offence, each of them removing one of the essential features of the offence. Because they can have a

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[1] Lavinia Valeria Lefterache, *Drept penal. Partea generală. Note de curs*¸ Universul Juridic Publ.-house, Bucharest, 2014, p. 93; George Antoniu, *Noul Cod Penal și Codul Penal anterior, privire compratívă. Partea generală*, in the Romanian Criminal Law Review, No 4/2004, p.15; Florin Streteanu, *Tratat de drept penal. Partea generală*, C.H. Beck Publ.-house, Bucharest, 2008, p.470

[2] In our opinion, there are not four features of the offence, but only three, because the attributive feature is part of the guilt, which it completes in order to become one feature of the offence and not two, different. Also, in the German doctrine, where this concept has first emerged, after that being taken by Austria, Spain, Portugal, Greece, the offence was defined from the perspective of the three features, previously stated by us (typicality, anti-legality and guilt). See in the meaning of a comparative law analysis, Lică Constantin, *Tipicitate și antijuridicitate*, in the Romanian Criminal Law Review, No 2/2008, pp. 143-145

[3] With all due respect for the Prof. George Antoniu, we cannot share his opinion according to which, the explanatory causes are different from the causes removing the criminal feature of the offence in which are included only the absence of typicality and of guilt, namely cases of non-attribution, because for some of them may be ordered safety measures, having a subjective feature. George Antoniu, *Cauzele justificative*¸ in the work coordinated by George Antoniu, *Explicații preliminare ale noului Cod Penal*¸ 1st Vol., Art 1-52, Universul Juridic Publ.-house, Bucharest, pp. 175-176. In the meaning of our arguments, see also the opinion of Gheorghe Ivan, Maria Claudia Ivan, *Drept penal. Partea generală conform noului Cod Penal*, C.H. Beck Publ.-house, Bucharest, 2013, p. 134

simultaneous existence with the commission with guilt of the offence, are considered by the doctrine as objective causes, while the causes of non-attribution are considered subjective causes[4].

When an offence is committed, which can have a criminal feature, the first of these features to be analyzed is the one referring to the fact if the offence is stated by the criminal law. A part of the French doctrine, considers this action as being enough, and as involving the attribute of typicality, German term. In this case, the French doctrine uses the term of **legal element**, the authorized bodies having to be sure that the concrete offence corresponds to a legal definition stated by a previous adopted text[5]. According to the new Romanian criminal conceptions, of German inspiration, as previously shown, supplementary to this first normative phase, it shall be analyzed if the offence is identical with the incrimination norms, presenting all its constitutive elements, this concordance being named **typicality**[6].

Nevertheless, an offence may be stated by the criminal law and may have a typical feature, but it can be justified, when it is authorized by a legal norm, when there is the consent of the victim (according to the law), when a right is protected or when an action to save is performed, under the conditions of the law[7].

This is why when the offence has no unjustified feature, we are in the presence, *per a contrario*, of an explanatory cause, "*being the proof that the incriminated action is not, simultaneously, contrary to the law*"[8]. This position of contrariety of a criminal action with the law itself, with the legal order, has been named as **anti-legality**[9], the term being taken on the Spanish channel[10], from the German doctrine.

According to Prof. Maria del Carmen Gómez Rivero, a certain anti-judicial behavior is when it trespasses a certain imperative norm, which without being justified, it endangers the social relation protected by that norm (the special legal object protected by the incrimination of the offence, we might add), which cannot be protected only by extra-judicial means[11]. This is why the anti-legality has a formal aspect, because it aims the violation of a criminal norm and a material aspect (substantial). Also, in order to be ascertained, the anti-legality requires a positive fact, namely the typicality, and a so-called negative fact, the absence of the explanatory causes[12].

Therefore, the two concepts, of anti-legality and of explanatory causes are complementary, the presence of one denying the other one, and vice versa[13]. The presence of an explanatory cause shall make the action to have a licit feature, according to the law and legal order. This idea wishes to emphasize that the presence of an explanatory cause in the commission of a criminal offence makes it permissible by the criminal law, but it does not assume that it is positive or wanted. Also, its existence (of the explanatory cause) does not necessarily assumes the absence of the typical feature of the offence, but "*it removes ab ignition the vocation of the typical action to transform into an offence*"[14].

Another issue generated by the apparition of the new concepts, was if, outside the explanatory causes stated by the Criminal Code, we may add some new ones. Starting from the principle of the legality of the incrimination, the existence of an explanatory cause is analyzed only from the perspective of the ones expressly stated by the law (here are listed all types of explanatory causes, including the ones stated as special causes applicable to certain offences, or the ones stated by other laws than the Criminal Code), because these represent exceptions from the principle of the criminal repercussions and cannot be of strict interpretation[15]. Though, in the German doctrine, starting from the differentiation between anti-legality, specific criminal notion (where the idea that the notion *criminal anti-legality* is a pleonasm), and the judicial licit, which can exist in all areas of law[16], it is considered that there are explanatory causes also in other areas of law, whose role is to remove the legal illicit. Although in terms of effects, these are identical, however the criminal explanatory causes are limited and, in general, are applicable to all areas of law[17].

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[4] Ioan Lascu, *Cauzele justificative și cauzele de neimputabilitate în Noul Cod penal*, in the Romanian Criminal Law Review, No 3/2011, p. 72

[5] The French doctrine studied by us does not use the term of typicality, but the one of legality. See Harald Renoult, *Droit pénal général*, 12th Ed., Paradigme Publ.-house, Orléans, 2007, p. 111

[6] Matei Basarab *et al.*, *Codul penal comentat. Partea generală*, 1st Vol., Hamangiu Publ.-house, Bucharest, 2007, p. 77

[7] Lavinia Valeria Lefterache, *op. cit.*, p. 94

[8] George Antoniu, *op. cit.*, p. 172

[9] Matei Basarab, *op. cit.*, p. 77. We note that the majority of the Romanian doctrine, unlike a part of the Spanish doctrine, consider anti-legality as being contrary to the entire legal order, and not just against the criminal norms.

[10] Certain Spanish authors, without explicitly using the term, define anti-legality as strictly being of a criminal nature (criminal anti-legality) and thus, as being formed only from those behaviors contrary to the criminal law, and to all the law, in general. See Luis Arroyo Zapatero, et al., *Curso de derecho penal. Parte general*, Experencia Publ.-house, Barcelona, 2004, p. 193. This is also the idea of Santiago Mir Puig, *Derecho penal. Parte general*, Reppertor Publ.-house, Barcelona, 2002, p. 146

[11] Claus Roxin, *Derecho penal. Parte general. Tomo I. Fundamentos, la estructura de la teoria del delito*, the translation from German into Spanish of the second edition, Civitas Publ.-House, Madrid, 2006, Para 4

[12] Maria del Carmen Gómez Rivero, Maria Isabel Martínez González, Elena Nuñez Castaño, *Nociones fundamentales de derecho penal. Parte general*¸ Tecnos Publ.-house, Madrid, 2010, p. 219; in the same meaning, see also Luis Arroyo Zapatero et al., *op. cit.*, pp. 194-195.

[13] Lică Constantin, *op. cit.*, p. 145

[14] George Antoniu, *op. cit.*, p. 174

[15] *Ibidem*, p. 175

[16] Claus Roxin, *op. cit.*, Para 1-3

[17] Ibidem, Para 36

Prof Florin Streteanu, also inspired by the German doctrine, appreciates in the same meaning that the "number of explanatory causes cannot be considered as definitive to those recognized in a given moment, the evolution of society determining the recognition and statement of new circumstances"[18].

Nevertheless, the aspects of legality, especially in the area of the criminal law, must prevail, and the judge is compelled to respect the formal concept of anti-legality before the material one, as explained by Claus Roxin[19].

The concepts of anti-legality and typicality, though they complete the theory of offence, do not fully explain the fundaments of the explanatory causes. This is why, in order to discover these fundaments we shall start our analysis from their creators, namely the German doctrine, supported by the Spanish, Portuguese and Italian etc. ones.

3. The fundament(s) of the explanatory causes

According to the German doctrine, pre-quoted, with the elaboration of the concept of explanatory causes, it was aimed its theoretical ground. In the beginning it was tried the creation of a unique fundament for all explanatory causes, elaborating the *theories*, called *monists*. The first of them was created by Wilhelm Sauer, in 1955 and supported by other German authors who have added their own opinions, such as Peter Noll (1965) or Eberhard Schmidhaüser (1987) and was named the *theory of purpose*, according to which an action is just in the area of law if it represents a proper mean for the achievement of a purpose recognized by the legislator as being just (fair). In other words, an action is just and permitted by the law if by it the community obtains a benefit higher than the prejudice caused. To this theory, we would say *utilitarian*, Peter Noll has added as fundament "*the ponderation of values*", while Eberhard Schmidhaüser considers that retaining an explanatory cause preserves that social relation considered as more valuable than the one prejudiced[20]. The same opinion is partially shared by the Spanish authors José Zugaldía Espinar and Esteban Pérez Alonso, for whom the law authorizes a criminal offence in order to save an interest of higher importance than the one sacrificed[21].

Though the theory and its later amendments cannot ground the situation in which both prejudiced values are identical (life against life, for instance). It is noticed that this theory puts on an equal footing a legitimate interest with a right recognized by the law and prioritizes the concept of material anti-legality.

Moreover, the German authors themselves have considered that this theory cannot justify all situations, and thus have emerged the *dualist theories*. Part of these theories have continued to find a common ground for all explanatory causes, while other have tried to find a common ground for all, which was subsequently completed for each explanatory cause.

Back to the German doctrine, Prof Edmund Mezger and Hermann Blei add to the "*theory of the predominant interest*" that of the "*absence of the unjust interest*"[22]. The absence of the interest refers to the situation in which the owner of the right or of the protected legitimate interest is no longer interest in his legal protection and agrees with its "violation" (in other words, when the victim consents to bear a certain prejudice, either material or moral, or both, then there is no confrontation of interests grounding the explanatory cause)[23]. This is why this idea offers to the consent a special place in the justification of the criminal action; though it (the consent) cannot justify by itself "*the collision of interest*" neither it represents a legal base for self-defense, for instance. For these reasons, Claus Roxin considers that this is one of the cases which exclude typicality, and thus not a fundament. For him, the common ground of all explanatory cases is represented by the "fair social regulation of opposite interests" – or, i.e. the criminal offence committed does not generate a social prejudice, being appreciated as fair by the society and, also, necessary for the protection of the prejudiced social relation[24].

With this completion a legal basis shall also be received by the situations in which the two interests or rights are equal as social value.

This is why lately have become widespread those dualist theories which finding a common ground for all – saving the predominant interest – more often, add another legal basis to each of the explanatory causes.

Certain known Romanian authors consider as general ground for explanatory causes the prevalence of the permissive norms, which remove the illicit feature, before the imperative norms which incriminate different criminal actions. This prevalence of the permissive norms is determined by the superior requirements of the social legal order, because the criminal action in the presence of explanatory causes is not contrary to the law[25].

According to us, the general ground of explanatory causes, which can be completed for each

[18] Florin Streteanu, *op. cit.*, p. 471

[19] Claus Roxin, *op. cit.*, Para 12 and 14

[20] Ibidem, Para 38

[21] José Zugaldía Espinar (director), Esteban Pérez Alonso (coord.) *et al.*, *Derecho penal. Parte general*, 2nd Ed., Tirant lo Blanch Publ.-house, 2009, p. 554

[22] Claus Roxin, *op. cit.*, Para 39

[23] Maria del Carmen Gómez Rivero, Maria Isabel Martínez González, Elena Nuñez Castaño, *op. cit.*, p. 224

[24] Claus Roxin, *op. cit.*, Para 40

[25] Traian Dima, *Drept penal. Partea generală*, 3rd Ed., Hamangiu Publ.-house, Bucharest, 2014, p. 181; see also, George Antoniu, *Explicații preliminare...*, *op. cit.*, p. 172

situation, should be searched in the very name of those causes; they express what is morally fair and just, but also legally, in the given case, for as long as we stay within the legal limits. Though are no longer considered as causes removing the guilt, because the offence is committed with intent, at least the aimed result, yet its action is within the limits permitted by the general law, but also by moral, being fair from the social perspective.

Furthermore analyzing the situation of each explanatory cause, we find that for Roxin, the ground of **self-defense** resides in the combination between the theory of the protection of the prejudiced social relation with the principle of the prevalence of law in front of an unjust aggression (we might add). The same idea is supported by the authors coordinated by José Zugaldía Espinar, who add the fact that self-defense also has "a general function of prevention, in the meaning that it warns the potential offender that the victim may react in the most energetic way possible"[26].

For the Romanian author Florin Streteanu the justification of self-defense resides in the prevalence that the society must give to the unjustly prejudiced social value, which in fact represents a combination between the theory of saving the predominant interest with the prevalence of the right of the innocent one in front of the unjust aggression[27].

Other Romanian authors legitimate this probative cause in that as long as the state which had the obligation to protect the social order cannot do it promptly, then it shall allow the possible victim to act for her own protection[28].

The **state of emergency** has as legal base the same principle of protecting the prejudiced social relation, but to the extent to which it is performed proportionally with the caused prejudice[29] (let us remember that one of the conditions of the state of emergency is that the saving action to not generate consequences more serious unless it would not have occurred[30]). But some Romanian authors suggest as fundament the absence of a real prejudice caused to the social order[31], which is near the general ground found by Roxin in his argumentation.

For the exercise of right and the performance of an obligation, the fundament was found in the very unity of the legal order, which cannot order or allow a certain thing within an area of the law or by a norm and to prohibit it in another area or by another norm[32]. Indeed, for as long as a person shall exercise a right or fulfils an obligation imposed by the law, it is protected by the law which states the right or the obligation. However, also in these cases has been ascertained that there are situations in which the initial limits established by the law are superannuated, taking either the form of the abuse of law, or the one of damaging certain legitimate interests or even rights of a person in the performance of an obligation imposed by the law. Is such attitudes are outside the area of law which allowed or imposed them and reach the area of criminal law, then the commission of a criminal action is no longer justified and the action shall be an offence, if other causes removing its criminal feature do not occur.

Same in the case in which the obligation is imposed by an authority, it is justified only if the authority who ordered it was entitled to do this, namely was a competent authority and, in addition, if this order was not intentionally illegal[33].

Finally, the last of the explanatory causes stated by the new Romanian Criminal Code is the **victim's consent**. Considered by itself a fundament by a part of the German doctrine, as stated before, the victim's consent finds its legal base in the possibility offered by the Art 26 Para 2 of the Constitution, according to which "*any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals*". Hence, the fundamental law itself expresses the ground for this explanatory cause, in the right of any person to freely dispose of himself, but within certain limits, which are the compliance with the general legal order, we might say. This public order imposes that the victim of a criminal action can waive only the rights to which morally and legally can waive, enjoying of a right of disposal over them. This is why this explanatory cause is not and shall not be recognized for the offences against life or in other cases expressly stated by the law[34] (for instance, the case stated by Art 190, 210 Para 3 and Art 211 Para 3 of the new Criminal Code).

Other authors propose as basis in this case the very idea of victim's waiving, with the condition that the victim to be the owner of waived value and the value to be of significant importance[35]. Though fair this allegation, in our opinion is preferable a positive base than a negative idea as legal ground for this explanatory cause.

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[26] José Zugaldía Espinar (director), Esteban Pérez Alonso (coord.) *et al.*, *op .cit.*, p. 556

[27] Florin Streteanu, *op. cit.*, p. 478

[28] Ilie Pascu, Vasile Dobrinoiu *et al.*, *Noul Cod penal comentat. Partea generală*, 2nd Ed., Universul Juridic Publ.-house, Bucharest, 2014, p. 147

[29] Claus Roxin, *op. cit.*, Para 41

[30] Lavinia Vlădilă, Olivian Mastacan, *Drept penal. Partea generală*, 2nd Ed., Universul Juridic Publ.-house, Bucharest, p. 143

[31] Florin Streteanu, *op. cit.*, pp. 506-507; Ilie Pascu, Vasile Dobrinoiu *et al.*, *op. cit.*, p. 159

[32] Florin Streteanu, *op. cit.*, p. 540

[33] According to Art 21 of the new Criminal Code

[34] According to Art 22 Para 2 of the new Criminal Code

[35] Florin Streteanu, op. cit., p. 528

4. Conclusions

The new Criminal Code has inserted new concepts by borrowing certain elements from the German and Spanish doctrines, among which the one of dichotomy explanatory causes – non-attributive causes. This article aimed to reveal the reason for which such differentiation was necessary, searching for the ground of the explanatory causes. It proved to be not an easy task, because we have found many opinions, some of them contrary, other ones complementary, but all very interesting. We have reached the conclusion that it is possible a general cause – the performance of what it is just, from the legal and moral perspective, ground completed with other elements for each of the four causes, as previously presented.

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IMPLICATIONS OF THE NEW LEGISLATION ON THE FUNDAMENTAL PRINCIPLES OF THE CRIMINAL TRIAL[1]

Andrei ZARAFIU[*]

Abstract

Each type of criminal trial is construed, from a systemic and normative perspective, on a range of fundamental rules.

The current pattern of criminal trial applied at national level since the implementation of the New Code of Criminal Procedure knows the same normative approach, which begins with the regulation of the Principles for the application of the criminal procedure law.

Even if, from the perspective of the form, the new procedure law was construed on the same normative fundament, from the perspective of the content, these differ from the previous regulations, being more adapted to the new legal realities and correspond to the trial model proposed by the new legislation.

This study aims to analyse the new fundamental principles of the criminal trial, to identify the current dimension of their normative content and to appraise the way in which these reason with the warranties systems offered by the European regulations.

Keywords: *criminal trial, principles, system, warranties*.

Introduction

As a novelty and following the model of criminal law, the new civil procedural law has been explicitly regulated in terms of its fundamental principles.

In addition to the actual content of the fundamental principles, this legislative approach underlines the significant theoretical and practical importance of these basic rules for the judicial system, as a whole.

Any procedural arrangement and, in particular, the criminal procedural one, which is specific to repressive justice, needs an essential, well-rounded framework, as the foundation for the development of the entire judicial construction.

Knowing such basic structure, laying down the correct legislative and practical dimension of its constituent elements, identifying proper solutions to overcome any potential procedural impediments generated by the application of the new basic rules of the criminal trial, become mandatory initial requirements for the application of the New Criminal Procedural Code.

At the same time, any approach which is exclusively theoretical is unable to cover the need generated by the exclusively dynamic character of the application of the criminal procedural law.

Therefore, a useful analysis may not by-pass the specific judicial reflex of effectiveness of certain new fundamental principles of the criminal trial.

Paper content

As a positive law branch, criminal procedural law consists in the entirety of the legal provisions regulating the course of the criminal trial and other legal procedures related to a criminal case. Such provisions, together with those regulating the legal relationships established among the various parties involved in the criminal trial make up the ensemble generically called *procedural law.*

Even if they have the value of *process rules* or *procedural rules*, or belong, as a subcategory, to the category of *organisation rules*, *competence rules* or *procedural rules*, all criminal process law rules have the same purpose: they prescribe procedural rules.

Also, all the provisions of criminal procedural law are mandatory, *i.e.* both the judicial bodies, and the other parties taking part in the criminal trial have the obligation to abide by the rules prescribed by these provisions.

Irrespective of their name, *i.e.* basic rules, fundamental principles, guiding provisions, etc., the provisions of the criminal procedural law comprise some provisions whose value is different from that of the regular provisions. In most criminal procedural laws, these are found in the beginning of the Code.

I believe that the value of a provision of criminal procedural law as a fundamental principle is given by 3 characteristics:

a) *general applicability*, *i.e.* it refers to all the activities carried out during the criminal trial, irrespective of the phase or stage;

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b) *direct applicability*, *i.e.* it does not need any additional provisions to transpose the generic rule in a particular context;

c) *priority applicability*, *i.e.* it has priority before all other provisions, even if sometimes these have a special character.

In the New Criminal Procedural Code, these provisions were called *principles of application of the criminal procedural law* and are *expressly* provided by Articles 2-12 of the Criminal Procedure Code.

All of the fundamental principles of the criminal trial make up a coordinated and flexible *system*, based on which the other procedural provisions are formulated, and shaping the political and legal framework of criminal justice.

The past years' evolution of the system of criminal trial fundamental principles confirms the *European model* of the new type of criminal trial in Romania, built in accordance with the provisions of the European Convention on Human Rights and based on the mandatory case-law of the Strasbourg Court.

The content of the fundamental principles of the criminal trial should not be considered only at a declarative level, the understanding of the *legal consequences* involved and the related *guarantees* being essential.

A. Lawfulness of the criminal trial (Article 2 of the Criminal Procedure Code)

This may be considered to be the quintessence of fundamental principles of the criminal trial, the framework principle which is the foundation for all other principles.

Lawfulness, as a fundamental principle, implies that all fragmentary activities making up, together, the criminal trial, are carried out *pursuant to the legal provisions*. The principle of lawfulness governs not only the activity carried out in a criminal case (criminal trial, in its strict sense), but also the activities carried out as part of other legal procedures, related to a criminal case.

Not accidentally, the principle of lawfulness is considered to be the most important fundamental principle of the criminal trial, since the law is not only the *requirement*, but also the *condition of the procedure*.

At the same time, in order to fulfil its purpose of preventing arbitrariness, the procedural law has to be predictable and accessible in accordance with the constitutional and human rights protection standards (*M. Udroiu*, Partea Generală, Noul Cod de Procedură Penală, C.H.Beck Publishing House, 2014 p. 5).

The most efficient guarantee of the principle of lawfulness is represented by the *procedural penalties*. Thus, the failure to comply with the legal provisions during the criminal trial may result in:

- the *nullity* of the acts and trial-related measures, and of the procedural acts;
- loss of trial-related rights (by *termination*)
- loss of efficiency of trial-related procedures (claims, complaints, exceptions), by the acknowledgment of *inadmissibility*;
- *exclusion* of illegally or unfairly produced evidence.

At the same time, the *parties to the trial* failing to comply with the legal provisions during the criminal trial may be held liable under the civil, criminal or judicial law (by the application of the judicial penalty). Also as a guarantee to the principle of lawfulness, the successive and progressive course of the activity making up the criminal trial implies permanent control of the lawfulness of the procedural acts (trial-related acts and measures, procedural acts).

Such control is exercised not only *at the request* of the interested parties (*e.g.*, by complaints against the criminal prosecution measures and acts, by the complaint addressed to the judge of the preliminary chamber against the decisions not to start the criminal prosecution or not to lodge a summons, by the exceptions and claims raised in the preliminary chamber procedure, by the means of appeal), but also *ex officio* (by exercising the supervision and control of the criminal investigation bodies by the prosecutor, by verifying the lawfulness and the merits of the summons indictment by the superior prosecutor, by the capacity held by the judge of the preliminary chamber or the court of law to invoke exceptions *ex officio*, etc.).

B. The principle of separation of judicial offices (Article 3 of the Criminal Procedure Code)

Although this principle functioned implicitly also under the former regulation, the separation of the judicial offices, as a basic rule of any modern procedural system, is currently expressly regulated as a fundamental principle of application of the criminal procedural law.

Pursuant to Article 3(1) of the Criminal Procedure Code, the following judicial offices are exercised in the criminal trial:

- the criminal prosecution;
- the disposition of the fundamental rights and freedoms of the individual at the criminal prosecution stage;
- the verification of the lawfulness of the summoning or non-summoning decision;
- the judgment.

What is the principle which *"represents, for the criminal procedure, what the separation of the legislative, executive and judicial authority represents for constitutional law."?* (*A. Esmein* citing Montesquieu in Histoire de la procédure criminelle en France, 1882, not. 410, apud J.Pradel, Procédure pénale, 16th edition, Cujas edition, Paris 2011, p.27.)

Theoretically, the principle means that each judicial office is exercised by specialised bodies, which may not exercise a different office

For the French judicial system, the consequence of the separatist principle does not have a procedural nature, but an organic nature, *i.e.* different judicial

bodies exercise each judicial office (*J. Pradel*, op.cit.,p.27).

In Romania, the current dimension of the principle is not only the result of a deliberate option of criminal policy, but also the expression of certain administrative constraints generated by insufficient judge magistrates.

By reference to both the general provision (Article 3 of the Criminal Procedure Code) and the special provisions whereby the principle is transposed within a particular context (Articles 203, 335, 341, 346, 362 of the Criminal Procedure Code, etc.) *I believe that*, in the current judicial system, the separation of judicial offices is:

- a relative separation, from an organic point of view (due to the lack of specialisation for jurisdictional offices)
- permissive, regarding the plurality in the same criminal case.

What should be understood by the notion *of judicial office*? This notion must not be mistaken by that of procedural office.

The judicial office is an exclusive characteristic of judicial bodies and refers to their competence, setting out the judicial actions taken by the official subjects in performing their duties provided by the law.

The procedural office is a general characteristic of (official or private) procedural subjects, and refers to the interest in consideration of which such subjects take part in the procedures.

While judicial offices set out the judicial bodies' duties, procedural offices set out the attitude (obviously, in a procedural sense) of the procedural subjects.

While the judicial office implies actions, *i.e.* operations performed pursuant to certain express competences, the procedural office implies manifestations and measures, understood as proper remedies.

Both judicial offices, and procedural offices may be exercised simultaneously during a procedural stage or phase, since they are intertwined and manifest themselves at different levels.

Any modern criminal procedural system, including the Romanian one, includes three trial-related offices:

- indictment (exercised on each side of the trial by the active subjects of the two actions)
- defence (exercised by passive subjects of the two offences).
- jurisdiction (to which the decision-making power belongs, power which is exercised by the judges).

Each of the 4 judicial offices has a proper judicial context of manifestation (procedural stage or phase), with a set object lying at its core.

Presently, one may notice the pre-eminence of *jurisdictional* offices, which are manifested including during the criminal prosecution.

These are exercised by the members of the same judicial category – the court judges, even if the methods and procedures applied are different.

The prosecution office and the judgment office are considered primary offices, given the object of the activity implied, which is related to the merits of the case *(clarification of the essential elements of the conflict relationship).*

The other two offices are considered subsidiary offices, given that the activity implied is related to the elements adjacent to the merits of the case *(theoretically, the office exercised by the rights and freedoms judge during the prosecution even has a contingent nature, since it may be exercised in a case other than a criminal case in which a final judgment was ruled by the court).*

Despite the express listing, two other judicial offices may also be identified in the current criminal trial:

- *the temporary order office,* regarding the freedom of the individual, which may be exercised in subsidiary both in the preliminary chamber procedure (Article 348 of the Criminal Procedure Code), and in the judgment phase (Article 362, Article 399 of the Criminal Procedure Code)
- *the office enforcing* penal judgments (see *I. Neagu*, *M. Damaschin*, Tratat de procedură penală. Partea Generală, În lumina noului Cod de procedură penală, Universul Juridic Publishing House, 2014, p.19).

The criminal prosecution office refers primarily to the activity of colleting the necessary evidenced in order to establish the existence or lack of grounds for summons.

From a judicial point of view, the *"collection of evidence"* implies three separate operations: identification, administration and analysis of the evidence.

The criminal prosecution office is exercised by the prosecutor and the criminal investigation bodies through proper acts *(prosecution acts).*

Although both bodies are criminal prosecution bodies, there is not equality, but a functional subordination relationship between them.

The office of disposition of the fundamental rights and freedoms of the individual has a subsidiary nature and is also exercised at the criminal prosecution stage.

The judicial body exercising this office is a jurisdictional body having duties in this respect (judge of rights and freedoms) or, *as an exception*, the body which exercises the primary office of criminal prosecution.

Thus, in exercising such office, the judge of rights and freedoms rules a decision during the criminal prosecution, regarding: preventive measures, precautionary measures, special supervision and investigation methods, and other evidence-related procedures of emotional nature, temporary safety measures, etc.

Also, in exercising its judicial office, the *judge of rights and freedoms* has other duties as well, during the prosecution phase, regarding the *anticipated hearing procedure*, *the complaint regarding the length* of the criminal trial, etc.

The office regarding the verification of the lawfulness of the decision to lodge or not lodge a summons is usually exercised by the judge of preliminary chamber, during the preliminary chamber procedure.

This judicial office also implies, in terms of duties, the *verification of the lawfulness* of the evidence produced and acts performed during the criminal prosecution, the *verification of the lawfulness* (and, exceptionally, even the *merits*), of the decisions not to lodge summons ruled by the prosecutor, as well as the *verification of the lawfulness and merits* of certain acts ordered by the prosecutor (*e.g.*, in case of re-opening the criminal prosecution, pursuant to Article 335 of the Criminal Procedure Code).

The judgment office is exercised at the judgment stage, by the court referred to and vested according to the law, in panels – Article 3(7) of the Criminal Procedure Code.

The activity implied by the exercise of this office is finalised by a resolution of the two judicial actions which, once it is final, acquires the authority of *res judicata*.

The judgment office implies a *jurisdiction* over the merits.

According to Article 3(3) of the Criminal Procedure Code, *during the same criminal trial, the exercise of a judicial office is not compatible with the exercise of another judicial office, except for that provided at paragraph (1) letter (c), which is compatible with the judgment office*.

This general provision is transposed, in a particular context, into the matter of incompatibility: Article 61(1)(e), Article 64(4) and (5), Article 65(4), Article 340 and Article 342(7) of the Criminal Procedure Code.

There are also certain exceptions regarding the admissibility of *multiple judicial offices*:

a) thus, the body exercising the criminal prosecution office in a case, may also exercise the office of disposition of the freedom of the individual at the same procedural stage: the criminal prosecution body may dispose of the freedom of the suspect by retention (Article 209 of the Criminal Procedure Code), or the freedom of the defendant, by retention or judicial control (Article 211(d) of the Criminal Procedure Code);

b) the implicit office of disposal of the freedom of the individual may be exercised by the same judge carrying out the procedure in the preliminary chamber (Article 348 of the Criminal Procedure Code), or making up the court panel vested with the settlement of the case (Articles 362, 399 of the Criminal Procedure Code).

c) the judge of preliminary chamber who exercised, atypically, duties specific to the verification office in the procedure regarding the settlement of the complaint against the decisions not to lodge summons, and ordered the commencement of judgment, is incompatible with the merits judgment of the case.

Such incompatibility, which apparently contradicts the general permission provided by Article 3(3) of the Criminal Procedure Code, is based on a mandatory decision of the High Court (Decision to approve the appeal in the interest of the Law No. XV/2006, Official Gazette No. 509 of June 13, 2006).

The separation of judicial offices represents the condition for the regulation of the functional competence in the criminal trial.

For a detailed approach of the principle, see *A. Zarafiu*, Despre separarea funcţiilor judiciare.Consecinţe. Impedimente. Remedii, în volumul Conferinţei *Reglementări fundamentale în Noul Cod penal şi Noul Cod de procedură penală,* organised by the Faculty of Law, Bucharest University, published at C.H.Beck Publishing House, 2014, p.225-240.

C. Presumption of innocence (Article 4 of the Criminal Procedure Code)

Pursuant to Article 4(1) of the Criminal Procedure Code, any individual is presumed *innocent* until their guilt is established by a final penal decision.

Based on the environment in which the penal action is settled, an individual's *guilt* is conditional upon three cumulative findings of the court, *i.e.*:

- *the deed is real* (it is material);
- *the deed is an offence* (it meets all the elements making up the criminal deed and was perpetrated with the type of guilt provided by the law);
- *the deed was perpetrated* by the person who is summoned.

Within this complex context, guilt as a *procedural* concept should not be mistaken with guilt as essential characteristic of the crime (subjective attitude), *which is a substantial concept*, and takes one of the forms provided by the criminal law at Article 16 of the Criminal Code (the intention, the guilt, etc.).

The material ground for establishing the guilt of a person, *lato sensu*, may only be a piece of evidence, legally and fairly produced.

Also, a person's guilt must be established *beyond any reasonable doubt*, *i.e.* after removing all doubts or contradictions identified in the evidence produced and influencing the judicial body's opinion.

In case such doubts or contradictions (*doubt*) may not be removed by additional evidence or the removal of contradictory evidence, then, pursuant to Article 4(2) of the Criminal Procedure Code, these are interpreted in favour of the suspect or defendant - *in dubio pro reo*.

In consideration of these aspects, the principle of the presumption of innocence has been granted the most important guarantee in the new procedural law:

The regulation, as a distinct situation of *prevention* of the initiation, or *extinguishment* of the criminal action, of the lack of evidence attesting to the fact that a person committed a crime – Article 16(1)(c) of the Criminal Procedure Code.

In other words, as a consequence of the principle of the presumption of innocence, no person may be considered to be guilty and held liable under the criminal law, if:

- *there is no evidence* attesting to the fact that the three cumulative conditions of penal guilt (the deed is real, it is an offence and was perpetrated by the person who is summoned);
- *the evidence produced* is not sufficient to remove the reasonable doubt in the judicial body's opinion.

Under these circumstances, the only possible decision is acquittal (or *classification* at the criminal prosecution stage).

The doctrine established that the presumption of innocence does not have an absolute, but a relative nature, and may be removed by unquestionable evidence of guilt.

I believe that further analysis of this matter is required.

Until the court's decision establishing the guilt *remains final*, the presumption of innocence operates in an absolute manner.

Irrespective of the nature of the offence and the evidence produced, and despite the defendant's position in the trial (the defendant may admit their guilt), until the final settlement of the case, the person against whom the judicial activity is carried out must be treated as *innocent*, from a procedural point of view.

As a consequence of the principle of the *presumption of innocence*:

- the duty of evidence is incumbent upon the person who raises the *charges* (in criminal matters) or *claims* (in civil matters);
- the suspect or the defendant does not have the obligation to prove their innocence, and has the right not to concur to their own indictment (Article 99(2) of the Criminal Procedure Code);
- the decision ruled by the first instance court (which is not final yet) may not be enforced if it is challenged by appeal, even if it establishes the defendant's guilt, etc.

At the level of European regulation, the *presumption of innocence* is perceived as a specific guarantee of the right to a fair trial, established in criminal matters – Article 6(2) ECHR, C. Bîrsan, Convenția europeană a drepturilor omului, Comentariu pe articole, 2nd edition, C.H.Beck Publishing House, 2010, p.533-543.

D. The principle of finding the truth (Article 5 of the Criminal Procedure Code)

Pursuant to Article 5(1) of the Criminal Procedure Code, judicial bodies have the obligation to ensure, based on evidence, the finding out of the truth about the facts and circumstances of the case, and the suspect or the defendant. Being an *obligation* of the judicial bodies, finding out the truth is also a guiding principle in carrying out the trial-related activity.

However, in order not to become an impossible obligation, finding out the truth *must be based* on judicial coordinates. Therefore, what needs to be found in a criminal case is the *objective truth* (judicial), not the absolute truth.

This type of truth requires a correspondence between the conclusions formulated by the judicial bodies and the objective reality concerning the deed and its perpetrator.

Considering its objective nature, the truth may be found, within the meaning of the fundamental principle regulated by Article 5, by *objective means.*

In this sense, the law stipulates the judicial bodies' obligation to ensure the finding out of truth based on evidence. But, according to Article 97(1), the evidence are *de facto elements* (they may be verified, under their material aspects).

The truth found by judicial means is even preferred to past material reality.

Thus, the *de facto* situation established by a final court decision is presumably reflecting the truth – *res judicata pro veritate habetur*.

An important consequence of the principle of finding the truth is the judicial bodies' obligation to clarify, based on evidence, the case, completely and under all its aspects.

Such obligation is transposed in a particular context into

- article 327(1) of the Criminal Procedure Code, which stipulates that the prosecutor may not proceed with the settlement of the cases, unless the criminal prosecution *is completed*;
- article 349(1) of the Criminal Procedure Code, which stipulates that the role of the court is also to ensure that evidence is produced for the *full clarification* of the circumstances of the case, for the purpose of finding the truth.

The evidence must be collected and produced, for the purpose of finding the truth, in full compliance with the law.

Moreover, Article 5(2) of the Civil Procedure Code stipulates the judicial bodies' obligation to collect and produce evidence both in favour, and against the suspect or defendant.

The dismissal or failure to record, in bad faith, the evidence proposed in favour of the suspect or defendant is punished according to the law.

The principle of finding the truth has an *absolute character.* A criminal case settled in breach of this principle and which does not reflect the truth (judicial error) may be re-examined by extraordinary remedies at law.

Also, according to the law (Article 531-542 of the Civil Procedure Code), the person who received a final sentence and subsequently demonstrates that a judicial error occurred is entitled to remedies for the prejudice suffered, offered by the state.

E. Ne bis in idem (Article 6 of the Civil Procedure Code)

The mandatory rule implies by this principle concerns the *situation following* the final settlement of a criminal case.

The rule is the consequence of the authority of *res judicata*.

The authority of *res judicata* is the *status* generated by the final settlement of a criminal case.

The authority of *res judicata* implies two effects:

- *the positive effect*, which enables the enforcement of the provisions of the final penal decision;
- *the negative effect*, which prevents the initiation of a new criminal trial against the same person fro the same deed.

Pursuant to Article 6 of the Criminal Procedure Code, no person may be prosecuted or judged for the perpetration of a crime when a final penal decision was previously ruled against that person, for the same deed, even of under a different legal classification.

At a national level, the condition for the application of the *ne bis in idem* rule is the ruling of a final penal decision (containing the settlement of the merits).

I believe that the mandatory effect also applies if a *decision not to summon* the same person, for the same deed was previously ruled, such decision being jurisdictionally confirmed by the judge of preliminary chamber (by the dismissal of the complaint lodged pursuant to Article 341 of the Criminal Procedure Code).

But, in this situation, the impeditive effect is *conditional*, because it only applies unless new deed or circumstances are discovered – see the explanations in Chapter III, the section regarding the extinguishment of the penal action.

Subject to the satisfaction of the condition mentioned above, the *ne bis in idem* rule is based on a double identity:

- of the person;
- of the deed (in a material sense)

In criminal matters, the identity *of case* (legal merits) is removed by the effect of the law (Article 6 expressly stipulates that the rule applies even if the deed is classified under *a different legal classification*).

Currently, the *ne bis in idem* rule is regulated both at the level of fundamental principle (Article 6 of the Civil Procedure Code), and at the level of cause, which prevents the initiation of the penal action (Article 16(1)(i) of the Criminal Procedure Code).

The rule may be used at a judicial level:

- by *exceptio rei iudicatae*, until a decision is ruled in the second trial;
- by *main course of action*, as a separate reason for appeal or appeal for annulment (Article 426(b) of the Criminal Procedure Code).

The *ne bis in idem* principle has an *absolute nature* both in terms of effects (the prevention may apply even after a decision ruled in the second trial becomes final, by an extraordinary remedy at law.), and in terms of scope of application (it also applies at a supra-national level, within the framework of international judicial cooperation in criminal matters – Article 8 and 129 of Law No. 302/2004, see *M. Udroiu*, op. cit., p. 26-28).

F. The fair nature and reasonable term of the criminal trial (Article 8 of the Criminal Procedure Code)

While lawfulness is the oldest fundamental principle, the framework or main principle, from which all other principles are derived, namely the right to a fair trial is, undoubtedly, the most *comprehensive*.

In the new criminal procedural system, this principle is stipulated, for the first time, as a basic rule, although its existence was unanimously accepted at the level of doctrine and at a judicial level.

The regulatory basis of the principle is Article 6 of ECHR and the case-law of the Court of Strasbourg.

How should one regard the national regulation, which is obviously incomplete and insufficient, taking into consideration the already settled character of the regulation, at a European level?

Article 8 of the Criminal Procedure Code does not regulate the *content of the principle* which guarantees the fair nature and reasonable term of the criminal trial.

The national rule must be considered the "interface" of the complex and multi-valent European regulation, which it accepts without any reserves.

Thus, the content and guarantees of the right to a fair trial, which also includes the reasonable term of the procedure, may not be found in the national regulation, but in:

- article 6 of the European Convention;
- article 47 of the Chart of Fundamental Rights of the European Union;
- the case-law of the Court of Strasbourg;
- the case-law of EUCJ;

Article 8 merely stipulates that the fair nature of the criminal trial is *conditional* upon the satisfaction of the procedural guarantees and the rights of the parties and of the other subjects taking part in the trial.

Also, the national lawmaker believes that the fair nature of the procedure must also ensure the achievement of the purpose of the criminal trial: the timely and full identification of the offences, so that no innocent person may be held liable under the criminal law, and any person who committed a crime may be punished according to the law, within a *reasonable* term.

The notion of reasonable term, which is *generic* in the regulation, is always considered *in a specific context*, depending on the characteristics of each criminal case.

Undoubtedly, in criminal matters, the reasonable nature of the term for carrying out the judicial

procedures implies the promptness of the judicial response.

There are several arguments in favour of this relationship:

- the purpose of the criminal trial implies the *timely identification* of offences;
- the procedural terms are limited in terms of material content: 24 hours, 3 days, 10 days, etc.;
- even if the judicial bodies' obligations were not conditioned by specific terms, they are bound to *efficiency*, using certain obvious time coordinates: *immediately*, *urgently*, etc.

Efficiency is emphasised when the judicial procedures are performed in relation to a person who is imprisoned (*e.g.* Article 322(2) of the Criminal Procedure Code stipulates that the *cases in which people are arrested by the prosecutor must be settled urgently and with priority*, Article 355 of the Criminal Procedure Code stipulates that the *court dates scheduled in the cases where the defendants are imprisoned are usually of 7 days, the judgment being performed urgently and with priority*.

In its turn, trial-related efficiency implies two aspects:

- *expedience* (mentioned above)
- *simplification* of judicial procedures. For example: even if they lack the necessary competence, the criminal prosecution bodies have the obligation to perform urgent criminal prosecution acts – Article 60 of the Criminal Procedure Code; when it voluntarily intervenes in the criminal trial (which was already initiated), the party who is held liable under the civil law starts the procedure from its current stage – Article 21(3) of the Criminal Procedure Code.

According to the case-law of the Court of Strasbourg (see *C. Bîrsan*, Convenția europeană a drepturilor omului, Comentariu pe articole, 2nd edition, C.H.Beck Publishing House, 2010, p.528; I.Neagu, M.Damaschin, op.cit., p.89, *M.Udroiu*, op.cit.,p.35-37), the following criteria may be taken into consideration when setting out the reasonable term of the procedure:

- the complexity of the criminal case;
- the parties' behaviour;
- the authorities' behaviour;
- the importance or the risk involved in the case.

As a novelty, at a national level, the reasonable term was also expressed at a material level, under Article 488^1 of the Criminal Procedure Code, regulating the appeal regarding the length of the criminal trial:

- less than 1 year for the duration of the criminal prosecution or judgment;
- more than 6 months for the cases which are subject to remedies at law.

The present paper has only considered, in analysing this principle, the regulation contained in Article 8 of the Criminal Procedure Code, and several general coordinates of the European regulation.

For a complex approach of this matter, several works need to be taken into consideration, containing a detailed analysis: *C. Bîrsan*, op.cit., p.351 *et seq.*; R. Chiriță, Convenția Europeană a Drepturilor Omului. Comentarii și explicații, 2nd edition, C.H.Beck Publishing House, 2008, p.194 *et seq.*, *D. Bogdan*, *M. Sălăgean*, Drepturi și libertăți fundamentale în jurisprudența Curții Europene a Drepturilor Omului, All Beck Publishing House, 2005, p.162 *et seq.*, *O. Predescu*, *M. Udroiu*, Protecția europeană a drepturilor omului în procesul penal român, C.H.Beck Publishing House, 2008, p.535 *et seq.*, *M. Damaschin*, Dreptul la un proces echitabil în materie penală, Universul Juridic Publishing House, 2009, etc..

In addition to general guarantees, whether *express* (the trial publicity, the reasonable term) or *implicit* (the equality of arms, contradictoriality, motivation of decisions, the right of the accused to remain silent and not to incriminate themselves), regarding the course of any trial (civil, criminal, etc.), the European regulation establishes, in criminal matters, certain *guarantees specific* to a fair trial – *C. Bîrsan*, op.cit., p.543-568.

Some of these guarantees are:

- the right to be informed on the nature of the indictment, Article 6(3)(a);
- granting the necessary time and facilities to prepare the defence, Article 6(3)(b);
- the right to defence, Article 6(3)(c);
- the right of the accused to examine the witnesses taking part in the trial, Article 6(3)(c);
- the right to the free assistance of an interpreter, Article 6(3)(e).

G. The right to freedom and safety (Article 9 of the Criminal Procedure Code)

The *criminal trial* is the only judicial context with a possible impact on individual freedom.

Therefore, in principle, Article 9(1) of the Criminal Procedure Code proclaims that any individual's right to freedom and safety *is guaranteed* during the criminal trial.

The guarantee implied by this principle covers two separate legal categories:

- individual freedom (as a fundamental right);
- individual's safety (all the guarantees protecting the individual against the actions taken by the public authorities).

The legal dimension of the concept of freedom is characterised by:

- *multiple meanings* (freedom, fundamental freedoms, public freedoms – see *A. Zarafiu*, Arestarea preventivă, C.H.Beck Publishing House, 2010, p.)
- *antithetical regulation* (freedoms protected by the strict regulation of the methods by which it is impacted).

Individual freedom protection at the level of the Criminal Procedure Code is limited to the regulation of the temporary methods by which freedom is impacted (*post-delictum*, but *ante judicium)*.

The methods by which individual freedom is finally impacted correspond to a protection achieved by means of *substantial law*, not procedural law.

What are the *consequences* of guaranteeing the freedom and safety of the individual in the criminal trial:

a) first of all, the temporary impact on individual freedom *has an exceptional nature*; it is preferred to maintain the *status quo* as far as freedom is concerned (which is also the natural condition of the human being) – Article 9 (2) of the Criminal Procedure Code;

- like any other exceptions, detention orders or freedom limiting measures may only be ordered in the situations and under the circumstances provided by the law.

One should notice that the protection of freedom at a procedural level refers to any form of temporary impact on freedom.

Without going into further details, which are the field of analysis of specific institutions one should take into consideration that individual freedom may be impacted by:

- *detention* (retention, house arrest, preventive detention);
- *limitation* (limitation of the freedom to move or travel);
- *conditioning* (following the establishment of certain obligations specific to judicial control).

Also, one should take into consideration that the temporary detention of an individual may take:

- *primary forms* (preventive detention measures, temporary safety measures based on medical reasons)
- *auxiliary forms* (detention in case of a psychiatric forensic examination, execution of a warrant for arrest, when the perpetrator is caught by any person, in the case of citizen's arrest)

b) any arrested individual has the right to be informed, within the shortest possible time, and in a language they understand, on the reasons for being arrested and has the right to lodge an appeal against this measure – Article 9 (3) of the Criminal Procedure Code;

c) another consequence of this principle is the competent judicial bodies' obligation to order the revocation of the measure and, as the case may be, the release of the person retained or arrested, when a detention or freedom limiting measure is found to be illegally ordered;

d) the right of any individual, against whom a detention order was *illegally* ordered during the criminal trial, to obtain a remedy for the prejudice suffered, according to the law.

In this sense, Article 539 of the Criminal Procedure Code stipulates a form of special liability in tort for the act committed by another person *(the liability of the State for the act committed by the judicial body)*, where the tort is the illegal detention.

Also, this special form of liability is also associated to a proper legal instrument for materialisation, *i.e.* a *civil injunction*, with specific elements, also regulated by the Criminal Procedure Code (Articles 541-542 of the Criminal Procedure Code).

H. The right to defence (Article 10 of the Criminal Procedure Code)

The guarantee for this right is a basic rule of all judicial procedures. However, in criminal matters, the right to defence manifests itself in its *complex* dimension.

In reality, the principle guarantees a set of *legal remedies* aimed at protecting the position and trial-related interests of a party or main subject in the trial.

Therefore, the content of this right is a *complex one*, which manifests itself in three separate areas:

- *the right* of the parties and main subjects in the trial to defend themselves;
- *the right* of the parties and main subjects in the trial to be represented *by a lawyer* (the right to a technical defence).
- *the obligation* of the judicial bodies to take into consideration, *ex officio*, the aspects which are in favour of the parties and main subjects in the trial (suspect or defendant), such obligation being expressly regulated by Article 5(2).

Starting from this complex content of the right guaranteed as a fundamental principle, I believe that the wording *right of defence*, used in the former regulation, is more eloquent than *right to defence* used in the note to Article 10 of the Criminal Procedure Code and Article 24 of the Constitution, which seems to induce only one component of the right *(the right to the defence offered by an expert)*.

Defence is a wider notion than *legal assistance.*

Article 10 of the Criminal Procedure Code regulates the *general context* of manifestation of the principle guaranteeing the right of defence in the criminal trial.

There are numerous legal remedies or trial-related guarantees which, *as a whole*, make up the right to defence, and are present in almost all the procedures.

The right to defence is guaranteed not only to the defendant, as a passive subject of the penal action, but also to the other parties or main subjects in the trial – Article 10(1) of the Criminal Procedure Code.

The parties, the main subjects in the trial and the lawyer have the right to be granted the necessary time and facilities to prepare the defence.

This provision allows, for example, the parties and the main subjects in the trial to request and to be granted a term for the purpose of *hiring a lawyer.*

Also, the regulation allows the lawyer to request and be granted a term in order to *study a large legal material.*

Even if, in principle, the time required to ensure an effective defence is *generically* guaranteed, following to be assessed *in a specific context*, depending on the characteristics of each case, sometimes there is no prior material quantification thereof.

Thus, pursuant to Article 91(2) of the Criminal Procedure Code, if the chosen lawyer *is replaced* by an official lawyer, during the trial, the court has the obligation to grant the official lawyer a minimum term of 3 days to *prepare the defence*.

The defence implies, first of all (but without limitation) a *defensive mechanism*, whereby a judicial response is given to certain indictments or claims.

The right of/to defence must be specifically and effectively guaranteed in the criminal trial, not formally or superficially.

In this sense, Article 10(5) of the Criminal Procedure Code stipulates the judicial bodies' obligation to ensure the *full* and actual exercise of the right to defence by the parties and main subjects in the trial, throughout the criminal trial.

A specific component of the *right to defence* in criminal matters is the *mandatory legal assistance* (which is sometimes free).

Even if the European protection of the right to defence (see the comment made by prof. Bîrsan, op. cit., p. 550-558 regarding Article 6(3)(c), which refers to the assistance given to the "accused", at a national level, in certain cases, *legal assistance becomes mandatory* not only for the suspect or defendant (Article 90 of the Criminal Procedure Code), but also for the harmed person and the other parties [Article 93(4) and (5) of the Criminal Procedure Code].

In these cases, the legal assistance must be supplied by a chosen or official lawyer, otherwise the absolute or, as the case may be, relative invalidity of the act is triggered [Article 281(1)(f) of the Criminal Procedure Code].

The new regulation of the right to defence in relation to a trial stipulates, as a component of the fairness and loyalty of the trial, the obligation to *exercise the right to defence* in good faith, in accordance with the purpose for which such right was acknowledged by the law – Article 10(6) of the Criminal Procedure Code.

What is the reason for the special placing of the right to defence, which is regulated as a set of trial-related rights, under the obligation to exercise the right in good faith?

Such provision *seems to be superfluous*, as long as Article 283(4)(m) of the Criminal Procedure Code approves the punishment by fine of up to RON 5000, of the judicial default consisting in the abuse of right (the exercise in bad faith of any trial-related and procedural right).

The regulation is regarded, at the level of the doctrine (*M. Udroiu*, op. cit., p. 48), as an implicit acknowledgment of the judicial bodies' ability to punish, in relation to the exercise of the right to defence, the abuse of right.

However, I believe that this *implicit* instrument of control, may easily become an *arbitrary* and *excessive* instrument, when used as a possibility to limit or condition the exercise itself of the right.

Trial-related excess in the exercise of the right to defence does not require any additional punishment (in addition to a judicial fine), but merely ignored.

Prof. Tanoviceanu (op. cit., vol. IV, p. 141) argues that "*the defence has every right, even the right to exaggerate, to use skills, to deviate from reality".*

Especially as far as the lawyers are concerned, the right to punish the abuse of right *other than* by applying a judicial fine, should only be granted to the bodies fostering the exercise of this liberal profession.

Accepting the judicial bodies' ability to impose additional punishments for the trial-related excess while exercising the right to defence means to implicitly accept the *absolute prevalence of the other trial-related offices* (indictment, jurisdiction) over the defence.

I. Respect for human dignity and private life (Article 11 of the Criminal Procedure Code)

The purpose of the criminal trial cannot be achieved *by any means*.

The judiciary activity encompasses certain exigencies pertaining simultaneously to the protection of both the public and private interest.

In this respect, according to Art. 11(1) of the Criminal Procedure Code, any person against whom a criminal prosecution was initiated or who is being on trial should be treated with the observance of human dignity.

The regulation *is showing deficit* since the protection of human dignity should be extended to all the stages of the criminal trial.

Only through such an extended application does this right correspond to the regulating modality at both national level (Art. 22(1) and (2) of the Constitution), and supra-national level (Art. 3 of ECHR, the European Convention for the prevention of torture and Inhuman or Degrading Treatment or Punishment, Strasbourg of November 26, 1987, ratified by Romania by Law No. 80/1994).

The principle regarding the observance of human dignity has an immediate corollary. No person can be subject to:

- torture;
- inhuman punishment or treatment;
- degrading punishment or treatment.

Each of the 3 notions relates to its *own semantic area* (see in this respect *C. Bîrsan*, op.cit., p.127-167, *A. Crişu*, Drept procesual penal, 4th Edition, reviewed and updated, Hamangiu Publishing House 2013, p. 67-71).

The most obvious consequence of the principle regarding the observance of human dignity can be encountered in the field of evidence.

Thus, the principle regarding the loyalty of the production of evidence entails, according to Art. 101 of the Criminal Procedure Code, the following *interdictions*:

- it shall be prohibited to use violence, threats or other means of coercion, as well as promises or urges

in order to obtain evidence (Article 101(1));

- no interview methods or techniques can be used, which affect a person's capacity to consciously or voluntarily remember or recount the deeds constituting the object of the evidence. The interdiction shall apply even if the interviewed person expresses his/her consent to the use of such a hearing method or technique (Article 101(2)).

Even if Art. 102(1) refers only to the evidence obtained *by means of torture*, as an application of the principle regarding the observance of human dignity, all the evidence obtained in breach of the said interdictions should be excluded.

Other trial-related institutions transpose on a specific level the exigencies entailed by the principle regarding the observance of human dignity:

- the suspension of criminal prosecution (Art. 312(1) of the Criminal Procedure Code) or of judgment (Art. 367(1) of the Criminal Procedure Code) when the suspect or, as applicable, the defendant is suffering from a severe condition, which prevents him *to attend* the criminal trial;
- the interruption of the hearing when a person shows visible signs of excessive fatigue or the symptoms of a disease affecting his/her physical or psychological capacity to attend the hearing (Art. 106(1) of the Criminal Procedure Code);
- the medical treatment under a permanent escort which is ordered when the person who is in preventive detention is suffering from a condition that cannot be treated in the medical network of A.N.P. (Art. 240(1) of the Criminal Procedure Code);
- declaring the session as non-public if the Court considers that judgment in a public session might impair a person's dignity (Art. 352(3) of the Criminal Procedure Code);
- postponing or discontinuing the execution of the punishment by imprisonment or life imprisonment when it is found, on the basis of a forensic expert report, that the convict is suffering from a condition that cannot be treated in the sanitary network of A.N.P. (Art. 589(1)(a) related to Art. 592 of the Criminal Procedure Code).

Last, but not least, emphasis should be placed on the fact that the protection of human dignity may appear in the shape of certain deeds incriminated by the criminal law:

- abusive inquiry (Art. 280 of the Criminal Code);
- subjection to ill-treatment (Art. 281 of the Criminal Code);
- torture (Art. 282 of the Criminal Code).

Art. 11 ensures, at the basic rule level, a double protection: both of human dignity, and of *private life*.

According to Art. 11(2) of the Criminal Procedure Code, observance of private life, of inviolability of domicile and of the secrecy of correspondence *shall be guaranteed*.

However, unlike human dignity, the protection of these rights is not absolute, as certain methods that affect the aforesaid principles are legally accepted.

Unlike other types of trials, the criminal trial entails sometimes the use of certain intrusive procedures, for the purpose of obtaining evidence, liable to affect a person's private life.

In this respect, mention can be made of the special supervision methods, generally stated in Art. 138(1) of the Criminal Procedure Code (interception of communications or of any type of communication, access to an IT system, video, audio surveillance or surveillance by taking photography, the location or monitoring by technical means, the retention, surrender or searching of mail transmissions, the use of under-cover investigators and collaborators, etc.) as well as any other procedures of discovering and seizing objects and writs (searching and seizing of objects or writs, Art. 156 of the Criminal Procedure Code).

Despite their emotional content, these methods of obtaining evidence are accepted at principle level if the limitation of the right to private life, of the inviolability of domicile and mail secrecy entailed by them occurs under the restrictive conditions of the law and if it is necessary in a democratic society.

J. Official language and the right to an interpreter (Article 12 of the Criminal Procedure Code)

Pursuant to Article 128(1) of the Constitution, the judicial procedure is carried out in *Romanian.*

This constitutional rule is transposed, at the level of the fundamental principle of the criminal trial, to Article 12, which stipulates that the official language in the criminal trial is Romanian.

The parties and the subjects in the trial who do not speak or understand Romanian, or unable to express themselves, have the right to an *interpreter*, free of charge.

The interpreter is a participant to the criminal trial who has no legitimacy in the case, who ensures *the exercise of the following* trial-related rights for the party or subject in the trial to which one of the above mentioned situations applies:

- the right to take note of the elements of the file;
- the right to speak (to give statements, to give explanations, to ask questions);
- the right to submit conclusions in court.

Pursuant to Article 12(3) of the Criminal Procedure Code, when legal assistance is mandatory, the suspect or the defendant is granted, free of charge, the possibility to communicate, through an interpreter, with the lawyer in order to prepare the hearing, to lodge a remedy at law or any other claim related of the settlement of the case.

The inability *to speak* or *to understand* Romanian or to express oneself is a matter of fact determined by the statement given by the party or subject in the trial, or inferred by the judicial body, considering all the elements of the case.

Moreover, Article 12(2) of the Criminal Procedure Code acknowledges the right of the

Romanian citizens who belong to national minorities *to express themselves in the mother tongue* before the courts of law.

However, this right is not conditional upon the lack of knowledge or inability to express oneself in Romanian.

In all cases, the procedural acts (understood as judicial writs) are prepared in Romanian.

The notion of *interpreter* is wider than that of *translator*. Also, the category of interpreters also includes the experts ensuring communication with people who suffer from certain sensorial, mental defects – according to the rules of *defectology*.

The interpreter's failure to perform their trial-related obligations may be punished by judicial fine or even by a penal sanction [the interpreter may be an active subject of the offence of false testimony, pursuant to Article 273(2)(c) of the Criminal Code].

This principle is transposed into a specific context by numerous rules:

- articles 81, 83, 85, 87 of the Criminal Procedure Code stipulate, among the trial-related rights of the main subjects and parties, the right to an interpreter, free of charge;
- article 105 of the Criminal Procedure Code regulates the hearing through an interpreter procedure;
- articles 209(2), 212(2), 226(3) of the Criminal Procedure Code regulate the obligation to inform the person against whom a preventive measure was ordered, in the language she understands, of the reasons for ordering such measure;
- article 329(3) of the Criminal Procedure Code regulates the obligation to provide a certified translation of the indictment etc.

Under the European regulation, *the right to free assistance by an interpreter* is a specific guarantee of the right to a fair trial in criminal matters – Article 6(3)(e) of the European Convention (*C. Bîrsan*, op.cit. p. 568-570).

Conclusions

The new fundamental principles of the criminal trial equally demonstrate both the deliberate option of the decision-making factors regarding the orientation of the penal policy at a national level, and the alignment of the Romanian criminal trial to the mixed, European model.

The regulation of the current system of basic rules related to the criminal trial reflects the intention to strike a balance between the need to protect public interest, by constraint, punishment and prevention, and the need to protect private interest, by guaranteeing more individual rights and freedoms.

Equally important is the acceptance and application of this new approach by the judicial system, so that the rules prescribed by these fundamental principles would not operated at a merely declarative level.

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COMPARATIVE ANALYSIS OF THE CAUSES OF ABSOLUTE NULLITY OF THE CONTRACT IN THE ROMANIAN AND THE SPANISH CIVIL LAW

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Abstract

The present paper is aimed to present a comparative analysis of the causes of absolute nullity of the contract in the Romanian and the Spanish civil law. Thus, the study focuses on the presentation of both similarities and differences between the provisions of the Romanian Civil Code and the Spanish Civil Code that regulate the legal institution of the nullity of contracts, outlining the practical consequences of the conclusion.

Keywords: *absolute invalidity, capacity, object, cause, form.*

1. Introduction

The invalidity of the contract is the civil sanction that is set to put aside the effects which are contrary to the legal provisions that regulate the validity conditions that are required for a lawful civil contract.[1]

Thus, the invalidity appears at the moment the contract is signed and prohibits that all or part of the ilegal effects of the contract take place.

The major clasification of the invalidity is done by using the criteria consisting of the nature of the interest which is set by the parties at the moment of signing the contract.

When the nature of the interest regards private matters or is considered to have minor impacts on the parties in comparison with the security of the civil circuit, the nature of the invalidity is relative, whereas the nature of the interest taken into consideration are of major importance for society or could have important consequences on the patrimonial effects of the parties and other persons, the invalidity is considered to be of absolute character.

The major difference between the absolute invalidity and the relativa invalidity (also known as the anulability of the contract) consists of the juridical regime of the effects of the invalidity. This matters refers to who can invoke the effects of the sanction or if the court cand state ex oficio the invalidity of a contract, whether the sanction can be covered through confirmation by one of the contracting parties or its author (in case of the unilateral act) or the period of time in which the invalidity can be invoked, with major references regarding if the sanction is brought up by the plaintiff or the defendant of the case.

Therefore, this study aims at presentinf the principal causes of invalidity both in the civil system of Romania as it was fundamentally changed by the New Civil Code enacted by Law no. 287/2009 and in the Spanish civil system in order to establish a common ground for the application of the legal provisions as they are quite similarly expressed in both legislations.

Due to the specific terms used in the Spanish civil code, I have noticed that the Spanish civil law is not often presented in our legal papers or studies, although the interraction between the two countries has been evidently increasing in the last decade, mainly after Romania joined the European Union in 2007, therefore creating more legal ties based on contractual relationships.

Thus, a more profound studying of both the differences and similarities of the contract and of its effects as legal institutions would prove beneficial for the study of the European civil law in the context of the unification of the legislations of the EU Member States.

2. Content

Usually, the legal provisions specifically state the nature of the invalidity whether it is an absolute or a relative one in specific cases. But sometimes determining the nature of the cause of invalidity could become an operation of legal interpretation that has to take place before establishing if the cause of invalidity exists and what effects it has on the existence of the contract.

In order to help the persons involved in the application of the legal provisions, the New Civil Code of Romania enacted by Law no. 287/2009 brings an improvement to the clasic way of determining the nature of the cause of invalidity by stating a legal order that has to be followed in such operations. Thus, article 1252 of the New Civil Code stipulates that if the nature of the invalidity is not explicitly determined or such

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[1] Gabriel Boroi and Carla Alexandra Anghelescu, *Curs de drept civil. Partea generală, Ediţia a 2-a revizuită şi adăugită,* (Bucharest: Hamangiu Press, 2012), 236.

nature does not result without any doubt from the legal provision itself, then the invalidity has a relative character, also called as anulability.

This can only be applicable in the case of the virtual invalidity because only in such case the nature of the invalidity is not expressly set forth by the legal provision. Although after analysing the text there are two conditions that seem to be independent and alternative when applying this presumption of relative invalidity, that is the lack of specific determination of the nature of the invalidity and not resulting implicitly and beyond any doubt from the provion, in fact the second condition also contains the first condition.[2] Thus, in addition of not being explicitly determined by the regulation, the persons who is called to interprete and apply the sanction of the invalidity has doubts whereas the nature of the sanction, that is the existence of the doubt regarding the absolute or relative character of the invalidity.

Usually, according to the Romanian civil system as it has been interpreted and developed by the national jurisprudence and its relevant doctrine, the causes of nullity could be stated as regarding the following aspects: the violation of the legal provisions setting forth the rules of the civil capacity, the invalidity of the object of the contract, the invalidity of the cause (scope) of the contract, the lack of form as provided by the law ad validitatem, the violation of the limits of the principle of the freedom of the contracts.[3]

The Spanish civil Code has a similar provision, but with the opposite effects due to its formulation. According to article 6.3 of the Civil Code, the contracts which are contrary to the imperative and prohibitive provisions are void by the effect of the law, except for the case in which the provision sets another sanction for the violation of the validity condition.[4]

Therefore, the Spanish civil code sets forth the importance and the seriousness of the causes of absolute nullity, providing that, in general, every violation of the regulations that stipulate the validity conditions of the contract atracts the absolute nullity of that contract, unless a specific regulations provided otherwise or establishes another type of civil sanction for that particular case.

In regards of the causes of absolute nullity, the Romanian civil Code establishes that they appear in the following situations in general terms: the total lack of consentment, for example when a person signs a contract which had been written in a foreign language that person does not understand at all. This case also exists in the Spanish civil system, therefore this consists of a similarity between the two legal systems.

In relation to the consentment of concluding a contract, it is imperative to say that in both system the vices of the consent (the error, the violence) are seen as causes of anulability. In the Spanish civil system this is explained by the fact that article 1261 of the Spanish Civil Code stipulates that there is no contract if one of the fundamental conditions of the validity of the contract does not exist at the moment of the conclusion of the contract itself. As the vices of consent are presumed to affect an existing consent of at least one of the contracting parties, the sanction that must intervene in this case is the relative nullity of the contract and not the absolute invalidity, which only exists in case of total inexistence of the consent at the moment of the signing of the contract.[5]

Although on this point there are similarities between the two civil legal systems, one could underline that the modification brought in matters of the vices of consent by the Romanian New Civil Code might have created a difference regarding the type and nature of the nullity in case of the absolute violence, as in the Spanish civil system this case atracts the absolute nullity of the contract, whereas article 1251 of the Romanian Civil Code generally states that the presence of the vices of consent can only atract the anulability of the contract and not its absolute invalidity.

Such an observation would at first be preferable, but a thorough analysis of the matter would reveal that in fact the premise is false due to the fact that actually, in both the Romanian and the Civil systems, the absolute violence is considered to be a part, only just a cause that could lead to the total lack of consent which, as has just been established, gives way for the absolute invalidity of the contract concluded by at least one party whose consent is entirely absent due to the existing violence that prevents him from having any representation of the conclusion of the contract and of the legal consequences of such a legal operation.

Another question regarding the case of the object of the contract raises multiple similarities between the two legal systems. There should be mentioned that both the Romanian civil system and the Spanish civil system regard the existence and the validity of the object of the contract as a ost important condition in regards to the validity of the contract as a whole. Therefore, the simple lack of determination of the object of the contract atracts the absolute invalidity of the contract itself. The same kind of sanction, that is the absolute nullity intervenes if the object of the contract is contrary to the public order or the morals.

A novelty introduced by the Romanian Civil Code regards the difference of concept between the

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[2] Cristina Zamșa, in *Noul Cod civil. Comentariu pe articole. Art. 1-2664*, ed. Fl. A. Baias et al. (Bucharest: C.H. Beck Press, 2012), 1311-1312.

[3] Boroi and Anghelescu, *Curs de drept civil. Partea generală,* 252.

[4] Francisco Javier Sanchez Calero et al., *Curso de derecho civil II. Derecho de obligaciones, contratos y responsabilidad por hechos ilicitos,* (Valencia: Tirant lo Blanch Press, 2012), 212.

[5] Carlos Lasarte, *Curso de derecho civil patrimonial. Introducción al derecho*, (Madrid: Tecnos Grupo Anaya Press, 2012, 18th Edition), 403.

object of the contract and the object of the obligation. Such difference tends not to be too obvious to the analysis of the legal provisions of the Spanish civil Code set forth in articles 1271 to 1273, although the practical importance of the dichotomy only falls in second plan.[6]

As regards to the cause of the contract, article 1238 paragraph 2 of the Romanian Civil Code stipulates that the lack of cause of the contract atracts its anulability, whereas in the Spanish civil system the lack of the cause is considered to be a motive for the absolute invalidity of the contract. Otherwise, both system consider the immoral or the illicit cause of the contract as a cause of absolute invalidity.[7] It is noticeable that article 1237 of the Romanian Civil Code considers the fraud as subsumed to the concept of illicit cause of the contract. That is that whenever the parties or at least one party concludes the contract only with the purpose of eludind the application of an imperative regulations, that contract is submitted to absolute invalidity because it violates an imperative legal provision that protects the general interest of society over the particular interest of the parties involved.

The final condition of validity of the contracts relates to the form in which the contract is lawfully concluded by the parties. Both systems preserve the general principle based on the liberty and choice of the form of the contract, that is that the contract is concluded once the two parties have agreed on its terms, without any sacramental form ofr the contract, except for the cases specifically set out by special legal provisions.

A few very similar provisions of the the Civil Codes have to be underlined. First of all, article 1244 of the Romanian Civil Code imperatively stipulates that all contracts regarding the tranfer of any real estate rights that have to be enlisted in the public record of the ,,funciary book" (cartea funciară), a public institutionalised registry which asure the publicity of the existing proprerties and their current owners. The imperative form provided by article 1244 is the authentic form, which means that the contract has to be concluded and atested by a notary.

In regards of property, art. 1280 paragraph 1 of the Spanish civil Code mostly states the same thing, that the contracts and all acts that have as an object to create, transfer, modify or terminate real rights regarding immobiliary goods have to be concluded in a public form, otherwise the same sanction of the absolute nullity of the contract would apply in such cases.[8]

In terms of the relative invalidity of the contract, there are more similarities between the two legal systems.

For example, is the case of the vices con consent, the essencial excusable error of the party, the dolus, the intimidacion and the deep fear. As a specific of the Spanish legal system, the lesion does not represent a cause of relative nullity as it does in the Romanian civil system, it only atracts the rescicion of the contract. On the other side, the New civil Code of Romania has introduced a new concept as to the sanction that intervenes in case of the lesion of the contract.

According to article 1222 paragraph 1, the party whose consent has been affected by lesion has to right to choose betweem asking for the contract to be anulled or the maintaining of the contract along with the diminuished obligations on her behalf. Paragraph 3 of the same article introduces a difference between the case in which the party who invoked the lesion was a minor at the moment the contract was signed, in which case the party can ask for the anullement of the contract without any restrictions, and the case in which the party was of age at the moment he signed the contract. In the latter, due to the fact that adults are presumed by the law to have mental and legal representations of their acts and operations and can thus see the consequences of their acts, the action of relative invalidity based on grounds of lesion of the contract cand only be admissible if the value of the lesion surpases half the valoue of the contract at the time the motion is registered at the court.

Another significant similarity consists of the cause of relative nullity regarding the violation of the provisions setting forth the incapacities or better said the capacity of a person to work or, in the way the Romanian system, the capacity of a person to exercise their civil rights by signing contracts by themselves without the consent of a representative or a tutor.

3. Conclusions

The causes of the invalidity of the contract can be put in different groups. The first one referes to the violacion of the legal limit stated by article 1255 of the Spanish civil Code, that is the law, the moral and the public order. A similar context is provided by article 1250 of the Romanian civil Code which stipulates that the contract is absolutely invalid in the cases explicitly provided by the law, as well as in the cases in which the absolute nullity comes as a result of disregarding a rule of general interest.

Another category comprises the absence of one of the esencial requirements of the validity of the contract, such as the consent, the object of the contract (or of his main obligations) and the cause.

Part of the Spanish doctrine[9] regard a different category of causes of invalidity when it comes to the illicit character of the cause and of the object of the

[6] Jesús Delgado Echeverría et al., *Las nulidades de los contractos: un sistema en evolución*, (Navarra: Aranzadi Press, 2007), 150.
[7] Luis Díez-Picazo, *Fundamentos del derecho civil patrimonial. Introducción. Teoría del contrato*, (Navarra: Civitas Press, 6th Edition, 2007), 578.
[8] Luis Díez-Picazo, *Fundamentos*, 292.
[9] Ángel M. López y López and Rosario Valpuesta Fernández, *Derecho civil patrimonial I*, (Valencia: Tirant lo Blanch Press, 2012), 117.

contract and not analyse these causes of nullity under the category of simply the missing fundamental conditions of the contract, the esential difference havibg to be that in this case the object or the cause exist, but in same way come against the public order or the moral of the society in such a way it is imperative for the absolute invalidity to operate in order to draw the effects of the contract ineffective.

The last category refers to the formal condition of the contract regarding the form ad solemnitatem whose violation invariably atracts the sanction of the absolute nullity of the contract due to the important effects.

A future study could focus on the analysis of the principles that regulate the effects of the invalidity of the contracts according to both the Romanian Civil Code and the Spanish Civil Code in order to asre a continuity of the comparative studies in this area.

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THE STATIC AND DYNAMIC ASPECTS OF ROMAN LAW AS PORTRAYED IN THE SOURCES OF LAW

Alina Monica AXENTE*

Abstract

The dynamics of the private Roman law sources had been influenced by the conjoined action of three factors: the Romans' conservative mentality, their practicality and the incorporation of the concepts of equity and good faith into their legal system. By virtue of the Romans' conservative mentality, their private law functioned according to less than thirty laws. Towards the end of the Republic, against the background of the economic revolution that gave variety to social relations and enhanced their complexity, many of the provisions of the old laws, including those laid down under the Law of the Twelve Tables, became inapplicable. Faced with these challenges and animated by their practicality, the Romans realized that appropriate measures had to be taken so as to strike a balance between the provisions of the law and the new demands of the ever-changing Roman social life. To this end, they started from the conviction that trade economy could not be strengthened and further develop without an effective legal ordinance. In order to counterbalance the discrepancy between the laws and the development of the social environment, the Romans resorted to procedural means and extensive research upon which they elaborated in accordance with the principles of equity and good faith. Consequently, towards the end of the Republic, the Praetor's Edict and the jurisprudence functioned as a legal filter with a view to striking a balance between the provisions of the old laws and the new social atmosphere. Throughout this stage in the evolution of private Roman law sources, the law embodied the static aspect, whereas the Praetor's Edict represented its dynamic counterpart. Therefore, by means of interweaving tradition with innovation, the Romans managed to modernize the private law under the impression that the old laws were still in effect.

Keywords: *sources of law, procedural means, jurisprudence, subjective rights, codification.*

Introduction:

On today's legal scene, modern law distinguishes itself through the metaphysical nuances it possesses and the fact that it places high emphasis on the reformation of the fundamental sources of law and the codification process. However, systematic research should not be conducted on legislative technique only, but also on the actual causes of law. Against a background in which the law is regarded as the inventor of social relations that will eventually bring about virtual law, it is essential that we look back on a system in which social relations led to legal action, thus contributing to the development of the law. Given that the sources of Roman law have no equivalent anywhere else in the world, it is no wonder that scholars have shown great interest in these profoundly original works. The dynamics of the sources of private Roman law had been influenced by the conjoined action of three factors: the Romans' conservative mentality, their practicality and the incorporation of the concepts of equity and good faith into their legal system. By virtue of the Romans' conservative mentality, their private law functioned according to less than thirty laws. This scarcity can also be explained by the old Romans' reluctance to abrogate their laws on the grounds that they reflected not only the voice of the people, but also the will of the gods and any act of human interference with them was thus prohibited. On the other hand, towards the end of the Republic, against the background of the economic revolution that gave variety to social relations and enhanced their complexity, many of the provisions of the old laws, including those laid down under the Law of the Twelve Tables, became inapplicable. Faced with these challenges and animated by their practicality, the Romans realized that appropriate measures had to be taken so as to strike a balance between the provisions of the law and the new demands of the ever-changing Roman social life. To this end, they started from the conviction that trade economy could not be strengthened and further develop without an effective legal ordinance.

In order to counterbalance the discrepancy between the laws and the development of the social environment, the Romans resorted to procedural means and extensive research upon which they elaborated in accordance with the principles of equity and good faith. Consequently, towards the end of the Republic, the Praetor's Edict and the jurisprudence functioned as a legal filter with a view to striking a balance between the provisions of the old laws and the new social atmosphere. At this stage in the evolution of Roman law, whenever the Praetor deemed a plaintiff's claims legitimate, the latter was also presented with the appropriate procedural means to have his claims valued by judicial process1. Moreover, the Praetor also created new, flexible and effective legal institutions that served as the basis for a new legal

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[1] C.St. Tomulescu, International Review of Laws in Antiquity, Bruxelles, 19, 1972, p.435.

branch called the praetorian law which functioned as a counterpart to the civil law laid down under the old laws. Throughout this stage in the evolution of the private Roman law sources, the law embodied the static aspect, whereas the Praetor's Edict represented its dynamic counterpart. Therefore, by means of interweaving tradition with innovation, the Romans managed to modernize private law under the impression that the old laws were still in effect.

By means of subtle interpretation of the legal texts, new legal proceedings destined to settle the disputes that arose during this time frame were introduced in the science of law. Consequently, a similar function had to be carried out by the jurisprudence. Acting under the impression that they reinterpret the old civil law, the jurisconsults heavily exploited the resources of the legal technique and created new legal institutions. It is through formulating legal principles and systematizing the research material on their basis that the jurisconsults managed to produce a dynamic work that could offer practical solutions to even the most complicated legal disputes. Here is how the synthesis of the Romans' conservative mentality, their practicality and the requirements of natural law led to the emergence of a dynamic and effective legal system the sources of which successfully ensured both the stability of the legal institutions and their adaptability to the ever-changing social conditions.

In order to shed light on the manner in which the Praetor's Edict influenced the development of the civil law, we must elaborate on the features and the functions of certain legal praetorian institutions. We will now further discuss the praetorian property, inheritance and pacts.

As far as matters of property are concerned, the Praetor created a fictitious action that made civil property available to peregrines[2]. Given that the right of civil property could be originally exercised by the Roman citizens only and was sanctioned through actions for the recovery of personal property, the Praetor introduced into the formula of this action the fiction stating that peregrines are Roman citizens, thus making it applicable to them too. Praetorian property was also sanctioned through a fictitious action to which certain things mancipi acquired through tradition were subjected[3]. For a long time, the only manner in which things mancipi could be transferred was through mancipatio, but if a thing mancipi was transferred through tradition, the Praetor would make the acquirer entitled to use the Publician action that features the fictitious formula stating that the necessary time for usucaption had run and, in this way, the acquirer won the trial as usucapient. In the Praetor's view, the one who purchased the property of another should be deemed to be in good faith and entitled to legal protection. Put differently, the aforementioned solution draws on the concept of good faith. Another addition to property law includes the fact that the Praetor managed to alleviate the consequences of the pecuniary punishment through the introduction of the arbitrary clause into the formula of the action[4]. According to this clause, if it was proved that the plaintiff was the rightful owner of the object of the legal dispute, but the defendant refused to return it to him, the latter would be compelled to award the injured party a monetary compensation established by the plaintiff in compliance with the overall rule. As a result, there was every incentive for the defendant to return the object to the plaintiff and in so doing, the retaliation in kind came to be prescribed via an indirect route. Therefore, although the pecuniary punishment was not expressly abolished, it was not, in fact, used in property recovery litigations, meaning that, on this occasion, a procedural rule was amended through a procedural mechanism[5].

The Praetor brought about changes in matters of inheritance too and first among these was the fact that according to praetorian law, legal actions entailed the protection of the rights of succession of blood relatives[6]. Although civil kinship was the only ground of succession laid down under the Law of the Twelve Tables, the Praetor also called to the inheritance the blood relatives who did not qualify as civil relatives, a practice that became known as praetorian inheritance. The Praetor's reforms later provided the basis for the Imperial reforms and by the time of Justinian, blood kinship became the only ground of succession[7]. Once again the Praetor did not expressly abrogated the regulations of the civil law, but through the protection of the rights of succession of the blood relatives, he laid the foundation of a new successional system that eventually prevailed, being legislated by the modern law.

The Praetor's reforms exerted a tremendous influence over the successional system which functioned as a catalyst of the protection of the rights of succession of the blood relatives, insofar as, according to the Law of the Twelve Tables, the agnatio was the only ground of succession. Through these reforms, the Praetor revolutionized the old successional system that deemed the cognatio irrelevant and paved the way for the Imperial reforms by means of which the consanguinity became the ground of succession. Therefore, the Praetor not only created a new successional system, but he also indirectly contributed to the shaping of specific aspects of the modern successional matters.

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[2] Gaius, 4.36.
[3] J. Gaudemet, Private Roman Law, Paris, 2000, p.162.
[4] R. Robaye, *Roman Law*, I, Bruxelles, 2001, p.162;
[5] Inst.,4.6.31.
[6] P.C. Timbal, Roman Law and the Old French Law, Dalloz, 1975, p.120.
[7] Nov. 118; P.F.Girard, op.cit., p.879.

In reply to the complaints of the blood relatives, the Praetor altered the old successional system via a procedural route that implied the grant of new formulae based on the possession of successional goods known as bonorum possessio. By this means, four new categories of praetorian heirs appeared, namely the bonorum possessio unde liberi, the bonorum possessio unde legitimi, the bonorum possessio unde cognati and the bonorum possessio unde vir et uxor. This new successional order entailed other changes: firstly, the emancipated son and his descendants were no longer excluded from the inheritance, thus joining the sui heredes. Secondly, if an agnate repudiated the inheritance, it would no longer become vacant, for it would be passed on to the next category of heirs, namely the cognates. By introducing this new category of heirs into the successional hierarchy, the Praetor revolutionized the old regulation in which they did not appear, thus creating a successional vocation for the mother and the children born in a marriage without manus. Of course, this was possible only if the relatives belonging to the first two categories were absent. Otherwise, the existence of a single agnate made it impossible for the cognates to be in the line of succession to the inheritance. Through the introduction of the fourth category of heirs, the bonorum possessio unde vir et uxor, those8 married without manus were granted the right to inherit each other, on the condition that there were no heirs belonging to the first three categories. Although the agnates continued to take precedence over all other heirs, the Praetor, who was not a legislator, took the first step towards the protection of the rights of succession of the blood relatives that, in turn, lead to the implementation of the Imperial reforms by means of which the cognatio became the ground of succession.

The praetorian pacts emerged in response to the finding that the formalist approach to contract matters was nothing but a hindrance in the way of the commerce that was so vital to the Roman society. Therefore, by introducing the praetorian pacts, namely the recepta, the hypotheca and the constitutum debiti, the Praetor not only elevated the simple act of intention and manifestation of volition of the parties to the rank of legal contract, but he also created new adaptation patterns for the law to the dynamics of the society.

The activity performed by the Judicial Magistrates, led by the Praetor, was mainly defined by the extension of the scope of regulation via procedures9. In so doing, the civil law which had been portrayed in the legal texts as contradictory, rigid and formalist was influenced to the degree that it evolved towards an abstract, unified approach10. The emergence of the praetorian law came, among others, as a consequence of the fact that it was inconceivable to the Romans that a subjective right could exist without an appropriate corresponding action. While nowadays the existence of an action originates from the existence of the law itself, in the Roman world, the subjective right arose from the existence of the legal action and therefore it was impossible for a subjective right to exist without a corresponding legal action11. The specificity of this relationship between right and action put the judicial bodies at the forefront of the overall development of the private law by ensuring both its stability and flexibility.

The concepts, principles and institutions of the praetorian law were later subjected to scientific research and organized into collections known as ad edictum. Salvius Iulianus' Edictum Perpetuum12 marked the culmination of the systematization process on the basis of scientific criteria undertaken by the praetorian law. While the Law of the Twelve Tables is a collection of primitive legal customs enshrined in the practice of the courts, Edictum Perpetuum is not only the outcome of the systematization process that passed the evolved judicial practice through the scientific research filter, but also a regulatory model that prevailed through its subtlety, accuracy, harmony and above all, the general and abstract nature of its provisions. Unlike modern society which often takes the risk of legislating away nothingness, the Romans closely followed the thread of the judicial practice. The explains the fact that the concepts and principles of the classical Roman law were recognized as such only if they were enshrined in the practice of the courts. It is concluded that, at the peak of the Roman legal system, judicial practice played a crucial role not only in the application of the law, but also in its creation.

For its part, by means of interpretation, the jurisprudence created new legal institutions that not only departed from the requirements of the old civil law, but also denied it. One can mention in this respect the adoption, the emancipation and the adjoining pacts.

The adoption emerged via interpretation in response to the social demands in a context where, in accordance with the Law of the Twelve Tables, it was a nearly impossible undertaking. By interpreting the provisions referring to the sale of sons, the jurisconsults created this artificial form of acquisition of parental power by which a person who was under the power of the head of his family came under the power of another13.

It is through the interpretation of the provisions of the Law of the Twelve Tables referring to the sale of sons, too, that the Praetor created the emancipation in reply to the fact that the rapid development of trade

[8] S.G. Longinescu, *Aspects of Roman Law*, II, Bucharest, 1929, p.976.
[9] E.Volterra, Jura, 7, 1956, p.141.
[10] Cicero, De inv.2.22.67.
[11] E.Molcut, "On the role of the courts in the shaping and application of the law", Review of Public Law, nr.4/2004, p.9.
[12] O.Lenel, Das edictum perpetuum, ed.I, 1883; ed. a II-a, 1907; e. a III-a, 1927, republished under the imprint of Aalen, 1956.
[13] GAIUS, 1.98; XII. T., 4.2.

economy became wholly incompatible with the son's incapacity to perform legal acts in his own name14.

Last but not least, one can mention in this respect the emergence of the adjoining pacts that, in the form of conventions concluded in addition to the main obligation, sought to make certain content-related amendments15.

At the same time, the jurisconsults drew up new legal principles. However, these principles were recognized as such only if they were able to offer optimal solutions to all types of legal disputes in a given area. Therefore, it is not through metaphysical judgements that the principles of the Roman law came into being, but rather through the fact that they confirmed in practice. The close link between the content of the jurisprudence and the requirements of practice is suggestively highlighted by the historical path taken by those fragments of the classical works that were compiled under Justinian's Digest and Institutes.

While the adoption of the Law of the Twelve Tables and the codification of the Praetor's Edict marked the culmination of several natural development processes which consisted in introducing certain legal norms and procedures, Justinian's Digest and Institutes hold a different historical meaning. They are not supposed to symbolize the end of a cycle in the legal evolution, but Justinian's desperate attempt to resuscitate the Roman slave society. Justinian, aware that the Roman slave system was collapsing, appointed a number of highly regarded jurists to systematize and reinstate the most valuable fragments of the works of the classical jurisconsults, hoping that if they came back into force, the slave system would be saved16. In reality, all his efforts turned out to be in vain as the slave society eventually collapsed, being replaced by feudalism.

Under these circumstances, Justinian's codification proved to be inoperative and a few decades later, it was gradually replaced by other sources of law that matched the new social realities. Emperor Justinian's failed attempt to return to the classical Roman law can be explained by the fact that the classical legal procedures were neither passed through the filter of the judicial practice, nor adapted to the demands of the feudal social relations which were on the rise at that time. Upon noticing that the provisions laid down under the Digest and the Institutes did not meet the new social requirements, the judges found themselves powerless to apply them.

Indeed, the classical legal values that appeared as a result of the unprecedented development of the trade economy could not be mechanically applied to a context in which natural economy prevailed. It was much later, specifically after the capitalist economic revolution, that the legal texts of the Digest and the Institutes were properly welcomed and successfully applied.

The sources of private Roman law do not owe their originality and effectiveness to metaphysical judgements, the thirst for codification and legislative techniques, but rather to their ability to keep pace with the growing demands of the legal practice. The instruments employed by the legal thinking and practice, namely the principles, institutions, classifications and concepts, reflected the social, economic and political changes experienced by the Roman world. The jurisprudence, the praetorian law and the law of the gentes took shape in response to the formalist and rigid civil law and in accordance with the principles of equity and good faith. The balance between the dynamic and static aspects of the sources of private Roman law was struck when the Praetor's responsibilities and the jurisprudence merged and created a convergent, like-minded force that employed different methods in order to counterbalance the discrepancy between these two features as follows: the jurisconsults extended the scope of regulation via interpretation whereas the Praetors sanctioned new subjective rights via procedures[**].

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[16] C.Ferrini, Works of Contardo Ferrini, Milano,II, p.307.

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TRANSFORMATION OF COMPANIES FROM THE PERSPECTIVE OF LAW NO. 31/1990

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Abstract

The legal consequences associated with amendments of a memorandum of association are influenced both by the intended purpose of the shareholders and by the practical type of amendment, whether it is in the form of changes of the share capital, mergers and acquisitions, dividing a company, change of registered office, change in the form of a company, extension of the company or others.

The paper proposes an approach to the effects of such changes underlining the general principles with a special focus on the uniqueness of the legal personality of a company maintained even after such alliteration as change in the form of a company occurs.

The research has illustrated the importance of the subject matter to Company Law, seen as a determinant element of a company's legal status through which this specific entity brings about the necessary flexibility vital to its existence and survival.

Keywords: *Company Law, memorandum of association, amendments of a memorandum of association, legal consequences, change in the form of a company.*

Introduction

It is common for companies to be forced, during operation, to adapt to economic and social circumstances, manifested in a society in constant expansion and globalization.

From a general perspective, these developments are due, primarily, to economic globalization, to irreversible trend of interdependence of world economies as a result of augmentation rate of international trade, of international capital flows or fulminant development of science and technology.

To align the needs and interests of individual associations with economic circumstances in which they occur, the associates may resort to adapt the company through the institution of changing its components.

Changing the company is achieved by modifying its articles of association. Thus, the legislator called Title IV of Law no. 31/1990 - "Amend the Articoles of Incorporation".

Wisely, was proposed the doctrine[1] as this title to bear the name "Change of the company", as amendments to the articles of incorporation is only a means by which is performed the change of the company itself. The establishment, operation, modification, dissolution and liquidation of the company are the legal consequences produced by consistent manifestations of wills of members and referring to the legal status of the company itself[2].

1. General principles of changing articles of incorporation

Amendment of Articles of Incorporation is performed under paragraph (1) of article 204 of Law no. 31/1990, by decision of the General Meeting or of the Board of Directors, or Executive Board, adopted pursuant to article 114, paragraph (1), or by decision of the court, pursuant to article 223 paragraph (3) and article 226 paragraph (2) of the Act.

The scope of changing the company, achieved by amending articles of incorporation, as reflected in Title IV of Law no. 31/1990, is represented by the change of legal form of the company [referred to in article 205 and article 204 paragraph (2) letter b)], extention of the duration of the company (art. 205) and the reduction or increase in share capital (Chapter II articles 207-221).

In addition to this, article 113 of the Act refers to moving the headquarters, changing the scope of activity, establishment or dissolution of secondary offices: branches, agencies, offices or other units without legal personality, merger with other companies or division of the company, as well as the anticipated dissolution of the company.

From the economy of the legal provisions mentioned above, results unequivocally the declarative nature of cases of changing the companies, so that doctrine and judicial practice included in this category: withdrawal of a partner, assignment of shares, completing articles of incorporation with new clauses on the issue of bonds, possibility to continue the company with the heirs of an associate, continue the

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[1] Stanciu D. Cărpenaru, *Tratat de drept comercial român. Conform noului Cod civil*, Ed. Universul Juridic [*Treaty of Romanian Commercial Law. Under the new Civil Code*], Universul Juridic, Bucharest, 2012, p. 231-232.

[2] Amelia - Raluca Bușcă, „Analiza condițiilor generale pentru modificarea societății în reglementarea Legii nr. 31/1990", ["Analysis of the general conditions for changing the company in regulating Law no. 31/1990"], in *Curierul Judiciar* no. 9/2014, p.494-502.

limited liability company with a single associate following the withdrawal, exclusion or death of other / other associates[3] and revocation of the administrator appointed by the Articles of Incorporation[4].

Will of associates/shareholders to amend the articles of association can often materialize on several levels, meaning that the decision to amend the articles of incorporation may look more elements of the company. Thus, the share capital may be increased and changed the company's legal form, may exercise the right of withdrawal of an associate while reducing the share capital by an amount equal to social part due to the withdrawing associate, may exercise the right of squeeze-out while delisting the company[5] etc.

The effects of modifying the articles of incorporation are different depending on the purpose of the associated by this operation, as well as the practical case of change. Thus, the possible consequences of change are: increase or reduction of share capital, extension of duration of life, changing the form of the company, company relocation, merger, division of the company etc.

Legal personality of the company is unique, and article 205 of Law no. 31/1990 states that amendments to the articles of association, exempli gratia, changing the form of the company, extension of its duration, do not cause the creation of a legal entity.

A corollary of this allegation is that are not affected the rights and obligations existing in the assets of the company at the time of its amendment.

In the following, we will refer to the effects of the change printed by the specific of one of the amendments to the articles of incorporation to which article 205 of Law no. 31/1990[6] reffers.

2. Transformation of the company

Notions

Because the company form produces multiple and significant effect on the company, which in its essence is amended in the doctrine[7], was decided to use the term "transformation of the company" to refer to the case of amending the articles of incorporation[8].

Legal form of the company draws its own legal regime regarding the establishment, organization, operation and termination of the company, influencing the conditions of the financial liability of associates, share capital, initial minimum contribution and minimum capital, the tax regime of the company etc.

The will of the associates in the sense of changing the company's form may be due to the evolution of the interests of associates during its lifetime, which have the possibility to choose from the five types of company allowed by law, general partnership, limited partnership, joint stock company, limited company by shares and limited liability company, the one that is able to best meet these interests.

By the form of the company, is understood exclusively one of the forms mentioned above and provided by article 2 of the law. Thus, the transformation of a limited liability company into a limited liability company with unique associate in not considered, as the latter does not have a separate regulation as a particular form of company[9]. However, trading the company on a regulated market or in an alternative trading system does not transform the company, this having essentially the same basic

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[3] St. D. Cărpenaru, op. cit., p. 232; I. Turcu, *Teoria și practica dreptului comercial*, [*Theory and practice of commercial law*], Editura Lumina Lex 1998, vol. I, p. 360.

[4] See Supreme Court, Commercial Division, Decision no. 1990/2002, in *Revista română de drept al afacerilor* [*Romanian Journal of Business Law*], no. 2/2003, p. 118. Conversely, the Court of Appeal Timișoara, Commercial Division, Civil Decision no. 128 of June 22nd 2010, unpublished, by showing that "the appointment and removal of directors, whether they are appointed by the articles of incorporation or by decision of the general meeting of shareholders, does not respresent an amendment to the articles of association of a company".

[5] In Continental Europe, most companies who withdraw from a regulated market resort to this mixed type of amending the articles of incorporation, called buyout offer with squeeze-out, with the acronym BOSO. To describe this mechanism as well as a comprehensive study on the causes of its use, see Isabelle Martinez, Stéphanie Serve, "The Delisting Decision: The Case of Buyout offer with Squeeze-out (BOSO)", in *International Review of Law & Economics*, December 2011, vol. no. 31, no. 4, p. 228-239.

[6] For the effects of the company life prolongation, see Amelia - Raluca Bușcă, „Efetele modificării societății conform Legii nr. 31/1990", ["Effects of changing the company according to Law no. 31/1990"] in *Curierul Judiciar* no. 10/2014, p.565-570.

[7] C. George, Drept Comercial Român [*Romanian Commercial Law*], op. cit., pp. 492-493.

[8] French law adopted the same term of transformation of the company. See Association Henri CAPITAN, *Vocabulaire juridique*, Gérard Cornu, editor, QUADRIGE / PUF Publisher, Paris, 2008, p. 930. It defines the transformation of a company as changing the form of a company, for example, transformation of a limited liability company ("SARL") into a joint-stock company ("société anonyme"), which does not entail the creation of a new legal person, but which is assimilated, sometimes, in tax matters, to a transfer of enterprises.

[9] See C. George, op. cit., p. 493.

characteristics as the previously held the listing on capital market[10].

Thus, this can be causes of the company transformation, the need for a capital which allows additional investment and / or an increased productivity, the imposition by the legislator of expensive technological acquisitions to improve the quality of a product, the need to increase export capacity, the need to increase the credibility of the company on the market of a product, anticipation of an augmentation of financial risk in a partnership or in general, domestic sau international economic or legislative changes.

Terms of achieving the transformation of the company

The transformation of the company is achieved in terms of article 204 of Law no. 31/1990[11], being necessary to be accomplished, in addition, the requirements for valid constitution of a company such as that chosen for transformation, such as the minimum number of associates, minimum capital, rules on statutory bodies and rules on the creation of corporate intent.

In principle, the choice of the form of the company is a reflection of the principle of freedom of contract, for the protection of public interests. The law provides exceptions to this rule, as the company is required to companies in the insurance sector, which can not exist except as limited companies, according to article 11, paragraph (1) of Law 32/2000 on insurance activity and insurances supervision[12] and banking, according to article 287 Government Emergency Ordinance no. 99/2006, banks, Romanian legal persons, and must be legally established as a joint-stock company[13] under commercial law[14].

3. Effects of achieving the transformation of the company

For the associates and because of their successors, changing the legal form of the company has effects from the moment of the decision to change. Pending the procedure for registration in the Trade Register and publication of the amendment, to third parties are not opposable specified change.

Continuity of legal personality of the company that changes its legal form is expressly provided for in article 205 of Law no. 31/1990[15].

The main reasons for the subsistence of the legal personality of the company subject to transformation are the coherence of the tax regime and legal effects on third parties.

In French law, which provides the same rule on continuing legal personality, it was shown that there is no transformation in the meaning of the word unless legal personality subsists. Otherwise, there would be the

[10] *Ibidem*. The author shows that many companies have found it necessary that the admission of the company to trading on a capital market to be reflected in the articles of incorporation, but the action is voluntary, subject to the general rules of statutory amendment, and not an expression of transforming the company.

[11] Under article 204 of the Law no. 31 / 1990 is not required the signature by all the associates of the act amended and of the updated articles of incorporation. In this matter, are not applicable the provisions of article 5 of Law no. 31/1990 included in Title II - Setting up companies, but the provisions of Title IV of Law 31/1990 entitled "Changing the articles of incorporation". Because these acts are the result of decisions of general meetings of shareholders, on the amended act and updated constitutive act is sufficient the signature of the persons referred to in paragraph 4 of article. 204 - Administrator or Board members. See C.A. Craiova, Commercial Division, Decision no. 556 / 6.04.2008, published on the internet at http://portal.just.ro/54/Lists/Jurisprudenta/DispForm.aspx?ID=513.

[12] See for development Vasile Nemeș, *Dreptul asigurărilor* [*Insurance Law*], Ed. Universul Juridic, Bucharest, 2010, and Vasile Nemeș, *Dreptul asigurărilor.Curs Universitar* [*Insurance Law.University Course*], Ed. Hamangiu, Bucharest, 2012, p. 36.

[13] For details on legal form needed to set up a bank and sanction of non-compliance with legal provisions on the legal form of banks, see Carmen Adriana Gheorghe, *Drept bancar* [*Banking Law*], 3rd edition, Ed. C.H. Beck, 2014, p. 104, 120-125.

[14] Stanciu D. Cărpenaru, *Tratat de drept comercial român. Conform noului Cod civil,* [*Treaty of Romanian Commercial Law. Under the new Civil Code*] op. cit., p. 141.

[15] Similar provisions are found in the legislation of many European countries. E.g., under Belgian law, until February 23rd 1967, the majority jurisprudence which the Court of Cassation confirmed several times, based on the principle of inviolability of essential elements of the company, was to the effect that the change in legal form by decision of the general meeting was prohibited, the adoption of such a decision led to the dissolution of the initial company, and establishing a different legal entity. By introducing a section VIII in the Uniform Laws on companies, by the Law on February 23rd 1967, was removed this dirimant obstacle in the way of transforming the company, granting that it continued the legal personality and not interrupted by such amendment to the articles of incorporation. See, in this regard, Claudine Weyne, editor, *Lexique sociétés Commerciales édition 2007,* Wolters Kluwer Belgium Publisher, Waterloo, 2007, p. 773 and Tilquin T. and V. Simonart, *Traité des sociétés*, vol. I, Kluwer Éditions Juridique Belgique Publisher, Diegem, 1996, p. 46.

dissolution of the company, followed by the creation of a new company[16].

Given that is preserved the legal personality, is understandable that the company keeps its identifying attributes such as headquarters, nationality and unique registration code.

Regarding the firm[17] of the company, is required it to be changed, lawfully provided for the form of the company chosen for transformation.

Thus, when the form of the company was changed into a general partnership, the firm of the company transformed must include the name of at least one associate with the words „general partnership" written as such. (Article 32 of Law no. 26/1990)

The transformation of the company into a limited partnership assumes that the new firm of the company to include the name of at least one of the general partners, with the words "limited partnership", written entirely. (Article 33 of Law no. 26/1990)

The law provides that if the name of a stranger person from the compant appears, with his consent, in the company of a general partnership or limited partnership, it becomes unlimited and severally liable for all obligations of the company. The same rule is applicable to the limited partner whose name appears in the limited partnership company. (Article 34 of Law no. 26/1990)

Regarding a joint-stock company or limited by shares, it consists of a personal name, likely to distinguish it from other companies, and will be accompanied by the words written entirely "joint-stock company" or "S.A." or, where appropriate, "limited company by shares". (Article 35 of Law no. 26/1990)

Finally, on a limited liability company, it includes a personal name, to which may be added the name of one or more partners, and will be accompanied by the words written entirely "Limited Liability Company" or "LLC" (article 36 of Law no. 26/1990)

Therefore, in all cases, changing the form of the company will attract the change of its firm, so that the associates will have to provide a specific clause on the company name[18].

After transformation, subsist without modification all contracts concluded earlier with third parties, such as lease contracts for headquarters, insurance contracts, loan contracts, leasing contracts etc.

It can not be supported that the transformation of the company would impose *per se* new obligations or would have any effect on the liability of shareholders, who are bound by the same social obligations as the existing in the moment of changing the form of the company[19].

However, we can conclude that the law does not impose obligations on creditors to preserve their rights to claim on the company. Of course, if the transformation of the company attracts new guarantees due to changes in its form, social creditors should be able to benefit from them. The solution is favorable to social creditors and is based on the fact that the associates have consented freely in changing the form of the company, thus taking all the negative effects that would attract such an amendment to the articles of association.

For example, we mention that if a limited liability company is transformed into a general partnership, creditors should be recognized, with the rights recognized to the initial form of the company, also the right to joint and several liability for social liabilities, according to article 3, paragraph (2) of Law no. 31/1990.

De lege ferenda, this solution should be integrated in article 3 of Law no. 31/1990, into a separate paragraph, as follows: "(4) If, prior to the amendment of the company, the associated who were liable for the social obligation only up to the competition of the subscribed capital became associates in the general partnership or limited associates in the limited partnership or in limited partnership by shares, paragraph (2) is applicable and social obligations incurred prior to such change, apart from the situation in which the creditor expressly consented in writing to change the company".

Please note that we have not considered it necessary to restrict the scope of applicability of the proposed text exclusively for the amendment of the company to change the legal form. On the contrary, as drafted, it could be applicable, for example, if is changed the articles of incorporation by becoming a general partner of a limited partner. We also appreciate useful to be made explicit renunciation of the social creditor to the guarantees of his claim, solution that can be removed otherwise the principle of mutual consent governing contracts. However, we considered it necessary to establish the written form ad validitatem, to prevent possible problems that would face the courts in reviewing the validity of the act of renunciation.

Also in regard to the effects of the transformation of the company, towards third parties, we mention that changing of the legal form of a limited partnership into a limited company or limited liability compant does not alter the terms of attracting liability towards the social creditors with titles previous transformation, they will respond unlimited and severally and not up to the subscribed capital.

Another proposal *de lege ferenda* with great practical utility is that article 3 of Law no. 31/1990 to include an additional paragraph as follows: "(5) Where, prior to the amendment of the compant, the associates who responded for the unlimited social obligations and

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[16] Y. Guyon, *Droit des affaires, Tome 1, Droit commercial général et sociétés*, Economica Publisher, Paris, 1996, p. 593.

[17] Article 30 of Law no. 26/1990 on Trade Register, defines the company as its name, where applicable, the name under which a trader operates and under that signs.

[18] Law 31/1990 does not use the term firm, but the name. See article 7, letter b); article 8, letter b); article 81, article 19, article 56 etc.

[19] C.A. Ploiești, Commercial Division and the administrative and fiscal department, decision no. 394/1998, in the Commercial Law Review no. 6/1999, p. 136, quoted by St. D. Cărpenaru, Gh. Piperea, S. David; *Companies Law*. *Comment on articles*, 5th edition, 2014, op. cit., p. 717.

jointly became limited partners in the partnership or company limited by shares shareholders in the joint-stock company or associates with limited liability company, paragraph (2) is applicable and social obligations incurred prior to such change, apart from the situation in which the creditor expressly consented in writing to change the company".

The considerations which accompanied the proposal for the introduction of the paragraph (4) in the article 3 of Law no. 31/1990 shall remain valid with respect to this de lege ferenda proposal.

Clearly, from the date of legal transformation of the company, the legal status of the company follows the new form chosen by the associates, with all the consequences resulting from the law.

3. Aspects on transforming the company in other countries

Changing companies in United Kingdom

Under article 21 of the *Companies Act 2006*[20] - Companies Law in 2006, in the United Kingdom, the change of documents of incorporation (named "articles of incorporation"[21]) can be achieved after a decision at an extraordinary general meeting of associates[22].

Article 22 of the same law provides that the articles of association of a company may contain certain clauses, referred to as *provisions for entrenchment*, establishing that certain elements of the articles of incorporation may be amended or excluded only if certain conditions are met or only after carrying out certain procedures much more restrictive than those applicable to the changes referred to in article 21.

The terms set out in article 22 can be inserted into the constitutive act *ab initio* or may be introduced by a subsequent agreement on which all associates have manifested its willingness positively.

It is noteworthy that, according to article 22 paragraph (3) of the same law, the inclusion of some *provisions for entrenchment* does not prevent modification of the articles of incorporation by agreement of will of all associates or change of it judicially.

4.2. Changing the company in France

According to the French Commercial Code[23], amending articles of incorporation of some companies may have *inter alia* aimed at changing the company's name or form, increase or decrease of the share capital, registered office and duration of the company.

On the transformation of companies, it may be voluntary or statutory. The voluntary basis may have, for example, the motivation of associates to benefit from a favorable tax regime and the need to adapt the company structure applicable to a more complex form[24]. However, the law may require change of legal form of the company, as a requirement for the survival of the company. Thus, according to article 221-15 paragraph (7) of the Commercial Code, the death of a associate of general partnership, where the shares are transmitted to a minor heir, since can not be held the unlimited and joint liablily to such person, it is necessary to transform the company, within one year, *inter alia* in a limited partnership in which the minor to acquire only the quality of limited associate. Otherwise, the company will dissolve.

The consequences of maintaining moral personality of the company after the transformation, provided by article 210-6 of the Commercial Code were amply discussed in the doctrine[25].

In terms of the company, transforming effects are reduced; meaning that, in the absence of novation, the rights and obligations that the company has entered into the old legal form subsist[26].

Regarding the rights of the associates, from the date of conversion will come into the new social rights, which replace the earlier rights through real subrogation.

4.3. Changing the company in Belgium

Unless otherwise stated, the general meeting of associates has the power to amend articles of incorporation of joint-stock companies, of private

[20] Law can be found on the Internet at the following address: http://www.legislation.gov.uk/ukpga/2006/46

[21] Until the entry into force of the *Companies Act 2006* for the establishment of companies was necessary to draft two articles of incorporation, named *memorandum of association* and *articles of association*, *memorandum and articles* together. Since the entry into force, October 1st 2009, is no longer drawn *memorandum of association*, but companies established before that date, work based on the two aforementioned acts.

[22] The procedure for making such decisions is described in article 283 of the *Companies Act 2006*. In principle, it requires the consent of at least 75% of associates.

[23] It is found on the internet, as official, updated daily, at http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379.

[24] See Philippe Merle, *Droit commercial. Societies Commerciales*, 7th Edition, Dalloz Publisher, Paris, 2000, p. 123.

[25] See Philippe Merle, *op. cit*, p. 125 and J. Fiscel, "L'absence d'être moral nouveau dans les transformations de société", *Gazette du Palais* 1986, II, p. 724.

[26] Y. Guyon, Note on March 4th 1969, Semaine Juridique - édition générale II, 15949, quoted by Philippe Merle, *op. cit*, p. 125.

limited companies[27] and cooperative companies with limited liability[28] under article 558 or 286 of the Companies Code[29].

In view of legal adoption of decisions, it is necessary that the proposed amendments to be expressly stated in the summons, the quorum shall be one half of the capital for the first convocation, for the next meeting is legally constituted regardlesss the quorum and the adoption of a decision to be made with a ¾ majority of the votes.

Belgian law provides different requirements for certain amendments to the articles of incorporation of the company.

Exempli gratia, to change the main object of the company is required prior report prepared by the management board or body, by detailing the situation of assets and liabilities of the company for a period ending no later than three months before the report to be attached to the act of summoning. The absence of this report draws annulment of general meeting[30].

Authentic form is mandatory for amending articles of incorporation of companies.

Subsistence of legal personality of the company after the change of legal form is provided in article 775 of the Companies Code. Proposal for the transformation of the company must be the subject of a report of the board of directors or management bodies, similar to that required for the change of the legal status of the company.

If the transformation of legal form of a limited company, of a limited partnership by shares or of a SPRL, the shares or social parts without vote right receive, after transformation, a vote right, regardless of any contrary provision in the articles of incorporation.

In the case of a general partnership transformation, of a limited partnership or a limited partnership by shares, joint associates and general associates bear unlimited joint and several liabilities towards third parties for previous social obligations.

Interestingly, in the case of transformation of a company into a general partnership, into limited partnership or limited partnership by shares, joint associates and general associates bear unlimited, but not jointly liability, to third parties for previous social obligations[31].

4.4. Changing the companies in Spain

On July 04th 2009, has intered into force the Law no. 3 / April 03rd 2009 on structuring changes of companies[32] with a wide content, detailed by 103 articles[33].

Regarding the objective scope, article 1 of this law states that structural changes of companies consist of transformation, merger, partition, global assignment of assets and liabilities, including international movement of headquarters. In this regard, paragraph (2) of the Act states that it is intended to regulate only those changes with "structural" character, i.e. changes affecting the property structure or of personnel of the company.

Subjective scope of the law is detailed in article 2, which states that it is applicable to all companies that have commercial character, or by their object, either by way of establishment.

Article 3 of the Act stipulates that following the transformation of the company by adopting a different legal form, it retains legal personality.

Regarding the effects on the liabilities of the associates for social obligations, article 21.1 provides that associates that assume personal and unlimited liability for social obligations are liable in the same way for previous debts of transformation.

Except where associates expressly consented to transformation, personal liability of members subsists, who were personally liable for contracted company's debts previous to transformation. Liability can be drawn no later than 5 years from the date of publication of transformation into "Trade Register Official Bulletin".

On the subjective side of this responsibility, in the doctrine was shown that it extends both on associations that remain in the company and on those who choose to withdraw from the company, as a result of transformation[34].

Regarding the subject of liability, the law refers to debts, but the doctrine concluded that this must look, in the case of successive performance contracts, only the

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[27] Private limited company ("société privée à responsabilité limitée, with the acronym SPRL") consists of one or more persons responsible for social obligations only in the line of their contribution and whose rights of association are not transferable except under certain conditions.

[28] Limited liability cooperative company ("société coopérative à responsabilité limitée, with the acronym SCRL") differs from SPRL by the fact that it must have at least three partners, to a minimum of two to SPRL, and by way of functioning of it.

[29] Companies Code of May 7th 1999 published in the Official Journal of August 06th 1999 under the no. 1999A09646, p. 29440, can be found on the Internet at www.ejustice.just.fgov.be.

[30] For details, see R. Verhoeven, *La pratique des Sociétés*, vol. I, Kluwer Publisher, Waterloo, 2007, p. 163 et seq

[31] For further details on the companies transformation, see R. Verhoeven, *La pratique des sociétés*, vol. II, Kluwer Publisher, Waterloo, 2007, p. 729-733.

[32] Available on the internet at http://www.boe.es/buscar/act.php?id=BOE-A-2009-5614

[33] Since its adoption, the law was received with skepticism both in doctrine and in jurisprudence, considered a true "technical failure". Fernando Vives Ruiz, Arnau Tapias Monné, "Law of Structural Modifications. A standard technically failed in *InDret-Magazine for the Anaysis of Law for 4/2013*, Barcelona, pp. 3-49. Also, see Jesús Quijano Gonzalez, "Elaboration process of the Law for Structural Modifications of Companies" in Fernando Rodrigues Artigas, editor, *Structural Modifications of Companies*, T. I, Aranzadi, Pamplona, p. 25-38; GONZÁLEZ-MENESES and Segismundo ÁLVAREZ ROYO-VILLANOVA, *Structural Modifications of Companies*, Dykinson Publisher, Madrid, 2011 and José Mª Beneyto Pérez, Rita Largo Gil, publishers and Esther Hernández Sainz, coordinator, *Transfers of companies and structural modifications of companies*, Bosch Publisher, Barcelona, 2010.

[34] See Manuel Álvarez GONZÁLEZ-MENESES and Segismundo ÁLVAREZ ROYO-VILLANOVA, *Structural Modifications of Companies*, Dykinson Publisher, Madrid, 2011, p. 107.

obligations to pay, corresponding to benefits previous transformation[35].

Under the provision of article 21.1 of law, is established the possibility of relief of liability, if those creditors consent the transformation.

It should be noted that, as stated, the law contains an institution less used in European legislation, global assignment of assets and liabilities of a company.

Despite the controversy that has born the Law on structural modifications of companies, it is worth the effort to codify in detail of the Spanish legislator in a timely matter, with tendency so close to the multiple faces of the legal consequences caused by changes of the company under its scope.

Conclusions

Changing companies, achieved by modifying their articles of incorporation, as provided by law, appears as one of the most viable solutions and less intrusive, available to the signatories by law, of a corporate pact to meet the needs of expanding companies, competitive or economic.

Compared to the dissolution of the company and formation of a new legal entity that takes into account the interests of current associates, changing the compay is shown, most often, as being preferable, for understandable reasons.

Given the outstanding importance of the institution as discussed, the conclusion suggests itself that the need for the development of the company must be accompanied by a constant effort to rationalize the regulations on its amendment. Thus, it is reasonable the idea to support, in Romania, an extensive process of refining the legal framework in this area.

By de lege ferenda proposals made in this approach, was tried the legislative consecration of some conclusions expressed in this paper, after the consultation with the doctrine and jurisprudence on the matter, consequent to the idea of making a predictable legal framework and unambiguous.

Of course, perhaps the most appropriate recommendation would be that the legislator to devote the amendment of the compant with a wider chapter in which to take some legislative solutions that have already been applied successfully in the legislation of other countries with longer tradition in the field of commercial law codification.

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CONSIDERATIONS REGARDING THE LOAN AGREEMENT IN THE LIGHT OF THE NEW CIVIL CODE

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Abstract

The loan contract contract is a legal contract by which a person, lender, transmits to another person, loanee, the use or the full legal rights regarding an object, with the obligation of returning, at a certain time, of the good or another good of the same quantity and quality

The loan contract has two forms, the loan for use and the loan for consumption.

The loan for use (Romanian: comodatul) is a free basis contract by which a party, lender (Romanian: comodant), hands in a movable or immovable good in order to be used by the other party, loanee with the obligation of returning, at a certain time, according to the contract .

The loan for consumption contract is an agreement by which a person, the lender, gives to another person, the loanee, a sum of money or any goods that are fungible and will be consumed by own nature and the loanee will return the same sum of money or the same quantity and quality of goods.

Keywords: *loan contract, loan for use, loan for consumption, promise of a loan, interest.*

1. The New Civil code richly regulates the loan agreement, with its two forms, the loan for use and the loan for consumption[1].

For the first time, the Civil Codes has provisions regarding the loan promise.

1.1. The loan contract is a legal contract by which a person, lender, transmits to another person, loanee, the use or the full legal rights regarding an object, with the obligation of returning, at a certain time, of the good or another good of the same quantity and quality[2].

The loan contract is part of the real-property contracts which means that for its validity the good that is loaned has to be given to the loanee (art. 1174 Civil Code). Handing in the good is the main condition for giving effects to the contract, and also its main effect.

1.2. The loan contract has two forms, the loan for use (Romanian: comodat) and the loan for consumption.

The main difference between the forms is the nature of the right that it is transmitted, in the case of the loan for use the lender transmits the loanee the right to use the good, as for the loan for consumption the lender transmits the loanee the full property right over the good.

The different nature of the right that is transmitted also gives birth to differences between the two forms of the contract.

1.3. The New Civil Code, for the first time, refers to the promise to contract, as the intention of a person to enter into an agreement in the future.

According to the law, the promise to contract must have all the conditions of the contract that is to be agreed. Should some of them lack the parties cannot execute their promise.

If one party refuses to undertake its obligations, a Court of justice, at the request of the other party which has fulfilled its obligations, may rule a decision that gives effect to the promised contract, should the nature of the contract permit and all its legal conditions are validly fulfilled.

Art. 2145 of the Civil Code permits a promise to contract a loan, which because is a real-property contract, the simple assent of the parties is not enough and the handing in of the good is mandatory.

If the good is held by the beneficiary, and the other party refuses to bind the contract by not giving its consent, a Court of justice, at the request of the other party which has fulfilled its obligations, may rule a decision that gives effect to the promised contract should the nature of the contract permit and all its legal conditions are validly fulfilled.

Thus, for the closing of the loan contract, by means of a Courts ruling a decision that gives effect to the promised contract, the law requires a perfectly valid promise of contract, the good must be in the possession of the beneficiary and a refusal from the other party to adhere to the contract.

2. The loan for use can be found in the provisions of the New Civil Code, art. 2146-2157.[3]

2.1. The loan for use (Romanian: comodatul) is a free basis contract by which a party, lender (Romanian: comodant), hands in a movable or immovable good in order to be used by the other party, loanee (Romanian: comodatar) with the obligation of

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[1] The legal provisions can be found in the New Civil Code, Book V, Title XI, Chapter XIII, art. 2144-2170.

[2] See C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, Romanian Civil Law (Tratat de drept civil roman), vol. II, Ed. C.H. Beck, Bucharest, 2008, pag. 622.

[3] See Fr. Deak, Romanian Civil Law. Special contracts (Tratat de drept civil. Contracte speciale), ed. Universul juridic, Bucharest, 2001, pag. 340 and next; L. Stănciulescu, Civil law. Contracts (Curs de drept civil. Contracte), ed. Hamangiu, Bucharest, 2014, pag. 401 and next.

returning, at a certain time, according to the contract (art. 2146 Civil Code).

The loan for use contract has the following characteristics: it is a real-property contract, it is always free based, it is unilateral and it transfers only the use of an good.

2.2. The validity conditions of the loan for use contact are se same given by law for any other real contract: the legal capacity of the parties to enter an agreement, the consent of both parties, handing in the good, a legal and moral object and a legal and moral purpose.

2.2.1. The loan for use contract is a management legal act. Thus, for it's legally closure both parties have to have the capacity required by law to enter a management contract.

Due to the fact that by means of loan the use of a good is transmitted, any person that was not forbidden by law or contract to use it may be a lender. Thus, the tenant or the holder of the real right of use may be a lender.

As for the loanee, he may not allow another to use the good without the express consent of the lender (art. 2148 par. 2 Civil Code).

2.2.2. The loan for use contract is closed, like any other real contract, by the agreement of both parties that sign it and when the good is handed in. the agreement of the parties not followed by the handing over of the good will only result in a promise of contract (precontract). Should the good be at the beneficiary, the other party refuses to acknowledge the contract, the Courts may rule a decision that gives effect to the promised contract (art. 2145 Civil Code).

2.2.3. The loan for use contract may refer to a movable or immovable good. Thus, the good that is given for use has to be returned in certain time, the good must only be not fungible and must keep its substance when used[4].

2.3. As any other contract, the loan for consumption gives special obligations. Being an unilateral contract results in obligations only for the loanee, but after, during the execution of the contract, some extra contractual obligations may arise for the lender too.

2.3.1. The obligations of the loanee are:

a) He must use the good he loaned according to its destination, given by the contract, or given by the nature of the good (art. 2148 par. 2 Civil Code).

According to the provisions of the law, the loanee cannot be held liable for any damage to the good should he use the good in respect to its destination for which it was loaned to him. Should he use the good for any other purposes than the one it was loaned to him or keep the good after the maturity of the loan, the loanee can be held liable for any damage that the good may suffer of if it is lost, even if the cause may be beyond control or an act of God. It represents an exception should the loanee prove that the good would have suffered a full or partial damage anyway due to the same cause beyond control. But still, the loanee will be held liable for the destruction of the good then the cause beyond control could not have been avoided by substituting a personal good or when he could not save both of two goods he chose to save his own.

The loanee can transmit the use of the good to a third party only with the express consent of the lender.

The misconduct regarding the use of the good as to its intended purpose gives the right to the lender to terminate the contract and claim damages (art. 1516 Civil Code).

b) The loanee must preserve the good given to him for use. In order to assure the use of the good for the duration of the contract and also to assure its return at the maturation of the loan, the loanee must preserve the good.

According to the law, the loanee must preserve and guard the good having the prudence and diligence of a good owner (art. 2148 Civil Code).

Due to the fact that by effect of the loan for use contract only a right of use is transferred, the risk of the contract falls to the lender as the owner of the good.

c) The loanee must pay all expenses arising from the use of the good. According to the law, any necessary expenses regarding the exploitation of the good fall to the loanee (art. 2151 Civil Code).

In some cases the loanee could ask for compensation from the lender, for any necessary improvements that the good might require and that could not have been foreseen when the contract was signed (art. 2151 par. 2 Civil Code).

d) The loanee must return the good. By effect of the loan for use contract, the loanee only receives a right to temporary use the good. Thus, the loanee must return the good at the specified term, or, should no specific time be stipulated, after he made use of the good according to the parties' agreement (art. 2155 Civil Code).

In the absence, from the contract, of any specific term or stipulation regarding the use the good or if the use of the good is on a permanent basis the loanee must return the good at the simple request of the lender.

The law also allows in advance return of the loaned good. The lender may ask for a return of his good before the specified term or before it was fully used according to the agreement, in the following situations: the lender has an immediate and unforeseen need for that good; the loanee does not respect his contractual obligations; the loanee deceases (art. 2156 Civil Code).

The good must be, in principal, physically retuned as it was (art. 2146 Civil Code). Restitution by money equivalent will be possible should only the agreement stipulate such permission or the lender

[4] Exceptionally, it has been admitted that goods that are consumed when used can be considered, by will of the parties, not fungible, and thus may become the object of a loan for use contract. See F. Deak, reference above, pag. 342.

waivers the physically return of the good as not necessary[5].

Taking into effect the obligation to return the good is facilitated by the law recognizing the loan for use contract as executors title. According to the law, should the contract be terminated due to expiration or death of the loanee, the loan for use contract that is conducted in an authentic form or under private signature is therefor an executors title (art. 2157 Civil Code)

In the absence from the contract of a specific term for returning the good the contract is an executors title only in the case when the scope for using the good is not mentioned or the use for which it was loaned is permanent.

A point must be made, that the loanee cannot hold the good as retention right for any obligations that he might have against the lender (art. 2153 Civil Code).

Should the loanee refuse to hand over the good, the lender can stake out a claim in requisition, as the owner of the good, which is unlimited, or can stake out a personal claim based on the loan contract, which is subject to limitation.

2.3.2. During the execution of the contract of loan for use some extra contractual obligations may arise for the lender:

a) The obligation to return all expanses made for conservation of the loaned good. As mentioned before, the expenses regarding the administration and conservation of the loaned good fall to the loanee. But during the execution of the contract there could be a necessity for adjusts to the loaned good, unforeseen at the signing of the contract. These expenses are to be paid by the lender, if he was notified in advance and did not oppose to adjusts being made by the loanee, or because of the urgency that the adjust required there was no time to notify him (art. 2151 par. 2 Civil Code).

The obligation of the lender to return the expenses mentioned has as basis business inventory (art. 1330 Civil Code).

b) The obligation to repair any damages of the loanee. The lender is obliged to pay any damages for any injury or prejudice caused to the loanee by his own fault. According to the law, the lender who, at the date of closing the contract, knew about hidden defects of the loaned good and failed to report them to the loanee must repair any damages suffered by the latter (art. 2152 Civil Code).

The obligation of the lender to pay all damages suffered by the loanee has as basis the delinquency responsibility of the lender (art. 1357 Civil Code).

2.4. The loan for use contract ceases according to the general rules: when the contract has been executed; the severance of the contract; the death of parties etc. in the application of the general rules the particularities of the loan for use will be taken into account.

2.4.1. According to the law, the loanee is entitled to use the good until the given term or until the good has been used according to the agreement of parties. Once executed, the contract is fulfilled and the loanee must return the good to the lender (art. 2155 Civil Code).

In the absence from the contract of the elements required to determine when the contract has been fulfilled, also in the case when the use of the good is permanent, the contract is considered to end upon request of the lender.

2.4.2. Any misconduct by the loanee gives the lender the possibility to server the contract, claim the return of the loaned good and also damages (art. 2156 Civil Code).

2.4.3. In general, after the death of a contracting party all rights are transferred to their inheritors by effect of the law. In the case of the loan for use contract, should the loanee decease, the contract will be terminated only at the request of the lender for the return of the good (art. 2156 Civil Code).

3. The loan for consumption contract has its legal provision in art. 2158-2170 Civil Code.

The Civil Code has general provisions regarding the loan for consumption and special provisions regarding the loan with interest.

Should any person close up loan for consumption contracts on a professional basis, the special provisions regarding credit institutions[6] or financial institutions[7] will be applicable.

3.1. The general provisions of the Civil Code regard the closing and content, validity conditions and effects of the loan for consumption contract.

The loan for consumption contract is an agreement by which a person, the lender, gives to another person, the loanee, a sum of money or any goods that are fungible and will be consumed by own nature and the loanee will return the same sum of money or the same quantity and quality of goods (art. 2158 Civil Code).

Usually, the loan for consumption is a free basis contract. In respect, art. 2159 Civil Code presumes that if the parties did not otherwise agree, the loan for consumption will be free basis. Should the loan for consumption refers to a sum of money, it will be presumed that the contract is by onerous title.

The use for consumption contract is a real contract, is unilateral and transmits the property.

3.1.2. The validity conditions for the loan for consumption are as any other contracts: the legal capacity of the parties to enter an agreement, the consent of both parties, handing in the good, a legal and moral object and a legal and moral purpose.

3.1.2.1. Because the use for consumption is a property transmitting contract, for its closing, both

[5] See F. Deak, reference above, pag. 346. See L. Stănciulescu, reference above, pag. 406.
[6] See Government Urgency Ordinance no. 99/2006 regarding institutions for credit and capital adequacy.
[7] See Government Urgency Ordinance no. 93/2009 regarding nonbanking financial institutions.

parties must have legal capacity to make disposition acts.

The lender must be the owner of the good and must fulfill the legal provisions regarding the disposition of that good.

The loanee must fulfill the legal provisions regarding his capacity to take property of the good and also to return it.

3.1.2.2. The loan for consumption contract will be realized, like any other real contract, by consent of both parties and giving out the loaned good. Giving out the loaned good is a condition for the legal closing of the contract and not an effect of it.

3.1.2.3. The object of the loan for consumption contract is a sum of money or any goods that are fungible and will be consumed by own nature (art. 2158 Civil Code). So, the object a general goods, fungible and that consume their substance.

Fungible goods are those that can be substituted with another alike in the execution of an obligation (art. 453 Civil Code).

The goods that consume their substance are movable goods which when normally used they must either be alienated or their substance is consumed (art. 544 Civil Code).

A point that must be made is that the object of the loan for consumption must be only goods that consume their substance by own nature.

3.1.3. Being a unilateral contract, the loan for consumption gives obligations only to the loanee. During the execution of the contract some extra contract obligation may arise for the lender too.

3.1.3.1. By the valid closing of the loan for consumption contract the loanee becomes the owner og the loaned goods and thus may dispose of them. As owner he will bear the risk of the contract (art. 2160 Civil Code).

After a specific period of time the loanee must give back to the lender the same sum of money or the same quantity and quality of goods. In lack of another agreement of the parties, the loanee must return the same quantity and quality of the goods that he received at the signing of the contract, regardless of the change in price.

If the object of the loan for consumption is a sum of money, should the parties not agree otherwise, the loanee must return the same sum, regardless of any fluctuation of its value.

In the case that giving back the same quantity and quality is not possible the loanee is obliged to pay the full value of the good from the date and place when the restitution was supposed to be done (art. 2164 Civil Code).

The return of the goods must be done at the specified term stipulated in the contract. According to the law, the term for restitution is presumed to have been fixed in favor of both parties. Should the contract be on free basis, the term is considered to be fixed only in favor of the loanee (art. 2161 Civil Code).

When the contract lacks to specify any return term for the loan, it will be fixed by the Court of Justice, according to the procedure provided by the law for presiding judge's interim order (art. 2162 Civil Code).

When ruling over the return term, the Court must take into consideration the purpose of the loan, the nature of the obligation and of the loaned goods, the conditions of the parties and any other relevant facts.

In the case that the contract allows the loanee to return the goods only when he has the means to do so, the Court should it observe that the loanee has them or could have had them cannot give a retuning term of more than 3 month.

In the case of the return term fixed by the Court the claim is subject to limitation, which begins at the date of closing the contract (art. 2163 Civil Code).

As in the case of the loan for use contract, regarding the obligation of retuning the loan, the loan for consumption contract is conducted in an authentic form or under private signature and is therefore an executors title, by law, in the cases of the death of the loanee and the expiration of the contract (art. 2165 Civil Code).

3.1.3.2. According to the law, the lender must repair any damages caused to the loanee because of the hidden defects of the goods (art. 2166 Civil Code).

In case of the loan for consumption which is by onerous title, the lender who, at the closing of the contract, knew of the existence of hidden defects and failed to notify the loanee must offer reparation should the loanee suffer any damages. The liability of the lender will be ascertained under art. 1707 Civil Code regarding the general warranty obligation of the seller for hidden defects of the sold goods.

3.2. The provisions of the Civil Code regarding the loan with interest contract regulate the field of application, the notion of loan with interest, different forms of interest, how interest flows and the anticipated payment of interest[8].

3.2.1. The provisions of the Civil Code regarding the loan with interest are applicable every time, on a contract basis, an obligation is born regarding a sum of money and that has a term for execution or regarding general replaceable goods, should no special rules exist regarding the validity and execution of such obligation (art. 2167 Civil Code).

Crediting on a professional basis can be done only by financial or credit institutions or other institutions given such right by law.

3.2.2. The loan with interest is the loan for consumption contract by onerous title, in which the loanee must return not only the sum he had loaned but also pay interest.

By effect of the law, the loan for consumption that has a sum of money as an object is presumed to be

[8] See Florin Moțiu, Special contracts in the new Civil Code (Contracte speciale în noul Cod civil), ed. Wolters Kluwer, Bucharest, 2010, pag. 297-299.

by onerous title which equals to a loan with interest (art. 2159 Civil Code).

3.2.3. Interest represents an equivalent of the use of capital (usage interest). Interest may be stipulated in currency or any other performers under any title or designation that the loanee must pay (art. 2168 Civil Code).

3.2.4. In case of a loan of a sum of money, interest will be added from the first day that the sum was given to the loanee. He must pay interest at the maturity of the loan contract.

Paying interest in advance can be made for only 6 month in advance (art. 2170 Civil Code).

If the rate of interest is only determinable any likely overpayments or deficits will be subject to compensation from one rate to another, for the entire duration of the contract, with the exception of the last rate which is always in favor of the lender.

3.2.5. The legal frame of the legal interest is given by Government Ordinance 13/2011 regarding the legal usage and penalty interests for money obligations and for certain financial and fiscal measures in banking sector[9].

The usage interest is the interest due by the debtor of an obligation regarding a sum of money at a certain term, calculated for the period previous to the expiration of that obligation. This interest is the price for using that money.

The penalty interests is owned by the debtor of a money obligation that was not restituted at due date. This interest represents compensation for sanctioning and repair the damage caused to the creditor by the late payment over the due date.

In the absence of an express agreement of the parties, regarding the interests' sum, the legally stated interests will be paid, as for either the usage or penalty interest.

The rate of the legally stated usage interest is set at the level of the reference interest given by the National Bank of Romania, which is the rate of interest for monetary policy, set by decision of the Council of administration of the National Bank.

The rate of the legally stated penalty interest is set at the rate of interest for monetary policy plus 4 percent points. In contracts between nonprofessional parties the rate of penalty interest will be at the rate of interest for monetary policy diminished by 20%.

In contracts between professionals and in those between professional and public contracting authorities the interest will be at the rate of interest for monetary policy plus 8 percent points[10].

In contracts that have an international element, when the Romanian law is applicable and when the payment is in a foreign currency, the legally stated usage and penalty interest is 6% per year (art. 4 G.O. no. 13/2011.

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[9] Published in Official Journal 607/29.08.2011. The Ordinance has been modified by Law no.72/2013 (OJ 182/2/04/2013). See also Stanciu Cărpenaru, Romanian Commercial Law treaty (Tratat de drept comercial român), ed. Universul Juridic, Bucharest, 2014, pag. 446-448.

[10] This provision is showed in art. 20 of Law no. 72/2013 modified by Government Ordinance no. 13/2011.

JURIDICAL WILL IN CONTRACTS

Emilian CIONGARU*

Abstract

In the business law, almost all judicial relationships of private law are obligational juridical relationships which are made up of legal acts and facts. The most important legal act is the contract since it is the basis of the social life in any community meaning that it represents the most important economic and juridical instrument for the participants to a contract. The persons are free and equal in society and, consequently, no power is valid and fundamental unless it relies on their consent, namely on a contract. So, the existence of a civil contract relies on the principles of consensualism, a perception based on moral rules to observe one's promises, to have good faith and to observe the interests of your fellow creature. The exterior manifestation, the expression or declaration of the juridical will constitutes the consent of such person in making the structure of contract. The declared will must correspond to the person's real will and the adoption and declaration of the juridical will must take place consciously. Any contract that does not derive from juridical will is null and the civilizing character is inexistent. The principles giving sense to consensualism is the one of agreement between parties so as to produce legal effects by itself and it is enough for the conclusion of a contract, regardless of the form in which it is exteriorized, a principle expressed by the Latin adagio pacta sunt servanda.

Keywords: *business law, principles of consensualism, juridical will, contract.*

1. Introduction

The liberty of contract principle has been initially taken over by the private international law in terms of the conflict of laws, and then it was consecrated in the internal law of the European states starting with Napoleon's Civil code, a codification work massively taken over by the Romanian Civil Code of 1864, then in the New Civil Code which take effect from 2011. We might say that by the recognition of the liberty of contract and the fact that the subjects of law are free to conclude or not any contracts and to establish their content in an unhampered manner being able to modify or extinguish the assumed obligations, the science of law has evolved from the rigidity of the quiritarian Roman law to the flexibility of consensualism from the modern era of law.

Will is undoubtedly one of the words having a high frequency in the current language mainly due to the fact that this term is associated to the human being's will to tend to something, to achieve something, to attain certain goals, to obtain the things necessary for the daily life, to fulfill a dream etc.

In the field of law, the will is met very often in cases such as the will of state incorporated into the juridical norm (the juridical norm being the expression of such will), the individual (unilateral) will that may manifest to achieve some agreements or to exceptionally produce legal effects by itself; the legal effects of human being's actions or inactions differ sometimes depending on the fact whether they are voluntary or involuntary.[1]

The principle of the free will in contractual matter means the liberty to conclude contracts but not in the sense of a perfect free will, but in the sense of liberty conditioned by the social life and the legal norms[2].

The word given by exteriorization of will in any contract represents the formation of the legal act, a fact leading to its definition as being the manifestation of will performed with the intention to produce legal effects, namely to create, modify or extinguish a judicial relationship and it contains three notions[3]: it is a manifestation of will which must come from a conscientious person since it is a product of such person's thought; the will must be manifested, namely exteriorized, so as to be efficacious from a juridical viewpoint; the manifestation of will is made to produce legal effects[4] to create, modify or extinguish a certain juridical situation.

This definition highlights the fact that the manifestation of will expressed to produce legal effects is the essence of the legal act, this will constituting the fundamental element of the legal act.

2. Content

The juridical will is a psychological act[5] and both from the psychological viewpoint and the juridical

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[1] Ion Dogaru, *Legal valences of will*, (Bucharest, Stiintifica si Enciclopedica, 1986), p. 11.

[2] Constantin Statescu, Corneliu Barsan, *Civil law. General theory of obligations*, (Bucharest, All, 1993), p.19.

[3] Ion Deleanu, *Legal fiction*, (Bucharest, All Beck, 2005), p. 249.

[4] Liviu Pop, *Treaty of civil law. The general theory of obligations*, (Iasi, Chemarea, 1994), p. 60.

[5] Mircea Djuvara, General Theory of Law. Law rational, sources and positive law, (Bucharest, All Beck, 1999), p. 228.

viewpoint the will is a complex element[6]. The will is complex from the psychological viewpoint because its formation represents a complex psychological process comprising a series of stages. The will is complex from the juridical viewpoint because its structure is made up of two elements: consent and cause and, consequently, the correlation between consent and juridical will is of the part-whole type.

When speaking of a contract, an offence or any legal act, one must take into account the psychological will which really took place in the consciousness of the subject of law in question. But the law has mechanisms that filter it by resorting to a series of extremely accurate juridical concepts and this way the will is turned into completely something else than the de facto will, namely an ideal will that the subject of law should have had and which has a logical nature and not a psychological one.

The will manifested by the contracting party must not be erroneous or determined by a vice of consent such as an error, an act of violence or by fraudulent maneuvers; the expression of will has to be the result of one's own decision, of autonomy without being influenced in any way or the result of a constraint or dubious methods. Only this way, the will incorporated into a contract really is one's own psychic process, a capacity of the contracting party to propose goals and to attain them.

Pacta sunt servanda principle, conventions must be observed, a principle relying on keeping one's word lays at the bottom of the entire organized society[7] expressing the rule of consensuality of conventions according to which parties' will is sufficient for the validity of a convention, except when we speak of real or solemn contracts, and the execution of obligations is made as they were assumed. The convention or contract, the legal act having the mission to civilize states, peoples, and persons, represents the basis of life in any community.

The theory of autonomy of will was enunciated and developed in the individualism climate of the 18th century by J.J. Rousseau and I. Kant.[8] In the Kantian philosophical system, autonomous will is a categorical imperative which justifies by itself: the most profound aspect of the human being is their free will. In order to have free wills, they must reciprocally limit themselves so as to ensure the social order. This order is the result of a social contract but not of a contract which intervened sometimes in history, as they thought, but of a contract resulted from the human mind itself.

The theory of autonomy of will[9] was considered for a long time as a postulate of the social life. Later on, mainly in the 20th century, they noticed that this theory contains numerous errors and exaggerations such as: the affirmation that the human being was initially free and that they gave up a part of their liberty by a social contract for social coexistence is pure fiction; will may not be autonomous since the human being lives in society and the social life imposes numerous obligations; there are no absolute liberties but only concrete liberties, namely determined by action or inaction.

The contemporary legislation and doctrine[10] based on the ideas, principles and norms of the continental law system identify two qualification criteria of the civil contract, more precisely the consensus and the legal purpose. The latter is considered as a subjective orientation of consensus and is totally subjected to parties' discretion to produce juridical-civil effects. Based on these criteria of uniform qualification of civil contracts, contractual agreement becomes binding for the parties regardless of other objective factors such as the form taken by the agreement or the effective transmission of right based on it, or especially the recognition by the legislator of such case in quality of content of contract sanctioned by the positive law. In other words, the construction of the civil contract relies on the principles of consensualism[11], the perception based on moral rules to keep one's word, to have good faith and to observe the interests of your fellow creature.

To be considered as a source of law, the will must be conscientious and rational. The consent, as an element of exteriorization of will, must be vice-free and expressed in full knowledge of facts. The theory of consent vices reinforces the free character of will. Thus, the consensus lacks the juridical sense where will is not free since it cannot create law.

The real will expressed with the intention to generate legal effects is the only one creating law, the altered or putative will is considered not to have existed upon the occurrence of consent. The sanction of expressing such a will is the cancelation of the likeness of law generated this way[12] (theory of nullity).

Internal will creates law. The exteriorization of will is a logical condition for the creation of contract whereas the interior one may not disclose its valences. In case of contradiction between the real and expressed will, the former prevails because will shall be appreciated as it must (*sollen*) be, and not as it is (*sein*), described. Real will remains the essence and the exteriorized will remains the phenomenon.

To manifest in the law and to produce legal effects, the will must be exteriorized either by words, written documents or by any other material means. If

[6] Denisa Barbu,*Genocidul,infracțiunile contra umanității și cele de război. Repere în Codul penal român în raport cu Statutul de la Roma*, (Iasi, Lumen, 2015), p.19.
[7] Alain Supiot, *Homo juridicus*, translation Catalina Teodora Burga, Dorin Rat, (Bucharest, Rosetti Educational, 2011), p. 138.
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[9] Robert-Henri Tison, *Le principe de l'autonomie de la volonte dans l'ancien droit francais*, (Paris, Domat, Montchrestien, 1931), p. 15.
[10] Zephaniah Benjamin, *What is the will ?*, (Bucharest, Enciclopedica Romana, 1969), p. 12.
[11] Gabriel Boroi, *Civil law. The general part. a second ed.*, (Bucharest, All Beck, 1999), pp. 162-163.
[12] Octavian Capatana, *Treatise of Civil Law, vol I*, (Bucharest, Academia RSR, 1989), pp. 234-235.

it was not exteriorized, psychological consciousness does not mean anything in law. Incontestably, the manifestation of will does not have a juridical significance either unless there is also a psychological will behind it. In the light of this psychological will which was the source, the legal ground resides in the external manifestation in that two parties contracted something after they have thought about it and the volition acts took place from the psychological viewpoint and this is manifested at the exterior by words, sometimes even written words. This external manifestation is the only proof of will: will is intangible without this filtration through the external manifestation. Consequently, what we must consider as essential in law is not the psychic will but the external manifestation of such will. [13]

The rational individual defines liberty by themselves through their will to get engaged judicially thus creating their own juridical reality.14 In the private law this is characterized by the fact that will is the intellectual fundament of the contract and the source of its binding force.he role of law is only limited to the guarantee of execution of contract and sanction is the only role of state in a contract. The explanation resides in the fact that the human being is a free individual whose activity may not be limited but by their will (intrinsic element) and not by the juridical norm (extrinsic element). At the same time, will is considered as the unique source of justice. The contract as a paradigm of voluntary self-limitation of individual freedom is not only the source of rights and obligations, but also embodies the idea of justice since only the contract, by self-accepted limitation, ensures the liberty of conscious will. The contract is genetically superior to the juridical norm, consequently the juridical norm may not limit individual's liberty but to the extent to which it guarantees the preservation of one's fellow-creature's liberty.

The requirements related to the form or registration of contracts as well as the rules of invalidity of contracts, most of them being an image of public limitation[15] of individual liberty, are tightly correlated and they are present in a large number of juridical norms.

The general conditions regarding the form of contract establish the form that the consensus must have so as to be acknowledged by the public authority[16], regardless of parties' will. In this case, even if the registration of a contract takes place after the conclusion of agreement related to the contractual clauses, the failure to make it shall lead to the nullity of contract from the viewpoint of the public authority and shall deprive the parties of the possibility to defend in court.

The juridical consequence of parties' failure to reach an agreement regarding all the essential clauses of contract differs from the consequences of the principle of formalism, namely the failure to conclude a contract means its inexistence as a juridical fact generating civil rights and obligations.

The form of expression of will upon the conclusion of a contract is analysed in tight connection with its content conditions knowing that in the Romanian law the rule of consensuality operates according to which parties' consensus17 is sufficient for the valid elaboration of a contract. We may not also overlook the issue of proof of the juridical operation in the sense of negotium juris for which purpose they require the written ascertainment of parties' will (the document is required ad validatem) or the existence of an inception of a written proof which completed by other evidence proves this operation. In the cases when the written form of contract is required under the sanction of absolute nullity (ad validitatem), the will of contracting parties shall be expressed and mandatorily be ascertained in writing.

"We may legitimately think that the Contract law is a universal law adapted to all epochs and all peoples, places and circumstances, that it is founded on the fundamental principles of good and evil coming from the natural reason and that they are unalterable and eternal".[18]

If the contract represents an adhesion to certain special juridical objects, it creates general situations meaning that when a person concludes such a contract or they become a borrower, seller or buyer they understand to be applied all the dispositions from the juridical norms referring to the specific legal object – loan, sale-purchase, entire chapters from the civil law comprising the provisions related to the specific legal acts as well as other entire chapters of law interpretation that the specialists in the domain constitute in an enormous quantity of information that make up thick treatises of civil law.

The question is whether the individual who concluded a contract and who most of the time does not have juridical knowledge may know all this huge volume of clauses incorporated automatically in their document. Most often, even an experienced lawyer could not provide them all, the more so as most individuals who are profane could not do this. The entire legislative system of a state, and not only, is involved in every manifestation of an act of will of each inhabitant of such state but, of course, not by an act of psychological will. When concluding a legal act, individuals think of a very limited number of

[13] Mihail Niemesch, *General Theory of Law*, (Bucharest, Hamangiu, 2014), pp. 156-157.
[14] Alex Weill, *Les obligations*, (Paris, Dalloz, 1971), p. 50.
[15] Véronique Ranouil*, L'autonomie de la volonte: naissance et evolution d'un concept*, (Paris, Presses Universitaires de France, 1980), p. 61.
[16] Jean Jaques Rouseau, *Du contract social*, (Paris, Flamarion, 1992), p. 126.
[17] Ioan Albu, *Contract and contractual liability*, (Cluj-Napoca, Dacia, 1994), p. 27.
[18] Wesley Addison, *Traite des contrats*, 1847, apud Patrick S.Atiyah, *Essays on contract*, (Oxford, Clarendon Press, 1986), p. 17.

conditions and for the rest they understand the law shall apply or they are constrained to obey it. Consequently, the effect of the legal act is, to a very limited extent, the product of the individual's psychological will and much more the product of hypothetical will as the individual had to have it when they consented to the conclusion of the legal act. Thus, between the legislative systems of a state and the individuals that are subject to the laws there is a continuous stream of legal communication[19]

Exemplifying for this purpose is the obligation of execution, a case in which will produces future effects even between living persons. Relevant is the situation when a person is lent a sum of money that they undertook to reimburse upon maturity the contract establishing implicitly that if they fail to fulfill such obligation they shall be liable to the rigour of the law. Upon maturity, if they failed to pay, the will that they manifested in their legal act long ago would produce effects upon maturity. Though they no longer want, they must pay the amount due. Thus, the psychological will disappeared much but the juridical will continues to subsist and produce effects. Another example may be given in case of the inexistence of will in infants and mad people, and yet as a person it produces juridical effects by the acts of their representatives since we do not speak of psychological will.

3. Conclusions

In conclusion, *the juridical will* requires the entire society to keep their word given in contracts, the observance which any contract is governed by the principle of free will or also known as the principle of liberty of contracts, according to which the parties are free to conclude any convention, to establish any clause by mutual agreement, to modify or to extinguish any obligation. The principle of free will manifests, in terms of content, by consensualism meaning that the parties are free to adapt the contract pursuant to their juridical will necessary upon the conclusion of a legal act and which supposes the fulfillment of two conditions: the existence of a will and the juridical intentionality thereof. According to the principle of consensualism, contracts may be validly concluded and produce legal effects by the simple consent of the parties, regardless of the form in which the consent is expressed. Based on the principle of free will, the parties create by themselves, exclusively by their will, the juridical norm meant to govern their juridical relationships agreed upon and mutually advantageous.

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[19] C.R.Butculescu, *Considerations regarding Law as an instrument of communication*, Juridical Tribune, vol. 4, Issue 2, December 2014, (Bucharest, ASE, 2014), pp.22-23.

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ENFORCING ARBITRAL AWARDS IN ROMANIA - ALWAYS A CHALLENGE

Paul COMŞA*

Abstract

Securing a favourable award from a foreign or domestic arbitral court proves to be in many cases only half the battle. As a rule, Romanian law and courts acknowledge the final, binding and enforceable nature of arbitration awards and state the principle that arbitration awards shall be freely implemented by parties. However, there are instances where the unsuccessful party does not voluntarily perform the obligations arising from the arbitral award. In these cases, before incurring legal expenses on formal enforcement procedures, it is worth attempting several informal or indirect means of persuading the other party to honour its duties. If the opposing party still refuses to comply with the award, one may resort to an ordinary enforcement procedure. In Romania, enforcement procedures may be conducted by judicial executors only after the arbitral award is rendered enforceable by a domestic court of law. As in most developed states, the vast majority of Romanian courts have enforced both domestic and foreign arbitral awards. Although there are certain instances when arbitral awards have been denied enforcement, these are the exception rather than the rule because under Romanian law the right of refusal to comply with the arbitral award shall be exerted only through an action of annulment for limited reasons.

Keywords: *arbitral award, enforcement of arbitral awards, final and binding, annulment of arbitral awards, enforcement procedure1*.

1. Introduction

Obtaining an arbitral award may not immediately end the dispute between parties. Even if this is rather an exception than the rule, there are instances when the losing party refuses to comply with the award promptly and voluntarily. In this hypothesis, several steps need to be made in order to enforce the arbitral award in the state of execution. These steps may vary from one country to another because each national legal system has its own requirements when it comes to enforcement procedures concerning domestic or foreign arbitral awards. Also, rendering an arbitral award enforceable in the state of execution may require compliance with certain mandatory procedural laws applicable at the seat of arbitration. This article briefly examines the issue of enforcing arbitral awards in Romania, with reference to relevant provisions from international regulations and other systems of law, as well. This topic is not fresh, being already analysed in many respects by Romanian scholars and tackled in several books, scientific papers and conferences. However, the enforcement of arbitral awards recently returned to the public's attention after the massive amendments to the Romanian Code of Civil Procedure in force, in October 2014, and the recent European Commission intervention regarding the implementation of the Arbitral award obtained in the *Micula v. Romania* case[1].

In Romania, the final, binding and enforceable nature of arbitration awards is recognised by law, courts and legal literature. However, even if, as a principle, the enforcement procedure does not allow for a substantive re-examination of the award, parties shall undertake an additional common procedure in order to enforce the arbitral award. The right to refusal to comply with the obligations set forth in the arbitral award shall be exerted only through an action of annulment for limited reasons.

As regards the recognition and enforcement of foreign arbitral awards, Romanian courts have usually denied arguments challenging their correctness. Still, the recent Arbitral Award in the *Micula v. Romania* case, which is currently under assessment by the European Commission for potential incompatibility with the internal market, may change this trend.

Therefore, due to their rising importance in the current law environment, this paper deals mostly with the legal basis and jurisprudence concerning the enforcement of foreign arbitral awards in Romania. The article addresses in particular the denial of enforcement of foreign arbitral awards, as well as the annulment of arbitral awards by Romanian courts.

2. Preliminary Step towards Enforcement: Recognition of Arbitral Awards in Romania

As a rule, recognition is prior to enforcement and it represents the official confirmation that the respective arbitral award is authentic, final and binding. Upon recognition, the award may be rendered enforceable by a domestic court of law.

Romanian law and courts generally recognize arbitral awards, whether international or domestic, and

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[1] The European Commission notification regarding the implementation of Arbitral award *Micula v. Romania* of 11 December 2013, published in the Official Journal of the European Union C 393/27 from 07.11.2014.

acknowledge their final, binding and enforceable nature if certain requirements are met.

In accordance with Article 1124 of the Romanian Code of Civil Procedure[2], any foreign arbitral award is recognised and may be enforced in Romania if ***(a)*** the dispute settled through arbitration may be resolved by Romanian arbitration courts and ***(b)*** the arbitral award is not contrary to public order. This legal provision refers to foreign arbitral awards[3], but domestic awards also need to comply with these rules.

These legal requirements are not only particular for the Romanian law system, but are also encountered in Article V paragraph (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, also known as the *"New York Convention"*), ratified by Romania[4]. Article V states that *"recognition and enforcement of an arbitral award may (...) be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country."* The European Convention on International Commercial Arbitration (1961), also ratified by Romania[5], has a more detailed approach, by indicating the governing law of the arbitration agreement. However, it envisages slightly the same legal requirements: according to Article VI paragraph (2) of the Convention, "*in taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions: (a) under the law to which the parties have subjected their arbitration agreement; (b) failing any indication thereon, under the law of the country in which the award is to be made; (c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute. The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration."*

In Romania, each recognition procedure begins with the examination of the arbitration agreement. More specifically, the competent court[6] examines whether parties have clearly incorporated a valid arbitration clause into their contract.

According to a widely used definition, an "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not[7].

2.1. The Validity of an Arbitration Agreement

There are several requirements regarding the validity of an arbitration agreement provided by national and international regulations and highlighted in the legal literature and law cases. Although these conditions may vary from one country to another, they generally refer to ***(a)*** the need for writing; ***(b)*** a defined legal relationship between parties; ***(c)*** the *"arbitrability"* of the dispute settled through arbitration and ***(d)*** the relationship of the arbitration clause with the contract into which it is incorporated[8].

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[2] Law no. 134/2010 regarding the Code of Civil Procedure, published in the Romanian Official Journal no. 545/2012. The current Code of Civil Procedure is in force from February 15th 2013 and replaced the former Code of 1865.

[3] According to Article 1123 of the Romanian Code of Civil Procedure, foreign arbitral awards means any foreign arbitral awards issued in both domestic or international disputes taking place in a foreign state and which are not considered in Romania as domestic arbitral awards.

[4] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded under the auspices of the United Nations Conference on International Commercial Arbitration held in 1958, in New York. Currently, there are 154 parties to the New York Convention. Romania ratified the Convention in 1961, by State Council Decree no. 186 issued on July 24th 1961.

[5] The European Convention on International Commercial Arbitration was concluded in Geneva, on 21 April 1961. Romania ratified this Convention by State Council Decree no. 281/1963, published in the Official Journal no. 12 issued on June 25th 1963.

[6] In accordance with Article 1125 paragraph (1) of the Romanian Code of Civil Procedure, the competent court is the tribunal located in the area where the losing party has its domicile or headquarters.

[7] This definition was provided by Article 7 of the UNCITRAL Model Law on International Commercial Arbitration from 1985, as revised in 2006. The Romanian Code of Civil Procedure (Articles 550-551) defines two forms of arbitration agreements, namely: *"clauza compromisorie"*, in English -*"compromissory clause"* or *"arbitration clause"*, under which the parties agree to submit all future disputes to arbitration and *"compromis"*, sometimes termed in English *"special agreement"*or *"agreement as to arbitration"*, under which parties agree to submit a current litigation to arbitration. Slightly similar legal definitions to the ones presented above are provided by the United Kingdom Arbitration Act of 1996 (Section 6), French Code of Civil Procedure (Article 1442), German Code of Civil Procedure (Section 1029), Dutch Code of Civil Procedure (Article 1020) etc. They are also compatible with the Italian law (see Articles 806-808 of the Italian Code of Civil Procedure), Spanish law (see Article 9 of the Spanish Law no. 60/2003 – *"Ley de Arbitraje"*) and other European legislations.

[8] For a detailed analysis on this matter, see Alan Redfern *et al.*, *Redfern and Hunter on International Arbitration* (New York: Oxford University Press, 2009), 89-106.

(a) Romanian law[9] requires that an arbitration agreement shall be in writing, in line with other international[10] and national[11] regulations.

The arbitration agreement shall be incorporated either into a document signed by parties, or in letters, telefax copies, telegrams, electronic mail or other forms of exchanging messages between parties, which ensure proof of the respective agreement by supporting documents. Also, the reference in a contract to any documents containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract[12]. Therefore, predetermined arbitration clauses may be incorporated entirely or partially by parties into their contract *per relationem*.

When the agreement refers to a litigation concerning the transfer or establishment of an ownership right on immovable property, the written arbitration agreement shall be authenticated by a public notary[13].

Romanian courts clearly state that unwritten arbitration agreements are not valid[14].

(b) In order to be valid, an arbitration agreement shall envisage litigation arising from a "defined legal relationship" between parties, whether contractual or not[15]. Parties shall unequivocally state their intention to settle their disputes by arbitration in their agreement.

In case of a contractual relationship, all claims shall refer to the respective contract. More specifically, the dispute submitted to arbitration shall generally refer to contractual liability or be closely related to the parties' agreement, thus being governed by the law of the contract.

In the hypothesis of a tort liability, the dispute submitted to arbitration shall have a "close enough relationship" with the agreement concluded between parties[16].

(c) The dispute governed by the arbitration agreement shall be capable of settlement by arbitration[17].

Determining whether a particular litigation may be resolved by an arbitral tribunal is significantly important when it comes to recognition of foreign arbitral awards.

The issue of *"arbitrability"* may be viewed from two perspectives - subjective (*ratione personae*) and objective (*ratione materiae*)[18]. *Ratione personae*, national regulations usually forbid certain natural and legal persons (mostly states and public authorities) to submit their disputes to arbitration. *Ratione materiae*, there are particular types of disputes which are not capable of being resolved through a private dispute resolution mechanism such as arbitration.

If the recognition of the arbitral award is sought in Romania, the Romanian Code of Civil Procedure clearly determines the disputes that may be settled by domestic and international arbitration. According to Article 542 of the Romanian Code of Civil Procedure, any dispute may be resolved through arbitration, unless it is related to matters involving the civil status of the natural person, the capacity of both natural and legal persons, mandatory provisions regarding the inheritance law and family law and, respectively, inalienable rights.

Consequently, as a rule, commercial disputes may be resolved by arbitration[19].

Public authorities that carry out economic activities may also conclude arbitration agreements, unless stated otherwise by law or their constitutive or organizational documents[20]. In other words, public entities have the capacity to enter into valid arbitration agreements only if they are empowered by national or international regulations[21].

Furthermore, pursuant to Article 1111 of the Romanian Code of Civil Procedure, any patrimonial dispute may be settled through arbitration if it is related

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[9] See Article 548 paragraph (1) of the Romanian Code of Civil Procedure and Article 8 paragraph (1) of the Rules of Arbitration Procedure of the Romanian Court of International Commercial Arbitration, as amended on June 5th 2014.

[10] See, for example, Article 7 of UNCITRAL Model Law on International Commercial Arbitration, as originally adopted, in 1985; Article II of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Article I, paragraph 2 of the 1961 Geneva Convention on International Commercial Arbitration.

[11] See, for example, Section 5 of the United Kingdom Arbitration Act (1996), Article 1443 of the French Code of Civil Procedure, Section 1031 paragraph (1) of the German Code of Civil Procedure, Article 1021 of the Dutch Code of Civil Procedure, Article 9 paragraph (3) of the Spanish Law no. 60/2003, Articles 807-808 of the Italian Code of Civil Procedure etc.

[12] See Article 7 paragraph (6) Option I of the 2006 UNICTRAL Model Law on International Commercial Arbitration. This interpretation is also valid under Romanian legislation.

[13] See Article 548 paragraph (2) of the Romanian Code of Civil Procedure.

[14] See, for example, Înalta Curte de Casație și Justiție (*The High Court of Justice*), Decision no. 1201/March 21st 2008, available in http://www.legalis.ro/ database.

[15] See Redfern *et al.*, *Redfern and Hunter on International Arbitration*, 93-94.

[16] See Viorel Roș, *Arbitrajul comercial internațional (International Commercial Arbitration)* (Bucharest: Monitorul Oficial, 2000), 124.

[17] For a detailed presentation on this issue, see Emmanuel Gaillard and John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Beijing: Citic Publishing House, 2004), 312-359.

[18] Emmanuel Gaillard and John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 312-313.

[19] See Curtea Supremă de Justiție (The Supreme Court of Justice), Decision no 319/1999, published in Viorel Roș, *Arbitrajul comercial internațional (International Commercial Arbitration)*, 125.

[20] If the complainant, public authority, does not have a legal authorization to conclude an arbitration agreement, the respective clause is null and void. See the Romanian Court of International Commercial Arbitration, Arbitral Decision no. 177/July 4th 2006, published in Marin Voicu, *Arbitrajul comercial. Jurisprudență adnotată și comentată 2004-2014 (Commercial Arbitration. Case Law with Commentaries)*, (Bucharest: Universul Juridic Publishing House, 2014), 170.

[21] *E.g.* Article II paragraph (1) of the 1961 Geneva Convention on International Commercial Arbitration.

to rights which are not inalienable[22] and the law of the place where the arbitration court is located does not provide for a national court to have exclusive competence on the respective legal issue.

Consequently, as a rule, Romanian legislation allows for a dispute which involves an economic interest to be submitted to arbitration, unless it concerns inalienable rights or other exceptions expressly provided by law.

(d) The validity of the arbitration clause partially depends on the validity of the contract into which it is incorporated.

The arbitration agreement is, in principle, autonomous from the main contract[23]. According to Article 550 paragraph (2) of the Romanian Code of Civil Procedure, *"the validity of an arbitration clause is independent of the validity of the contract into which it is incorporated"*[24].

Therefore, the arbitration agreement is unaffected by the status of the main contract[25]. In other words, the fact that a contract is declared null and void by an ordinary court does not entail *ipso jure* the validity of the arbitration agreement[26]. However, parties which have concluded the main contract and, implicitly the arbitration clause shall have legal capacity to enter into the respective contract[27] and give their valid consent to submit disputes which may arise between them to an arbitral court[28].

2.2. The Binding Effects of the Arbitration Agreement

A valid arbitration agreement incorporated into a contract (*per relationem*) becomes part of the respective contract. Consequently, according to Article 1270 of the Romanian Civil Code[29], which states the principle of the binding force of contracts (*pacta sunt servanda*), there is a binding commitment by the parties to refer to arbitration.

The principle of the binding force of the arbitration agreement is clearly specified in Articles 552 and 553 of the Romanian Code of Civil Procedure. Therefore, when parties have validly agreed to resort to arbitration, national courts do not have jurisdiction to decide upon the substance of the present or future disputes covered by the respective arbitration agreement.

Domestic courts acknowledged the autonomy and binding force of arbitration agreements[30]. It was held that the validity of the arbitration clause is independent of the validity of the contract into which it was incorporated and Romanian law does not provide for requirements of "subsequent validation of the arbitration clause"[31].

International jurisprudence also recognizes the binding nature of the arbitration agreement. It has been considered that if *"parties concluded an arbitration agreement, emphasizing that resort to arbitration, although conditional, was mandatory in that nothing could be interpreted as giving the parties a choice between arbitration and litigation"*[32].

A valid arbitration agreement, thus binding for parties, has two main effects, namely: ***(a)*** it compels the parties to solve all *"arbitrable"* present or future litigation by arbitration and ***(b)*** it prevents the parties from seeking resolution for the respective litigation through domestic courts[33].

Romanian and international courts generally recognised the validity of arbitration agreements (by frequently applying the *in favorem validitatis*

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[22] Disputes which concern inalienable rights shall not be settled by means of arbitration. See Curtea Supremă de Justiţie (*The Supreme Court of Justice*), Decision no. 537/1998, published in Corneliu Turianu and Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence)* (Bucharest: C.H. Beck Publishing House, 2008), 26.

[23] The international jurisprudence is also in favour of the autonomy of the arbitration clause in relation to the main contract. See, for instance, the ICC International Court of Arbitration, *Meniccuci v. Mahieux* case, Decision from December 13th 1975, extract published in Jean-François Lachaume, *Jurisprudence Française Relative au Droit International (Année 1975) - French Jurisprudence on International Law (Year 1975)*, in Annuaire francais de droit international, vol. 22, 1976, 887.

[24] For a detailed presentation on the autonomy of the arbitration agreement under Romanian law, see Raluca Dinu, *Aspecte teoretice şi practice privind formarea şi autonomia convenţiei arbitrale (Practical Aspects Regarding the Formation and Autonomy of the Arbitration Agreement)*, in Revista Română de Arbitraj (Romanian Journal of Arbitration), vol. 15, no. 3/2010, 39-58.

[25] Emmanuel Gaillard and John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 209-217.

[26] See Radu Bogdan Bobei, *Commercial Arbitration. Elementary Handbook on Scholarly Pragmatism* (Bucharest: C.H. Beck Publishing House, 2014), 38.

[27] See Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 1452/2007, published in Corneliu Turianu and Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence)*, 21.

[28] For further information, see Alan Redfern *et al.*, *Redfern and Hunter on International Arbitration*, 95-106; Emmanuel Gaillard and John Savage (ed.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 242-312.

[29] Law no. 287/2009 regarding the Civil Code, published in the Romanian Official Journal no. 505/2011.

[30] See, for instance, Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania - C.C.I.R., Arbitral award no. 92/2009, published in Vanda Anamaria Vlasov, *Arbitrajul comercial. Jurisprudenţă arbitrală 2007-2009. Practică judiciară (Commercial Arbitration. Jurisprudence)* (Bucharest: Hamangiu Publishing House, 2010), 3.

[31] Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania - C.C.I.R., Arbitral award no. 49/2007, published in Vanda Anamaria Vlasov, *Arbitrajul comercial. Jurisprudenţă arbitrală 2007-2009. Practică judiciară (Commercial Arbitration. Jurisprudence)*, 7-8.

[32] See *Ho Fat Sing t/a Famous Design Engineering Co. v. Hop Tai Construction Co. Ltd*., District Court, Hong Kong Special Administrative Region of China, 23 December 2008, extract published in Radu Bogdan Bobei, *Commercial Arbitration. Elementary Handbook on Scholarly Pragmatism*, 43.

[33] See Article 10 of the Rules of Arbitration Procedure of the Romanian Court of International Commercial Arbitration, as amended on June 5th 2014, and Articles 552-553 of the Romanian Code of Civil Procedure.

principle) and their binding effects. It was held[34] that when an ordinary court recognises the validity of an arbitration clause, the litigation arising from non-compliance with the contractual duties shall be submitted to the competent arbitration tribunal because the domestic court is not competent to settle the respective dispute. The Romanian Supreme Court of Justice considered that by concluding an arbitration agreement which stated that all disputes shall be settled by a specific arbitration court, parties committed to remove the competence of national courts concerning litigations covered by the respective agreement[35].

In another case, a national court declined its competence in favour of an arbitration court designated by parties through their agreement[36].

Therefore, the binding effects of arbitration agreements are widely recognised by law and jurisprudence.

2.3. The Final and Binding Nature of Arbitral Awards

Romanian law recognises the final and binding nature of arbitral awards, whether domestic or international, and states the principle that the arbitral award shall be voluntarily implemented by parties.

According to Article 74 paragraph (1) of the Rules of the Romanian Court of International Arbitration, *"the arbitral award is final and binding"* and *"it shall be voluntarily implemented by the party in default, promptly or within the period indicated in the award"*. This perspective is shared by the Romanian Code of Civil Procedure which states that *"the arbitral award is final and binding"* (Article 606) and becomes *"enforceable and binding since it is communicated to parties"* (Article 1120 paragraph (3)). The arbitral award may only be cancelled by means of setting aside, based on one of the reasons expressly provided by the Romanian Code of Civil Procedure (see *infra*, Section 3.4).

Romanian legal literature acknowledged the final and binding nature of arbitral awards even under the 1865 Code of Civil Procedure. It was emphasized[37] that when decisions are made by jurisdictional authorities such as an arbitral tribunal, they are governed by similar principles to the ones applicable to court decisions. Therefore, an award is not only final, but also a binding decision.

The making of the arbitral award has a number of immediate effects: it prevents the parties from seeking justice in ordinary courts; it is *res judicata* with regard to the respective dispute; it is enforceable; it may be used as evidence in other courts[38]; it terminates the arbitrators' jurisdiction over the dispute which they have resolved and it marks the point in time since the award should be voluntarily performed by the parties[39]. *Res judicata* of the arbitral award may be raised in both ordinary and arbitration courts[40].

The final and binding nature of arbitral awards is widely recognised in other domestic and international regulations, as well.

A detailed reference to the final and binding nature is provided by the Arbitration Rules of the International Chamber of Commerce from Paris (*I.C.C. Paris*), which state, in Article 34 paragraph (6), that *"every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made"*.

Also, the uniform UNCITRAL Arbitration Rules, as amended in 2013, clearly stipulate that *"the award shall be made in writing and shall be final and binding on the parties. The parties shall undertake to carry out all awards without delay"* (Article 34, paragraph 2).

Furthermore, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides that *"each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon"* (Article III).

The arbitration laws from other European countries generally recognise the *res judicata* nature of the arbitral award[41]. Consequently, in other countries

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[34] The ICC International Court of Arbitration, *Sté Italiban v. Sté Lux Air* case, Decision from November 14th 1975, extract published in Jean-François Lachaume, *Jurisprudence Française Relative au Droit International (Année 1975) - French Jurisprudence on International Law (Year 1975)*, in Annuaire francais de droit international, vol. 22, 1976, 888.

[35] See Curtea Supremă de Justiţie (Supreme Court of Justice), Decision no. 392/1997, published in Corneliu Turianu, Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence)*, 28.

[36] Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania - C.C.I.R., Arbitral award no. 39/2008, published in Vanda Anamaria Vlasov, *Arbitrajul comercial. Jurisprudenţă arbitrală 2007-2009. Practică judiciară (Commercial Arbitration. Jurisprudence)*, 1-2.

[37] Savelly Zilberstein, Viorel Mihai Ciobanu, *Tratat de executare silită (Treaty on Judicial enforcement)* (Bucharest: Lumina Lex Publishing House, 2001), 269.

[38] See Ion Deleanu, Sergiu Deleanu, *Arbitrajul intern şi internaţional (Domestic and International Arbitration)* (Bucharest: Rosetti Publishing House, 2005), 265-266; Radu Bogdan Bobei, *Arbitrajul intern şi internaţional Texte. Comentarii. Mentalităţi (Domestic and International Arbitration. Texts. Comments. Mentalities)* (Bucharest: C.H. Beck Publishing House, 2013), 170-173 and Gabriel Mihai, *Arbitrajul internaţional şi efectele hotărârilor arbitrale străine (International Arbitration and the Effects of Foreign Arbitration Awards)* (Bucharest: Universul Juridic Publishing House, 2013), 155-156.

[39] Redfern *et al.*, *Redfern and Hunter on International Arbitration*, 775.

[40] Viorel Roş, *Arbitrajul comercial internaţional (International Commercial Arbitration)*, 505.

[41] *E.g.* Section 58 of the United Kingdom Arbitration Act of 1996; Article 1484 of the French Civil Code; Article 1055 of the German Code of Civil Procedure; Article 824-bis of the Italian Code of Civil Procedure; Article 43 of the Spanish Law no. 60/2003 – *"Ley de Arbitraje"*; Article 1059 of the Dutch Code of Civil Procedure; Article 896 of the Greek Code of Civil Procedure *etc.*

as well, a claimant cannot bring the same claims in a different arbitration or court proceedings[42].

This outcome is legitimate because, as emphasized by the legal literature[43], *"one of the fundamental objectives of international arbitration is to provide a final, binding resolution of the parties' dispute. (...) If parties are not bound by the results of the awards made against them – either dismissing or upholding their claims or declaring their conduct wrongful or lawful – then those awards do not achieve their intended purpose and are of limited practical value"*[44].

Regarding this aspect, a leading decision pronounced by the United States Court of Appeals acknowledged the fact that *"extensive judicial review frustrates the basic purpose of arbitration which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings"*[45]. Consequently, *"the sanctity of res judicata attached to the final decision of an international tribunal"* (author's note: ordinary or arbitration court, international or domestic) became *"an essential and settled rule of international law"*[46].

Romanian courts constantly share this perspective. It was held that arbitral awards are enforceable just like any other ordinary judicial decision[47], final and binding between parties[48]. They also become *res judicata* with regard to the dispute settled by arbitration[49] and are duly recognised in Romania when all mandatory requirements concerning the validity of the arbitration agreements and arbitral proceedings provided by the Romanian law and the international conventions ratified by Romania are met[50]. Last but not least, Romanian courts established the fact that, as a principle, the recognition and enforcement procedure does not allow for a substantive re-examination of the award[51].

3. The Enforcement of Arbitral Awards in Romania

3.1. The Easiest Way to Enforce an Arbitral Award – Convince the Losing Party to Comply with the Award

Before granting permission for enforcement in the ordinary courts of law, the party who wins in an arbitration trial shall consider persuading the losing party to voluntarily perform its duties arising from the arbitral award.

The enforcement procedure is not mandatory and, before incurring legal expenses on formal enforcement procedures, it is worth trying to convince the party in default to promptly comply with the arbitral award.

The losing party may be determined to fulfil its duties by exerting commercial pressure, threatening to cease trading, negotiating a reduction in the size of the award in order to avoid the legal costs of enforcement action or applying reputational pressure. The threat of enforcement action may be sometimes enough to encourage voluntary payment[52].

A cost/benefit analysis for enforcement against informal means is always appropriate in order to ensure that the most effective steps are taken.

However, in many cases the losing party asks for a new trial. In this hypothesis, the party who won the arbitration shall file an application to render the arbitral award enforceable.

3.2. The Enforcement Procedure in Romania. Reasons for Denying Enforcement

In Romania, the enforcement procedure constitutes the second stage in civil proceedings and is the only legal way to oblige the losing party, by using the coercive force of the state, to comply with the arbitral award.

As evidenced above, arbitral awards are final and binding. However, parties need to undertake an additional common procedure in order to enforce them in Romania. Thus, the party seeking enforcement shall

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[42] Stuart Dutson *et al*., *International Arbitration. A Practical Guide* (London: Globe Business Publishing Ltd., 2012), 201.

[43] Gary B. Born, *International Arbitration. Cases and Materials* (The Hague Wolters Kluwer Publishing House, 2011), 1047.

[44] For a slightly similar perspective, also see Maria Tzavela, *The binding nature of the arbitral award (res judicata) under Greek Law*, published in Mihai Şandru, Andrei Săvescu (coord.), *Forţa juridică a hotărârilor arbitrale (The binding nature of arbitral awards)* (Bucharest: University Publishing House, 2012), 139-143.

[45] See U.S. Court of Appeals, Second Circuit, Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (December 23rd 1974), published in Gary B. Born, *International Arbitration. Cases and Materials*, 1129-1130.

[46] The Trail Smelter Arbitration Case (U.S. v. Canada), Awards of 16 April 1938 and 11 March 1941, published in Gary B. Born, *International Arbitration. Cases and Materials*, 1047.

[47] *E.g.* Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 1031/March 26th 2009, published in Buletinul Casaţiei no. 3/2009 (Bucharest: C.H. Beck Publishing House), 55-56.

[48] See, *e.g.* Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 436/February 7th 2008; Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 1778/May 23rd 2008; Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 282/January 25th 2011, published in Buletinul Casaţiei no. 10/2011 *etc.* The previous mentioned decisions are available in Legalis Database.

[49] See, *e.g.* Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 1110/March 15th 2011, published in Buletinul Casaţiei no. 1/2012; Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 4130/December 14th 2011 *etc.* These decisions are available in Legalis Database.

[50] See, *e.g.* Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 1778/May 23rd 2008, available on http://www.newyorkconvention1958.org/ (Consulted on March 10th 2015).

[51] See Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 3181/2009, published in *Jurisprudenţa Secţiei comerciale pe anul 2009 (Commercial Jurisprudence - 2009)* (Bucharest: Hamangiu Publishing House, 2010), 213-216.

[52] Stuart Dutson *et al*., *International Arbitration. A Practical Guide*, 203.

file an application at the courthouse located in the area of the debtor's or creditor's domicile or headquarters. If the creditor's domicile or headquarters is located in a foreign country, he may file the application at the courthouse located in the area of his chosen residence (see Article 640[1] Romanian Code of Civil Procedure). The relevant arbitral award and arbitration agreement shall be attached in original or certified copy to the application[53]. The procedure for rendering the arbitral awards enforceable is charged with RON 20 (see Article 10 of Government Emergency Ordinance no. 80/2013 on court fees[54]).

Problems arise when the arbitral award or agreement are made in a language other than Romanian. In this case, the party applying for enforcement of the award shall produce a certified translation of these documents into Romanian. However, foreign arbitral awards and agreements shall be "overlegalised" by both competent public authorities and diplomatic or consular agents from the country where the respective documents were issued (see Article 1092 of the Romanian Code of Civil Procedure). In a controversial case[55], a Romanian court refused to enforce an arbitral award because the document was not authenticated by the International Chamber of Commerce from Paris Secretariat, the French Ministry of Justice, the French Ministry for Foreign Affairs and the Romanian Consulate from Paris.

The court which is competent to solve the application examines the validity of the arbitral award in the council room, without summoning the parties.

Recognition or enforcement of foreign arbitral awards may be refused only for limited reasons, respectively if the party against whom it is invoked proves that ***(a)*** the parties to the arbitration agreement were incapable pursuant to the law where the arbitral award was rendered; ***(b)*** the arbitration agreement was not valid under the law governing it or under the law of the country where the arbitral award was issued; ***(c)*** the party against whom the foreign arbitral award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; ***(d)*** the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the arbitration agreement or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; ***(e)*** the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of arbitration; ***(f)*** the foreign arbitral award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made (see Article 1128 of the Romanian Code of Civil Procedure). These rules are almost similar with the requirements provided by the 1958 New York Convention in Article V.

If the court renders the arbitral award enforceable, all enforcement procedures may be carried out by Romanian judicial executors.

Frequently, the losing party demands a substantive re-examination of the arbitral award during the enforcement procedure. However, Romanian courts of enforcement only verify the validity of arbitration agreements, arbitral proceedings and arbitral awards and do not extensively review the litigation.

As pointed out in the legal literature, *"efficient arbitration implicates a tension between the rival goals of finality and fairness. Freeing awards from judicial challenge promotes finality, while enhancing calls for some measure of court supervision. The arbitration's winner looks for finality, while the loser wants careful judicial scrutiny of doubtful decisions"*[56].

In the majority of reported decisions Romanian courts have enforced arbitral awards and promoted finality, supervising only the validity of arbitration. For instance, claims regarding the interpretation and implementation of duties arising from the arbitration award[57], alleged non-designation of the subject matter and arbitrators through an arbitral clause[58], alleged violation of the right to defend[59], substantive matter of

[53] For a detailed presentation on the reasons why the documents to be rendered enforceable shall be presented in original, see Gabriel Boroi, Carla Alexandra Anghelescu, *Verificarea înscrisului în original în cadrul procedurii de învestire cu formulă executorie (The Examination of the Original Document in the Procedure for Rendering it Enforceable)*, available online on http://www.inm-lex.ro/fisiere/d_175/Investirea%20cu%20formula%20executorie_depunerea%20originalului.pdf (Consulted on March 4th 2015).

[54] Published in the Official Journal of Romania no. 392/2013.

[55] See Tribunalul București, Decision no. 5804/October 4th 2000, extract published in Andreia Iordăchiță, *Recunoașterea și executarea sentințelor arbitrale străine: comparație între sistemul francez și cel român (Recognisal and Enforcement of Foreign Arbitral Awards: Comparison between the French and the Romanian System of Law)*, published in Revista Română de Arbitraj (Romanian Arbitration Journal) no. 4/2008 (Bucharest: Rentrop&Straton Publishing House), 32-33.

[56] See William W. (Rusty) Park, *Why courts review arbitral awards*, Mealey's International Arbitration Report, v. 16, no. 11, 2001, 1-10 *apud* Arnoldo Wald, *Arbitration in Brasil*, published in Revista Română de Arbitraj (Romanian Arbitration Journal) no. 4/2010 (Bucharest: Rentrop&Straton Publishing House), 47.

[57] See Înalta Curte de Casație și Justiție (The High Court of Justice), Decision no. 747/2006, published in Corneliu Turianu, Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence),* 21.

[58] See Înalta Curte de Casație și Justiție (The High Court of Justice), Decision no. 3659/2005, published in Corneliu Turianu, Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence),* 22.

[59] See Înalta Curte de Casație și Justiție (The High Court of Justice), Decision no. 4393/2003, published in Corneliu Turianu, Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence),* 23.

the dispute settled through arbitration[60], high amount of arbitral expenses[61] were not accepted by Romanian courts.

3.3. The Enforcement Procedures in Other European Countries

Other European countries have slightly similar rules when it comes to enforcement.

In the United Kingdom, an award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgement or order of the court to the same effect (See Section 66 of the Arbitration Act from 1996).

In France, the party who seeks coercive enforcement needs to obtain an *exequatur ordinance* (fr. - *ordonnance d'exequatur*) from the competent domestic court located in the area where the arbitral award was issued (Articles 1487 and 1516 of the French Code of Civil Procedure).

In Germany, in order to render an arbitral award enforceable, parties shall file a petition for a declaration of enforceability at the higher regional court (*Oberlandesgericht, OLG*) designated in the arbitration agreement or, if no such designation was made, at the higher regional court in the district of which the venue of the arbitration proceedings is located.

If no venue for arbitration proceedings has been arranged in Germany, the higher regional court (*OLG*) shall have jurisdiction in the district of which the respondent has his registered seat or his habitual place of abode, or in which assets of the respondent are located, or in which the object being laid claim to by the request for arbitration proceedings, or affected by the measure, is located; as an alternative, the higher regional court of Berlin (Kammergericht, KG) shall have jurisdiction.

The competent court is to order a hearing for oral argument to be held if there are grounds for reversing the arbitral award. Such grounds for reversal shall not be taken into account insofar as a petition for reversal based on these grounds has been denied, in a final and binding judgment, at the time the petition for declaration of enforceability is received.

The arbitral award, or a certified copy of the same, is to be enclosed with the petition for a declaration of enforceability of an arbitration award. The certification may also be performed by the attorney retained and authorised for the court proceedings (see Section 1064 paragraph (1) of the German Code of Civil Procedure).

Under German law, the recognition and enforcement of foreign arbitral awards is governed by the 1958 Convention on the recognition and enforcement of foreign arbitral awards. The stipulations of other treaties concerning the recognition and enforcement of arbitral awards remain unaffected.

The procedures presented above resemble the ones provided by other European domestic laws such as the Italian law[62], Spanish law[63], Dutch law[64] and Greek law[65].

Consequently, not only in Romania, but also in other countries, the enforcement of arbitral awards requires the cooperation of ordinary courts. In cases where the national courts of enforcement are not supportive, international regulations such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the European Convention on International Commercial Arbitration (1961), the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the Convention on the Settlement of Investment Disputes between States and Nationals of other States (concluded in Washington, in 1965) and several bilateral investment treaties provide strong protections. These international guarantees were envisaged by the international jurisprudence[66].

3.4. The Possibility of Challenging Arbitral Awards in Romania

Under the Romanian law, the right of refusal to comply with the arbitral award may be exerted through an action of annulment before the competent court within a month since the communication of the arbitral award[67] (Article 611 paragraph (1) of the Romanian Code of Civil Procedure). This legal term is

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[60] See Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 3197/2009, published in *Jurisprudenţa Secţiei comerciale pe anul 2009 (Jurisprudence of Commercial Courts)*, 225-228.

[61] See Înalta Curte de Casaţie şi Justiţie (The High Court of Justice), Decision no. 4351/1998, published in Corneliu Turianu, Vasile Pătulea, *Drept comercial. Culegere de practică judiciară (Commercial Law. Jurisprudence),* 27.

[62] For further details, see articles 825 and 839 of the Italian Code of Civil Procedure.

[63] See Titles VIII and IX (Articles 44 – 46) of the Spanish Law no. 60/2003 – *"Ley de Arbitraje"*.

[64] See Section 4 (*Enforcement of the arbitral award*), Articles 1062 and 1063 of the Dutch Code of Civil Procedure.

[65] For further details, see articles 903-907, 918 and 919 of the Greek Code of Civil Procedure.

[66] *E.g.* see European Court of Human Rights (ECHR), Case of *Stran Greek Refineries and Stratis Andreadis v. Greece*, Application no. 13427/87, Judgement of December 9th 1994; ECHR, Case of *Regent Company v. Ukraine*, Application no. 773/03, Judgement of April 3rd 2008; International Centre for Settlement of Investment Disputes (ICSID) Case no. ARB/05/17 (*Desert Line Projects LLC v. The Republic of Yemen*), Award of February 6th 2008; ICSID Case no. ARB/05/07 (*Saipem S.p.A. v. The People's Republic of Bangladesh*), Decision on Jurisdiction and Recommendation on Provisional Measures of March 21st 2007, Award of June 30th 2009. These cases were commented by Sabine Konrad and Markus Birch, in *Non Enforcement of Arbitral Awards: Only a Pyrrhic Victory?*, published by Revista Română de Arbitraj (Romanian Arbitration Journal) no. 4/2010 (Bucharest: Rentrop&Straton Publishing House), 48-53.

[67] In the case a regulation on which the award was grounded is declared unconstitutional the legal term is of three months.

mandatory. Romanian courts often dismissed the action of annulment on grounds of lateness[68].

Romanian courts may cancel an arbitral award only for the following reasons: ***(a)*** the litigation was not capable of being settled by arbitration; ***(b)*** the tribunal resolved the dispute in the absence of an arbitration agreement or under a null and void arbitration agreement; ***(c)*** the arbitral court was not constituted in accordance with the arbitration agreement; ***(d)*** the party in default was absent during the debates before the arbitration court and the summoning procedure was not legally conducted; ***(e)*** the award was issued after the deadline of the arbitration procedure has expired, one of the parties invoked the caducity of the arbitration and both parties did not agree to continue the trial; ***(f)*** the arbitral award is beyond the scope of the arbitration agreement (*extra petita* or *ultra petita*); ***(g)*** the arbitral award does not include the sentence, reasoning, place and date when it was issued or it is not signed by all arbitrators; ***(h)*** the arbitral award violates the public order, good morals or other mandatory regulations; ***(i)*** a regulation or provision on which the arbitral award is grounded is declared unconstitutional by the Romanian Constitutional Court.

Therefore, for instance, Romanian courts may cancel arbitral awards on the following grounds: disputes concerning the status of partner in a limited liability company may not be settled by arbitration[69]; disputes referring to several legal issues, only part of them being capable of being settled by arbitration, may not be solved by arbitration courts[70]; public authorities are not allowed to conclude arbitration agreements in which they designate domestic courts of arbitration, unless expressly authorised by law[71]; the arbitration agreement is null and void, not being signed by the legal representative of the legal person[72]; the arbitration agreement was not signed by both parties[73]; the arbitration court vested to solve the litigation was changed several times during the proceedings[74]; the super arbitrator was nominated without seeking the parties' consent[75]; one of the parties was not legally summoned because the citation did not include its apartment number[76], the dispute was settled *ex aequo et bono* and the sentence is not thoroughly explained in the arbitration award[77] *etc.*

3.5. Challenging Arbitral Awards in Other European Countries

The possibility of challenging arbitral awards is also provided in other systems of law.

In the United Kingdom, arbitral awards may be challenged when the person against whom it is sought to be enforced shows that the arbitration court lacked substantive jurisdiction to make the award, on the ground of serious irregularity affecting the tribunal, the proceedings or the award[78] (Sections 67, 68 of the Arbitration Act from 1996). The court may by order confirm the award, vary the award, remit the award to the tribunal, in whole or in part, for reconsideration, set aside the award in whole or in part or declare the award to be of no effect, in whole or in part.

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[68] *E.g.* Tribunalul Bucureşti (Bucharest Tribunal), Decision no. 752 bis/1994, published in Dan Lupaşcu, *Culegere de practică judiciară a Tribunalului Bucureşti în materie comercială 1990-1998 (Bucharest Tribunal Jurisprudence in Commercial Issues)* (Bucharest: All Beck Publishing House, 1999), 45.

[69] See Curtea Supremă de Justiție (Supreme Court of Justice), Decision no. 196/1998, quoted by Viorel Roș, *Arbitrajul comercial internațional (International Commercial Arbitration)*, 457.

[70] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Sentence no. 157/May 31st 2001, published in Revista de Drept Comercial (Commercial Law Journal) no. 11/2001, 166 *apud* Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)* (Bucharest: Lumina Lex Publishing House, 2005), 45.

[71] See the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Sentences no. 174/November 11th 1999, 175/November 11th 1999 and 179/July 14th 2000, quoted in Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)*, 54.

[72] The Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, Sentence no. 10/February 15th 1995, published in Dumitru Mazilu and Daniel-Mihail Şandru, *Practică jurisdicțională și arbitrală de comerț exterior (Judicial and Arbitral Case Law of International Commerce)* (Bucharest: Lumina Lex Publishing House, 2002), 213.

[73] See Curtea de Apel București (Bucharest Court of Appeal), Decision no. 1416/October 26th 2001, published in Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)*, 58.

[74] See Curtea de Apel București (Bucharest Court of Appeal), Decision no. 235/February 11th 2004, published in Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)*, 74.

[75] See Curtea de Apel București (Bucharest Court of Appeal), Decision no. 1870/December 2nd 2003, published in Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)*, 74.

[76] See Curtea de Apel București (Bucharest Court of Appeal), Decision no. 1351/October 24th 2002, published in Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (The Judicial Control on Arbitral Awards)*, 77.

[77] Înalta Curte de Casație și Justiție (The High Court of Justice), Decision no. 4180/October 25th 2012, published in Marin Voicu, *Arbitrajul commercial. Jurisprudență adnotată și comentată 2004-2014 (Commercial Arbitration. Case Law with Commentaries)*, 463-466.

[78] In accordance with Section 68, Subsection (2) of the Arbitration Act from 1996, "serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant: (a) failure by the tribunal to act fairly and impartially as between parties, adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense and comply with other general duties provided by the law; (b) the tribunal exceeding its powers, otherwise than by exceeding its substantive jurisdiction; (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; (d) failure by the tribunal to deal with all the issues that were put to it; (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; (f) uncertainty or ambiguity as to the effect of the awards; (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; (h) failure to comply with the requirements as to the form of the award; or (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

The United Kingdom also ratified the 1958 New York Convention and incorporated the requirements for recognition and enforcement of New York Convention Awards in its legislation (see Sections 100 – 104 of the 1996 Arbitration Act).

However, even in the United Kingdom, a country with a declared pro-arbitration attitude, there are problems related to the enforcement of arbitral awards. For instance, in 2009 the English Court of Appeal refused the enforcement of a New York Convention award in *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* on grounds that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made. In this case, a domestic English court contradicted an international arbitration tribunal, composed of experienced arbitrators, which considered that the arbitration agreement was valid under the French Law (the law where the award was made)[79].

In France, the party against whom the arbitral award is sought to be enforced has the possibility of challenging the respective award through an action for annulment only if ***(1)*** the arbitration court was not competent to solve the litigation, ***(2)*** it was not legally constituted or ***(3)*** did not conform to its mission; ***(4)*** the principle of contradictoriness was not observed; ***(5)*** the arbitral award is contrary to public order or ***(6)*** the arbitral award does not include the reasoning, the date when it was issued, the name of the arbitrators, their signatures or it is not held by the majority of arbitrators (Article 1492 of the French Code of Civil Procedure[80]).

The French law lists fewer grounds for cancellation than the ones provided by the Romanian law. Consequently, at least in theory, the French system of law seems to be more flexible in enforcing arbitral awards than the Romanian one.

Indeed, in practice French courts have enforced arbitral awards which, *exempli gratia*: maintained the prohibition for the franchisee to conduct similar commercial activities with other members of the franchise (limited in time and space), even if this constituted an alleged violation of the public order[81]; referred to French civil law provisions which were not raised by parties during the proceedings[82] or were challenged on grounds that the arbitration agreement was missing, if this issue was not raised during the arbitral proceedings[83].

In Germany, only a petition for reversal of the arbitration award by a court may be filed against an arbitration award.

According to Section 1059 paragraph (2) of the German Code of Civil Procedure, an arbitration award may be reversed only if: ***(a)*** the petitioner asserts, and provides reasons for his assertion, that: ***(i)*** one of the parties concluding an arbitration agreement did not have the capacity to do so pursuant to the laws that are relevant to such party personally, or that the arbitration agreement is invalid under the laws to which the parties to the dispute have subjected it, or, if the parties to the dispute have not made any determinations in this regard, that it is invalid under German law; ***(ii)*** he has not been properly notified of the appointment of an arbitral judge, or of the arbitration proceedings, or that he was unable to assert the means of challenge or defence available to him for other reasons; ***(iii)*** the arbitration award concerns a dispute not mentioned in the agreement as to arbitration, or not subject to the provisions of the arbitration clause, or that it contains decisions that are above and beyond the limits of the arbitration agreement; however, where that part of the arbitration award referring to points at issue that were subject to the arbitration proceedings can be separated from the part concerning points at issue that were not subject to the arbitration proceedings, only the latter part of the arbitration award may be reversed or ***(iv)*** the formation of the arbitral tribunal or the arbitration proceedings did not correspond to a provision of the German Code of Civil Procedure or to an admissible agreement between the parties, and that it is to be assumed that this has had an effect on the arbitration award; or ***(b)*** the court determines that: ***(i)*** the subject matter of the dispute is not eligible for arbitration under German law or ***(ii)*** the recognition or enforcement of the arbitration award will lead to a result contrary to public order.

Unless the parties to the dispute agree otherwise, the petition for reversal shall be filed with the court within a period of three months. The period begins on the day on which the petitioner has received the arbitration award.

The petition for reversal of the arbitration award may no longer be filed once a German court has declared the arbitration award to be enforceable (see Article 1059 paragraph (3) of the German Code of Civil Procedure).

Thus, the German law has a rigorous approach when it comes to cancelling arbitral awards.

The sole possibility of cancelling the arbitral awards under limited grounds is also provided by other

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[79] For a description of the case, see Gary B. Born and Timothy Lindsay, *Enforcement of International Awards in England and the New York Convention*; the article was published on *http://kluwerarbitration blog.com/* - post from August 21st 2009 (Consulted on March 7th 2015).

[80] There are some differences in case of arbitral awards issued in France (see Article 1520, French Code of Civil Procedure).

[81] See Cour de Cassation, *Varassedis c. Prodim*, Pourvoi no. 03-12.382, January 17th 2006, published in Revista Română de Arbitraj (Romanian Arbitration Journal) no. 3/2009 (Bucharest: Rentrop&Straton Publishing House), 88.

[82] See Cour de Cassation, Conselho Nacional de Carregadores c. M. X et autres, Pourvoi no. 03-19.764, March 14th 2006, published in Revista Română de Arbitraj (Romanian Arbitration Journal) no. 3/2009 (Bucharest: Rentrop&Straton Publishing House), 91.

[83] See Cour de Cassation, *Société Intercafco c. Société Dafci*, Pourvoi no. 03-19.054, January 31st 2006, published in Revista Română de Arbitraj (Romanian Arbitration Journal) no. 3/2009 (Bucharest: Rentrop&Straton Publishing House), 88.

European systems of law such as the Italian law[84], Dutch law[85] and Greek law[86]. The Spanish law mentions the possibilities of annulling and revising arbitral awards, but only for limitative reasons[87].

4. Romania, Between Scylla and Charybdis – Notes on the Controversial Case of Micula v. Romania[88]

The recognition and enforcement of foreign arbitral awards requires the cooperation of both domestic and international institutions. Problems arise whenever different levels of authorities do not share the same attitude towards enforcement action.

Many of these kinds of situations are encountered in the European Union (*E.U.*).

As a rule, the E.U. does not interfere with the recognition and enforcement proceedings of arbitral awards within its Member States. Regulation No. 1215/2012 on the recognition and enforcement of judgements in civil and commercial matters by the Member States[89] is illustrative in relation to this aspect. In accordance with article 1 paragraph (2), the main European regulation related to enforcement issues does not apply to arbitration, so it does not directly refer to cases where domestic courts have to render decisions relating to arbitration proceedings or arbitral awards.

However, in accordance with article 12 from the Preamble, Regulation No. 1215/2012 does not prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

Even if this Regulation apparently allows the Member States to adopt their own policies on arbitration, there were several cases when European authorities strongly recommended national courts to deny enforcement of arbitral awards.

Many of the respective cases referred to arbitral awards which were contrary to mandatory European consumer laws.

For example, in *Mostaza Claro* case[90], the European Court of Justice (*E.C.J.*) held that the national court seized of an action for annulment of an arbitral award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.

In *Asturcom* case[91], the E.C.J. went even further and stated that a national court hearing an action for enforcement of an arbitral award which has become final and was made in the absence of the consumer is required, where it has available to it the legal and factual elements necessary for that task. If the arbitration clause incorporated into the contract is unfair, it is for the respective court to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause[92].

Other alleged violations of mandatory European rules were related to competition law and especially in subject matters related to state aid. In a leading case[93], The European Court of Justice stated that a national court must refuse to apply any provision likely to conflict with the Community law, including a national provision that seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid which has been found to be incompatible with the common market in a decision of the European Commission which has become final.

An interesting case concerning the alleged violation of European state aid regulations by a Member State is currently under investigation by the European Commission.

The *Micula v. Romania* case arises from Romania's introduction of certain economic incentives for the development of disfavoured regions of Romania and their subsequent revocation in the

[84] See, mostly, Articles 827 – 830 of the Italian Code of Civil Procedure.

[85] See Section 5 (*Reversal and revocation of the arbitral award*): Articles 1064 – 1068, from the Dutch Code of Civil Procedure.

[86] See, particularly, articles 897 - 901 of the Greek Code of Civil Procedure.

[87] See Title VII (Articles 40 – 43) of the Spanish Law no. 60/2003 – *"Ley de Arbitraje"*.

[88] *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case no. ARB/05/20, Award of December 11th 2013, available on *http://www.italaw.com/*.

[89] 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 the Official Journal of the European Union no. L 351/1 from 20.12.2012. It replaced Council Regulation (EC) No. 44/2001.

[90] *Elisa Maria Mostaza Claro v. Centro Movil Milenium SL*, Case C-168/05, European Court of Justice judgement of October 26th 2006, available on *http://curia.europa.eu/*.

[91] *Asturcom Telecomunicaciones SL v. Cristina Rodriguez Nogueira*, Case C-40/08, E.C.J. Judgement of October 6th 2009, available on *http://curia.europa.eu/*.

[92] For detailed comments on the implication of this case in the context of Romanian law, see Mihai Șandru, Evelina Oprina, *Discuții privind posibilitatea anulării hotărârii arbitrale de către instanța de executare. Notă la hotărârea Asturcom (cauza C-40/08) în contextul legislației române (Debates upon the Possibility of Annulment of Arbitration Award by the Court of Enforcement. Note on Judgement Asturcom (Case C-40/08) from the Point of View of Romanian Legislation)*, in Mihai Șandru, Andrei Săvescu (coord.), *Forța juridică a hotărârilor arbitrale (The binding nature of arbitral awards)*, p. 9-43.

[93] See *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, Case C-119/05, Judgement of July 18th 2007, available on *http://curia.europa.eu/*.

context of Romania's accession to the European Union in 2007.

Specifically, in 1998, Romania enacted Emergency Government Ordinance 24/1998, which made available certain tax incentives, including customs duties exemptions to investors in certain disfavoured regions who met the requirements set out in the respective Ordinance and its implementing legislation.

Relying on those incentives and expecting that they would be maintained for a 10-year period, the claimants made substantial investments in a disfavoured region located in north-western Romania.

In order to meet the criteria for accession to the European Union, Romania needed to eliminate all forms of state aid in national legislation incompatible with the *acquis communautaire*. Therefore, in 2004, Romania revoked most of the incentives provided by Emergency Government Ordinance 24/1998, including certain facilities granted to the claimants, ending the part of the incentive program early.

The claimants, of Swedish nationality, filed a request for arbitration on grounds that Romania violated the Sweden – Romania Bilateral Investment Treaty, which is designed to protect Swedish investors from unfair or inequitable treatment by the Romanian government.

Romania's primary defence was that the respective incentives were not compatible with the European Union law and the amendment of Emergency Government Ordinance 24/1998 was to comply with European Union accession and to address the European Commission's concerns over state aid. Romania's position was strongly supported by the European Commission, which intervened in the case as *amicus curiae*, on behalf of Romania.

However, the ICSID Arbitral Court awarded the claimants and forced Romania to pay them a considerable amount of damages.

As regards the enforcement of the arbitral award, the Tribunal referred to Articles 53 and 54 of the ICSID Convention which state that the award shall be binding on the parties and each Member State shall recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a national court.

Following the issuance of the arbitral award, the European Commission tried to prevent Romania from honouring its payment obligations, arguing that the award is unenforceable within the European Union. The European Commission pointed out that the implementation of the arbitral award would constitute illegal state aid, which may create an economic advantage not otherwise available on the market for the claimants. Still, Romania partially enforced the award.

In May 2014, the European Commission issued a suspension injunction which enjoined Romania to immediately suspend any action which may lead to the execution or implementation of the arbitral award. The suspension injunction was directly binding for the Romanian domestic courts.

On October 1st 2014, the European Commission decided to initiate a formal investigation procedure on the case. Following the respective investigation, the European Commission concluded that compensation paid by Romania for the abolished investment aid scheme breaches EU state aid rules and the beneficiaries have to pay back all amounts already received.

However, Romania is currently between Scylla and Charybdis because the European Union is not the only authority to be considered in this case.

The role of the World Bank is not to be underestimated when enforcing ICSID arbitral awards because the International Centre for Settlement of Investment Disputes is a member of the World Bank Group[94].

The World Bank often reminded the member states where the ICSID arbitral awards were to be enforced of the importance of prompt payment. The international credit institution may also refrain from making new loans to a member country in certain extreme cases involving expropriation or external debt issues[95].

Therefore, the World Bank may pressure its member states to enforce ICSID arbitral awards.

Consequently, Romania courts have a delicate task when it comes to choosing between enforcing the arbitral award in accordance with domestic rules, ICSID regulations and the bilateral investment treaty between Romania and Sweden and, respectively, denying enforcement in order to comply with the public order of the European Union.

The *Micula case* may set a precedent on refusing the enforcement in Romania of certain arbitral awards that meet the validity requirements according to the domestic law, but are contrary to European regulations. This solution might undermine the Romanian people's trust in arbitration, as an alternative dispute resolution mechanism.

Therefore, in the future, problems related to the recognition and enforcement of arbitral awards tend to become more and more complex and controversial.

5. Conclusions

Arbitration has become an accepted dispute resolution mechanism in Romania over the last

[94] Other members of the World Bank Group are the International Bank of Reconstruction and Development, the International Finance Corporation, the International Development Association and the Multilateral Investment Guarantee Agency.

[95] See Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, paper presented at the 24th Joint Colloquium on International Arbitration held in Paris on November 16th 2007, Session on Specific Aspects of State-Party Arbitration. The article is available online in PDF version on *http://www.arbitration-icca.org/*.

decades, due to its indisputable advantages. Among its benefits is the final and binding nature of arbitral awards.

Romanian law and courts generally acknowledge the finality and enforceability of arbitration awards, whether international or domestic. However, in recent years, there were several exceptions to the rule. An important exception, which could set a precedent for denying enforcement, is the *Micula case* (presented in section 4).

This might lead to the conclusion that enforcing arbitral awards in Romania still represents a challenge, even if, at least in theory, the Romanian law is pro-arbitration.

One way of dealing with the risk of non-enforcement is to persuade the losing party to voluntarily perform its duties arising from the arbitral award. This goal could be achieved in many ways – *e.g.* by exerting commercial pressure, negotiating a reduction in the size of the award, applying reputational pressure *etc.*

However, in many cases the losing party seeks a substantial re-examination of the award before the ordinary courts. In this case, the only option remaining for the winning party is to file a request to render the arbitral award enforceable. This procedure may be costly and time-consuming, especially when you need to enforce an arbitral award issued by a foreign court of arbitration.

As a rule, Romanian courts examine the validity of arbitration agreements, proceedings and awards in order to render them enforceable. In many cases this additional procedure is a mere formality.

After granting enforcement, the right of refusal to comply with the arbitral award may be exerted only through an action of annulment for limited reasons, before the competent court and within a month since the communication of the arbitral award. The grounds for annulment are pretty diverse and may be sometimes interpretable. Nevertheless, Romanian courts have rarely cancelled arbitral awards.

Romanian regulations and case law on recognition and enforcement of arbitral awards resemble other European domestic arbitration laws and jurisprudence. Most European countries ratified international conventions meant to harmonize arbitration and court-related procedures. Also, many European systems of law recognise the final and binding nature of arbitral awards and are in favour of enforcement.

Still, national regulations are not entirely uniform when it comes to enforcement procedures and validity requirements. Future research in this field may lead to interesting results, by determining the European countries with the most favourable attitude towards arbitration.

Also, an extensive review on the European case law related to the enforcement of arbitral awards could provide valuable insights.

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INSURANCE OF ASSETS REGULATED BY SPECIAL LAWS

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Abstract

Within the introduction the paper analyzes the main legal hypotheses which may bring into question the binding nature of the insurance.

The provisions of the Law no. 136/1995 (Art. 3) provide that, the legislator understands that, it is of binding nature the insurance that materializes through an agreement in which the rights and obligations of the parties shall be established by law.

Since the parties are "forced" by the law to conclude the respective agreement, the law also establishing the content of the legal relationship of obligations as well as the sanction for the non-conclusion of the agreement by the potential insured and by the insurer, the agreement is classified as a forced agreement.

In the legal field regarding assets insurance such an example is the mandatory home insurance against earthquakes, landslides and floods.

However, the legislation also comprises provisions that lead to the mandatory conclusion of an insurance agreement without establishing, by the law, the rights and obligations of the parties.

In such cases, the relationships between the parties are going to be established when the agreement is concluded, according to each insurer, based on certain (adhesion) agreements. For the insurer these insurances are always optional, without sanctioning the refusal of the conclusion. The mandatory conclusion relates only to the insured and exclusively regards the conclusion of the insurance agreement, which maintains the nature of the adhesion agreement and does not acquire the nature of a forced agreement.

The article analyzes the main special regulations regarding the mandatory insurances of assets, insisting on the mandatory home insurance against earthquakes, landslides and floods, the property insurance subject to mortgage loan agreements and the insurance of assets subject to leasing contracts.

The final part of each section presents the conclusions regarding the type of insurance analyzed.

Keywords: *mandatory insurance, home, leasing, mortgage loan.*

I. Introduction

The main normative acts governing the insurance field are Law no. 136/1995 on insurance and reinsurance in Romania, as subsequently supplemented and amended, Law no. 32/2000 on insurance companies and insurance supervision and the new Civil Code (Law no. 287/2009 on the Civil Code).

The insurance activity is also regulated by secondary legislation. We take into consideration the norms issued by the Insurance Supervisory Commission of Romania ("I.S.C.") before its duties were taken over by the Financial Supervisory Authority ("F.S.A.") and the norms subsequently issued by the new supervisory and control authority[1].

Pursuant to art. 192 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, art. 9-47 of Law no. 136/1995 were abolished, and, thus, the main rules regarding the insurance contract and various forms of insurance are presented in the new Civil Code.

As a result of the changes caused by the entry into force of the new Civil Code, the application of the Law no. 136/1995 was substantially reduced, the normative act evoked currently regulates the compulsory motor third party liability insurance for damages resulting from road accidents.

The assets insurance contract is regulated by the Civil Code, in Section II of the insurance contract, entitled "assets insurance" (art. 2214-2220).

Referring to the categories of assets that may be subject to an insurance contract, according to an opinion[2], only the traded goods can be insured, although, in certain cases, there is also accepted the insurance of assets that are temporary unassignable.

Furthermore, there are insurable the assets that are movable by their nature, the movables by anticipation, the assets that are immovable by their nature as well as the immovables by destination. It is

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[1] The Financial Supervisory Authority (F.S.A.) was established by G.E.O. no. 93/2012 on the establishment, organization and functioning of the Financial Supervisory Authority published in the Official Gazette, Part 1, no. 874 of 21st of December 2012 as a self-financed, independent, autonomous, specialized, administrative authority, with legal personality, that performs its duties by taking over and reorganizing all duties and prerogatives of the National Securities Commission (N.S.C.), the Insurance Supervisory Commission (I.S.C.) and the Private Pension System Supervisory Commission (P.P.S.S.C.);

[2] Irina Sferdian, „Asigurări. Privire specială asupra contractului de asigurare din perspectiva Codului Civil", Editura C.H.Beck, Bucureşti, 2013, page 166

possible to insure both specific assets, individually determined, and also generic assets, even the ones not individualized (e.g. the goods from a warehouse, unspecified, within the limits of an insured amount), provided that the individualization is possible when the insured risk occurs.

The consumable goods and the durable goods can be equally insured, specifying that, often, in the insurance contract, in case of some of the consumable goods, exclusions from payment of the compensation are found. (e.g. fuel from the tank).

Although productive goods can be insured, the insurance of fruits requires, in most cases, a special clause and a supplement of the insurance premium. The same situation may occur in case of the insurance of incidental goods. Thus, also basically the insurance of the main goods extends to incidental goods, in order to ensure the latter, one may claim to supplement the insurance premium that is owed.

The doctrine has also shown that certain assets and social values can not be subject to insurance, in this regard there are listed the assets resulted from committing a crime, fines of any kind, illegal activities.[3]

There are also excluded from insurance (i) the assets that are no longer of economical importance or the ones that can no longer be used as intended or due to the degradation, (ii), the assets that no longer meet certain requirements provided by the normative acts and (iii) the assets that, by their own characteristics or because of the place where they are located are not at risk or, on the contrary, are subject to an excessive risk.[4]

In this context, of the presentation of the categories of insurable assets, we specify that there are assets for which it is mandatory to conclude the insurance. Thus, we identified, in the specific legislation of certain activity fields, provisions that refer to the insurance of assets and that establish the obligation to conclude an insurance.

From the normative provisions analyzed one can draw the conclusion that, in certain cases, the insurance of assets is mandatory. Before proceeding to the presentation of the main aspects of interest regarding the insurance of assets regulated by special laws, we consider that it requires some comments and distinctions regarding the mandatory nature of certain insurances of assets, as they are regulated in the analyzed normative acts.

In terms of insurance classification, it shows great interest the classification of art. 1 of Law no. 136/1995, as subsequently supplemented and amended, that "in Romania, the insurance activity is carried out as life insurance and general insurance, mandatory or optional, under the law." Therefore, according to legal provision quoted, the insurances can be mandatory or optional.

In accordance with the provisions of the Law no. 136/1995, for the optional insurance, the relations between the insured and the insurer, as well as the rights and obligations of each party shall be established by the insurance contract, (art. 2) while, for the mandatory insurance, the relations between the insurer and the insured, the rights and obligations of each party are established by the law.

The determining criteria for the assessment of the mandatory nature of an insurance are, on the one hand, the source of the obligation to conclude the insurance, which is broadly represented by the law, and, on the other hand, the legal relationship that arises between the insured and the insurer by the contract concluded. The first criterion distinguishes the optional from the mandatory insurance, and the second criterion, distinguishes between the types of mandatory insurance [5].

As an example, the Law no. 136/1995 on insurance and reinsurance in Romania regulates as mandatory insurance, the civil liability insurance for vehicles owners, the mandatory nature of the insurance arising from the law. For the application of the Law no. 136/1995, periodically, there are issued norms that regulate the content of the mandatory civil liability insurance contract, the latest normative act issued in this respect was the Financial Supervisory Authority Norm no. 23/2014 on compulsory motor third party liability insurance for damages resulting from road accidents [6] (MTPL).

Also, the Law no. 260/2008 on the mandatory home insurance against earthquakes, landslides and floods [7], provides, even from the title, the mandatory nature of the insurance. Also, norms are issued for the application of this law. We refer to F.S.A. Norm no. 7/2013 on the form and clauses of the mandatory home insurance contract[8].

From the provisions of art. 3 of Law no. 136/1995 it comes out that, in the legislator's sense, the insurance of a mandatory nature, is the one that takes shape of a contract where the rights and obligations of the parties are provided by the law. Because the parties are "forced' by law to conclude the respective contract, the law also establishing the binding legal relationship as well as the sanction of

[3] Liviu Stănciulescu, Vasile Nemeş, "Dreptul contractelor civile şi comerciale în reglementarea noului Cod civil", Editura Hamangiu, 2013, page 472;

[4] Irina Sferdian, op. cit., page 167;

[5] Irina Sferdian, „Contractul de asigurare de bunuri", Editura Lumina Lex, Bucureşti, 2004, page 23;

[6] The Financial Supervisory Authority Norm no. 23/2014 on compulsory motor third party liability insurance for damages resulting from road accidents published in the Official Gazette, Part I, no. 826 of 12th of November 2014;

[7] Law no. 260/2008 on the mandatory home insurance against earthquakes, landslides and floods[7], republished in 2013 was republished in the Official Gazette no. 635 of 15th of October 2013, Part 1;

[8] The Financial Supervisory Authority Norm no. 7/2013 on the form and the clauses within the mandatory home insurance contract was published on O.G. no. 521 of 20.03.2013, Part I.;

non-conclusion of the contract by the possible insured and by the insurer, the contract being classified as a forced contract.

There are legislative provisions that lead to the obligation to conclude an insurance contract but, however, without establishing, by law, the rights and obligations of the parties. In these cases, the relationships between the parties shall be established in the contract, depending on each insurer, based on certain contracts (adhesion contracts).

In this regard we mention the professional liability insurances (lawyer, notary, doctor, accountant, etc.), the conclusion of which is mandatory, being required by the normative act that regulates each of those professions separately.

Also, regarding the insurance of assets the legal framework that establishes the binding nature of insurance is met, exclusive obligation of the insured.

Taking into consideration the obligation stated by the provisions of art. 2060 paragraph 2 of the Civil Code binding the consignee to conclude an insurance contract for the assets received as consignment [9], the obligation to ensure the cultural movable assets temporary exported provided by the provisions of art.3 of G.O. no. 44/2000 [10], regarding certain measures on the temporary exported cultural movable assets [11], the obligation provided by G.O. no. 51/1997 binding the financer or the lessor in a leasing contract, to conclude an insurance for the leased assets or the obligation to ensure the assets acquired by mortgage loans, during the contracts, the obligation provided by art. 16 of Law no. 190/1999 on the mortgage loan for real estate investments.

Also, by Law no. 15/1998 on optional insurances of assets, people and civil liability within the Ministry of National Defence, Ministry of Interior, Romanian Intelligence Service, Foreign Intelligence Service, Protection and Guard Service, Special Telecommunications Service and Ministry of Justice – General Directorate of Penitentiaries, republished[12], there has been provided that these institutions conclude optional insurance contracts for the provided assets, in case of damage, destruction or other events.

These insurances can not be considered mandatory under the Law no. 136/1995 because the rights and obligations of each party are not established by law, not being forced insurance contracts, but they may be considered mandatory regarding the insured, respectively the person that has the obligation to conclude the insurance, the obligation established by a normative act set forth for the regulation of the profession (notary, lawyer, doctor, etc.) or an activity (leasing, bank lending activity, etc).

In the case of the latter, the insured has the obligation to conclude the insurance, as mentioned above, and as comes out from the law. Failure to comply with this obligation is sanctioned, for example, with the suspension of the professional activity that the person carries out, with the impossibility to conclude service contracts, or with the termination of the concluded contracts for non-execution of the contractual obligations, among which the conclusion of the insurance. As shown in the doctrine[13], these insurances are always optional for the insurer, the refusal to conclude these insurances is not being sanctioned. This type of insurances is called "pseudo mandatory insurance"[14]

In conclusion, if in case of mandatory insurances as the compulsory motor third party liability insurance for damages resulting from road accidents (MTPL) or the mandatory home insurance against earthquakes, landslides and floods, both the conclusion and the form, respectively the content of the insurance contract are enforced by the law, in case of "pseudo mandatory insurance", the obligation lies only for the insured and regards exclusively the conclusion of the insurance contract, that keeps the adhesion contract nature and does not acquire the forced contract nature.

We, hereinafter, present the insurances of assets regulated by special laws, trying to approach the main aspects of interest with regard to (I) the mandatory home insurance against earthquakes, landslides and flood, (II) the property insurance subject to mortgage loan agreements and (III) the insurance of assets subject to leasing contracts.

II. Mandatory home insurance

1. Legislative framework

Home insurance against hazards became mandatory with the coming into force of Law 260/2008 on the obligation to take out insurance for residential buildings against risk of earthquakes, landslides and floods, published in the National Gazette of Romania (NGR), No. 757 of November 11,

[9] In accordance with the provisions of art. 2060 paragraph 2 Civil Code "the consignee shall ensure the assets to the value established by the consignment contract or, in its absence, to the price estimate on the consignment date. He will be held liable to the consignor for the damage or loss of the assets for reasons of force majeure or due to a third party, if they were not ensured on the consignment date or if the insurance expired and was not renewed or if the insurance company was not agreed by the consignor. The consignee is required to pay regularly the insurance premiums.";

[10] According to art. 3 paragraph 2 of G.O. no. 44/2000, "the temporary export may be approved only in special cases and only for movable assets classified as Thesaurus, National Commission for Museums and Collections without conditioning it by the existence of an insurance contract for the asset in question, as provided in paragraph (2)";

[11] G.O. no. 44/30.01.2000 was published in the Official Gazette no. 788 of 12.12.2001, was approved and amended by Law no. 143/2001 and republished under art. II of the Law no. 143/2001, published in Official Gazette of Romania no. 171 of 4th April 2001, Part I.

[12] Official Gazette no. 200 of 30th of April 2001;

[13] Irina Sferdian, Contractul de asigurare de bunuri", Editura Lumina Lex, Bucureşti, 2004, page 25;

[14] Irina Sferdian, op cit, page 25, also see Cosmin Iliescu, "Contractul de asigurare de bunuri în Romania", Ed All Beck, Bucureşti, 1999, pages 106-108;

2008, subsequently amended and completed both by Law no. 243/2013, published in the NGR, Part 1, No. 456/24.07.2013.

We specify that at the time this document was drawn up, the Chamber of Deputies of the Romanian Parliament, as decisional Chamber, approved a draft of a law regarding the amendment and the supplementation of the Law no. 260/2008[15], the normative act being forwarded for promulgation to the President of Romania, so that, to be subsequently published in the Official Gazette of Romania. On 23 of april 2015 the law was rejected for promulgation by the President of Romania, who mentioned, in the reexamination request which was sended to the Parliament, the fact that the law has to be improved in certain aspects.

In order to turn mandatory home insurance into a practical instrument, the legislator has enacted a set of norms, initially designed by the Romanian Insurance Supervisory Commission ("I.S.C."), and subsequently by the Financial Supervisory Authority ("F.S.A."). These technical norms refer to issues such as authorization of insurance companies to offer mandatory home insurance policies in case of earthquakes, landslides or floods[16], to the form of and clauses in the mandatory home insurance contract[17], to the ways and methods to ascertain, valuate and compensate the damage incurred[18].

In addition to this, the Pool for Insurance against Natural Disasters ("P.I.A.N.D.") was set up in September 2009, when the Certificate of Incorporation was signed. Its activity is regulated by P.I.A.N.D.[19] norms drawn up successively by I.S.C. and F.S.A.

Under Law no. 260/2008, P.I.A.N.D. is the only company authorized to issue mandatory home insurance policies against natural hazards, which was set up through the association of companies authorized to issue such policies.

The organization and operation of P.I.A.N.D, the conditions and documents required by F.S.A. to authorize P.I.A.N.D. to offer home insurance coverage, as well as the conditions to be met by shareholders and by officials in P.I.A.N.D are regulated at present by the F.S.A. Norm no.6/2013, published in the National Gazette of Romania no. 521/20.08.2013.

The matter of mandatory home insurance coverage against hazards caused by natural phenomena is not dealt with in EU legislation, but this protection mechanism exists in seven European states, which apply to mandatory home insurance, namely, Denmark, Holland, France, Belgium, Switzerland, Norway and Spain.

2. The scope of the insurance

In keeping with Law no. 260/2008 any residential building can be covered by insurance.

Natural persons or legal entities have the obligation to take out insurance coverage if they own various types of property (dwellings). The law mentions private houses, state owned flats, official temporary housing, etc.

As far as the term "residence" is concerned, the legislator refers to the provisions of Art.2 of Law no. 144/1996, taken in conjunction with the provisions in Art. 3, paragraph 1 of F.S.A. Norm no.7/2013[20].

In the case of condominiums, the term "dwelling" refers both to spaces which are exclusive property as well as to the appurtenant quota of the joint ownership over the commonly used spaces and construction elements. (art 1 of Law no. 260/2008).

In the case of condominiums, a separate insurance policy must be taken out for each dwelling.

The insurance policy does not cover outbuildings, extensions, utilities, which are not structurally connected to the building insured, as well as the possessions therein (art.3, paragraph 7 of the law amending Law no. 260/2008)

The law distinguishes between type A and type B constructions. Type A buildings have the structural strength made of reinforced concrete, metal or wood, or outer walls made of stone, burnt bricks and/or any other materials having undergone chemical and/or thermal treatment. Type B buildings have their outer walls made of loam brick or any other materials which have not been subjected to any chemical and/or thermal treatment.

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[15] The Chamber of Deputies passed by final vote on 25th of March 2015, "The draft of the Law regarding the amendment and supplementation of the Law no. 260/2008 on the mandatory home insurance against earthquakes, landslides and floods (PL-x411/2012) - ordinary law (291 votes for, 3 abstentions);

[16] Norms regarding the authorization of insurers to issue mandatory home insurance policies for earthquakes, landslides or, floods, enforced through FSA Order no.23/2008, published in the National Gazette of Romania (NGR) part 1 , no. 3 of 05.01.2009, with amendments brought by FSA Order no.19/2009, published in NGR a no.621/16.09.2009;

[17] The norms and clauses of the mandatory home insurance contract, enforced by F.S.A. Order no. 5/2009, published in NGR no.320/14.05.2009, amended by F.S.A. Order no.10/2010, NGR , part 1.no.538/02.08.2010 which represented the initial legal regulations were quashed , by FSA Norm no.7/2013 concerning the form and clauses contained in the mandatory home insurance contract published in NGR, part 1 no. 521 of 29/08/2013;

[18] Norms regarding the examination, valuation and compensation for damages for mandatory home insurance policies (MHIP) were enforced by F.S.A. Norm no. 7, published in NGR, no.369/02.06.2009.

[19] IPNH Norms, applied by F.S.A. Order no. 17/2009, published in NGR No.691/14.10.2009, amended by F.S.A. Order no 20.2009, published in NGR no. 691/14.10.2009 , which constituted the initial legal regulations were quashed by F.S.A. Norm no.6/2013- IPNH published in NGR, part 1, no.521/20.08.2013

[20] Art.3. Paragraph 1 of F.S.A. no.7/2013 states that "dwellings are considered to be those constructions destined for permanent or temporary living, which are made up of one or several rooms used for habitation, fittings an fixtures which are integral part of the construction used as dwelling, with the structural frame and walls presented in Law no. 260/2008, republished, city subsequent amendments and additions.

The law does not make either the features of the area the dwelling lies in or the state of the building, a prerequisite condition for taking out insurance coverage, as the law is primarily meant to provide social protection[21]. In the case of dwellings lying in areas with a high risk of natural hazards, or of buildings in an advanced state of disrepair, or raised disregarding legal regulations in force, the question arises whether in such cases the consequences of a natural disaster can be said to be "uncertain " and hence, if they can be subject to mandatory home insurance. One may wonder, with justification, if this is a matter of insurance or of social solidarity[22].

The law does not provide for insurance coverage of property irrespective of its condition. The legislator expressively states that the unsatisfactory state of a building can cause the policy holder to forfeit his right to indemnification.

The following excluding alternatives have been taken into account: the collapse of the building is exclusively due to construction defects, even if related to one of the risks insured (art. 23 paragraph 2, point 2.3 of F.S.A. Norm no.17/2013); the damage was produced to a dwelling built in an unauthorized area (art 24, paragraph 1 of F.S.A. Norm no. 7/2013) or in case the insurance beneficiaries/ the insured have built, extended or modified a dwelling in the absence of a building permit, legally issued, or have not fully complied with its specifications, thus affecting its structural strength and consequently, enhancing the exposure to a a risk legally covered by insurance. (Art.24, paragraph 2 of the F.S.A. Norm no. 7/2013).

The amendments brought to Law no. 20/2008(the respective bill has been approved by the Chamber of Deputies and is pending promulgation by the President of Romania) have established that dwellings which are part of buildings classified as presenting Class 1 seismic risk cannot be insured against hazards before they have been seismically refitted.

Insurance practice has been confronted with the question whether parish houses fall within the scope of Law no. 260/2008 or not.

The provisions of art. 170, paragraph 4 of Government Ordinance no. 53, referring to the Statute Governing the Romanian Orthodox Church (R.O.C.) places “parish houses” within the category of “Church Property”, i.e. property used in the practice of the religious cult. According to a distinguished prelate of the Romanian Orthodox Church this destination does not allow “parish houses” to fall within the scope of Law no. 260/2008[23].

One must also consider, for a correct classification, the provisions of the Statute Governing the Romanian Orthodox Church recognized as such by Government Decision no. 53 of 16.01.2008, on the Statute for the organization and operation of the Romanian Orthodox Church, published in the Official Gazette of Romania, Part 1, no. 50/22.01.2008, according to which "general, mandatory norms regarding the insurance of church property belonging to the Romanian Patriarchate are subject to the approval of the Holy Synod". (art. 170 paragraph 8).

In our opinion, in keeping with the provisions of art.2, letter a) of Law 114/1996, taking out insurance coverage is mandatory if the parish house " meets the living conditions necessary for an individual or a family" (art. 2 , letter a) of Law 146/1996). We think that the possibility conferred by the legislator on the Romanian Orthodox Church to adopt general and mandatory norms regarding the mandatory insurance of its own property cannot lead to disregard for legal norms on mandatory insurance of dwellings passed by the Romanian State.

Finally, it is worth also pointing out that, the law amending Law no. 260/2008 does not allow insurance companies which are authorized to issue insurance policies for natural hazards to offer optional insurance policies to owners who have not first taken out the mandatory home insurance policy.

3. The parties of the insurance contract

The Insurer. In mandatory home insurance policies, the insurer is P.I.A.N.D., which is an insurance-reinsurance company, set up as a private legal entity, and not by the different insurance companies which through association go under the name P.I.A.N.D., the latter only acting as intermediaries in closing mandatory home insurance policies.

P.I.A.N.D. is the sole company authorized to issue mandatory home insurance policies.

In keeping with the provisions of art. 7, para. 1 of Law no. 260/200, the insurance contract is concluded in written form between P.I.A.N.D. and the homeowner, mediated by the insurance companies authorized to cover natural hazards risks, by derogation from the provisions of Law no.32/2000, subsequently amended and completed.

Therefore, the insurers do not incur the risk themselves, they only transfer it to P.I.A.N.D., in their capacity as intermediaries, in keeping with the provisions of art. 12 and 13 of F.S.A. Norm no.7/2013. The insured pays the premium to the insurer, who in his turn passes it on to PA.I.N.D., as required by the provisions of art.7, paragraph 1 and 4 of Law no. 260/2008, as amended by Law no. 243/2013.

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[21] Corneliu Bente, "Obligativitatea asigurării locuinţelor", The Journal of the Faculty of Economics Science, Analele Universitatii din Oradea, Stiinte Economice, vol II, 2006, p.532, http//steconomice.uoradea.ro/Analele/en.volum-2006-finance-accounting-and-banks.html;

[22] "Asigurarea Locuinţelor-o noua asigurare obligatorie.Intre experienta si experiment", author Mirela Carmen Dobrila in Analele Stiintifice ale Universitatii "Alexandru Ioan Cuza" Iasi, Tomul LVIV, Stiinte Juridice, 2010.

[23] Fr. Mihai Valica: *„Asigurarea obligatorie a patrimoniului bisericesc şi nu numai-un abuz o jignire”* , article from 07.08.2011 published on the website „Apologeticum”; article that can be read on the website www.apologeticum.ro;

The Insured. Pursuant to F.S.A. Norm no. 7/2013, the insured can be any natural person or legal entity having an insurable interest in the dwelling which is the subject of the mandatory home insurance policy, that is, the owner, building caretaker, lessor or the legal representative of the former who upon closing a mandatory home insurance contract with P.I.A.N.D. commits to pay the obligatory premium to P.I.A.N.D.

The insurance policy can include a beneficiary of the insurance, designated by the owner to receive the indemnification for the damage incurred by the dwelling insured.

Under the law, house owners whose title to a property is recorded with the tax authorities (art. 3, paragraph 1 of law 260/2008) have the obligation to take out insurance for their property. Persons or authorities designated as caretakers of the respective property incur the same obligation (art.3, paragraph 2).

Regarding the insured, according to the doctrine, it is the financer-lessor[24] who is under the obligation to close an insurance contract in cases of financial or operational leasing.

As regards the property right dismemberment (usufruct, habitation and easement) it is the obligation of the bare owner or of the owner to take out insurance for the usufruct and the habitation rights, since he holds over the legal provision for the building, keeping the capacity of owner thereof. In case of the easement right, this obligation belongs to the holder of the superficies right in capacity of construction owner, in case of life annuity contracts this obligation belongs to the annuity debtor in capacity of home owner, and for the caretaking contract the obligation for the insurance's conclusion belongs to debtor of the caretaking obligation[25].

In cases in which the owner of the property changes, the liability of P.I.A.N.D. continues until the expiry of the validity of the insurance policy covering the dwelling (art.17, paragraph 2 of F.S.A. and Norm no.7/2013). The former owner must hand over the insurance policy to the next owner, who has the obligation to notify the insurer that the title to the property is now held by a different person. In this way the validity of the insurance contract is maintained ope legis, with no need for a new clause.

4. The form and content of the mandatory home insurance contract

There are express legal provisions with reference to the written form and the clauses of the mandatory home insurance contract.

Both art. 7 of the Law no. 260/2008[26], republished, and the provisions of the F.S.A. Norm no. 7 /2013 (art. 9) govern aspects regarding the (written) form of the contract, the content of the insurance contract and of the mandatory home insurance policy, the conditions that the insurance must fulfill in order to ensure its validity.

Under the current law the mandatory home insurance policy is considered to be valid if the following conditions are met cumulatively: a) the insurance policy covers the building for residential use for the mandatory amount; b) the insurance policy covers for the risks stipulated in art.6; c) the insured has paid the mandatory premium (art. 8 of Law 260/2008, republished in 2013)

The written form of the contract is required ad probationem, not ad validitatem and it ensures compliance with regulations regarding the content of the insurance contract, as laid out in art.2201/civil code, which lists the elements the insurance policy[27] must mention.

By the recent amendments to the Law no. 260/2008 the proof of the mandatory home insurance contract is carried out only with the mandatory home insurance policy, eliminating the provision from the previous regulation according to which the proof was made both by mandatory home insurance policy and by insurance certificate.

The insured value is the maximum liability assumed by IPNH to underwrite the risks listed in art.2 letter b) of Law 260/2008, subsequently amended and completed, for each type of dwelling insured, joint or several, irrespective of the number of covered hazards produced during the validity of the insurance contract. (art. 25 paragraph 1 of the F.S.A. Norm no.7/2013).

In keeping with the provisions of art 26, paragraph 1 and 2 of F.S.A. Norm no. 7/2013, for type A dwellings the value insured is the equivalent in RON of 20,000 Euros, at the exchange rate set by the National Bank of Romania on the day the mandatory home insurance contract is concluded. For type B dwellings the value insured is the equivalent in RON of 10,000 Euros.

Each time property damage occurs, the insured value diminishes, in keeping with the amount paid as compensation. The policy holder can increase the

[24] Vasile Nemeș, „Asigurarea obligatorie a locuinței" in the review " Buletinul Național pentru pregătirea și perfecționarea avocaților" no. 1/2010, page 77 ;

[25] Vasile Nemeș, op cit, page 79 ;

[26] Art. 7(1) Mandatory home insurance contract is concluded in writing either directly between P.I.A.N.D. and the owner of the house, or by insurance companies authorized to practice disaster risk, as a derogation from the provisions of Law no. 32/2000, as amended and supplemented, and must meet at least the following conditions;

[27] For aspects regarding the insurance contract probation and form see V. Nemeș, Dreptul Asigurărilor, Ed a 4-a Editura Hamangiu 2012, page 188;

value insured to the initial amount by paying a higher premium.

If the amount of the indemnification received for one or several hazards covered reaches the compensation limit, the owner is obliged to close a new mandatory home insurance contract, after carrying out all the repair work necessary to make the dwelling habitable again.

5. Insured risks

The insured risk is a future contingency, possible but uncertain, provided for in the contract of insurance, the insurance agreement being concluded against harmful consequences that may occur as a result of the occurrence of such risks.

The risks that can be subscribed by concluding the mandatory home insurance are: earthquakes, landslides and flooding.

Therefore the insurance contract *does not cover all the risks* incurred by the property insured, that is the building, the dwelling, respectively.

In certain cases (for which no details or examples are given) the law amending Law no. 260/2008 (PL-x411/2012, at present pending promulgation by the President of Romania), provides that the Pool for Insurance against Natural Disasters ("P.I.A.N.D.") can condition the conclusion of **the insurance policy against natural disasters** (mandatory home insurance policy) on a **risk inspection**.

The risk inspection shall be carried out according to the norms of the Financial Supervisory Authority (F.S.A.), and its costs shall be borne by the insurance – reinsurance company P.I.A.N.D.

According to art.6 of Law no. 260/2008, risks for which it is mandatory to take out insurance against natural hazards in fact represent the damage caused to buildings for residential use as a direct or indirect effect produced by any form of manifestation of a hazard.

The deficiencies in the formulation of art. 6 of Law no. 26/2008 require clarification since legal doctrine correctly points out the confusion between insurable risks and damage[28], due to the legislator's lack of complete clarity.

The provisions of art.2, paragraph 1, b) of Law no. 260/2008 limit natural hazards to earthquakes, landslides and flooding, while for other risks additional optional insurance is required.

Consequently, mandatory home insurance can be taken out alongside an optional insurance policy as they cover distinct risks and types of damage. It should be mentioned that in case of damage, compensation is paid primarily by virtue of the mandatory home insurance policy, while the remaining indemnification due is paid based on the optional policy[29].

Through its effect, Law no. 260/2008 makes it possible for damage produced as an indirect consequence of insured hazards to be covered by insurance, as well.

Thus, art. 20 paragraph 2 of the Financial Supervisory Authority Norm ("F.S.A.") no. 7/2013 on the forms and clauses in the insurance contract also stipulates the coverage of direct damages incurred by the constructions destined as dwellings, *the indirect consequence* of the occurrence of the events mentioned in paragraph (1), such as fire, explosion as a result of an earthquake or landslides or other similar cases.

In the specialized literature on this subject it is pointed out that the risks mentioned are limited, with the exclusion of severe storms or fire from the list of insurable risks.

To support this critical opinion it is shown that Prudential Norms on covering risks posed by natural hazards applied under I.S.C. Order no.4/10.04.2002, published in the National Gazette no.359/20.05.2002, which set out the conditions to be met by authorized insurance companies to be allowed to underwrite hazard risks, include in the category of hazards all risks associated with a catastrophic event or a series of events, which can cause substantial damage in a short period of time. Natural hazards are defined as events caused by natural calamities, among which, alongside earthquakes and floods , thefts are mentioned.(art.1).[30]

Besides the provisions of I.S.C. Order no.5/2009, F.S.A. Norm no. 7/2013 lists the risks which are not indemnified, art. 22, paragraph 1 and 2, and the cases in which the mandatory home insurance policy is not valid[31]. Also, art. 23 and 24 list the situations that

[28] Vasile Nemeș, „Asigurarea obligatorie a locuinței" in the review "Buletinul Național pentru pregătirea și perfecționarea avocaților no. 1/2010, page 76 ;

[29] Art. 19 paragraph 4[1] introduced by Law no. 243/2013 amending and supplementing Law no. 260/2008 provides: "In case a person has both a compulsory insurance contract, and an optional insurance contract, payment of damages is firstly carried out based on the compulsory insurance contract, for the remaining uncovered payment, the payment shall be carried out based on optional insurance contract. The insured value taken into account in order to determine the optional insurance installment is represented by the difference between the total value of the house insured and the insured value taken into account in order to determine the compulsory insurance installment";

[30] Mirela Carmen Dobrilă, op. cit., page 115;

[31] Art. 22. - (1) Mandatory home insurance against earthquakes, landslides or floods does not cover the damages caused by:

1.1. floods during barrier lakes formation or when changing artificial watercourses; by the formation of the barrier lake we understand filling with water the barrier lake up to the overflow;

1.2. in cases of sudden threat of collapse or landslide, as well as in case of the inability to use even by repairing or strengthening buildings, if these phenomena occurred, facilitated or aggravated by digging or by civil works of any kind, prospecting, exploration or oil or mining exploitation on the surface or in depth, regardless of the time passed since their completion or abandonment;

1.3. compaction (sagging) of the foundation soil either under the load of the construction or due to other causes;

1.4. the formation of cracks in the foundation soil or the ground around the building, due to the volume variation of the land, as a result of contraction/expansion caused by freeze/thawing;

entitle P.I.A.N.D.. not to grant the indemnification[32], among which we can find the general provision referring to failure to comply with the contractual obligations, the one referring to failure of the insured to comply with the obligation to inform, lack of evidence regarding the justification of the right to indemnification, favor the damage or increase of the prejudice by the insured or the persons that live and take care of the household together with the insured, etc.

6. Insurance contract duration and effects

The mandatory home insurance contract is valid for 12 months, during which time P.I.A.N.D. assumes responsibility for the consequences of an insured hazard (art.15 of F.S.A. Norm no. 7/2013).

The insurance policy is binding starting at midnight on the fifth day after the obligatory premium was paid in and the insurance contract was executed and issued, with the exception of policy renewals where the policy becomes binding at midnight of the day following the day when the premium was paid, and the contract was executed and issued.

Therefore the responsibility of P.I.A.N.D. starts at midnight, of the fifth day after the insurance premium was paid, and on the following day for policy renewals, but not earlier than on the day following the expiry of the previous policy and the date on which the title to the property held by a natural person or legal entity takes effect. (art. 16 of F.S.A. Norm no. 7/2013).

Thus, as mentioned before, the change of the title holder is no cause for the termination of the insurance contract.

The responsibility of P.I.A.N.D. ends either on the date of the expiry of the validity of the insurance contract (midnight of last validity day written on the policy) or before it, the moment the building insured becomes completely uninhabitable or ceases to exist for causes other than those representing risks covered by insurance. (art. of F.S.A. Norm no. 7/2013).

Loss of dwelling status of a building does not entail reimbursement of the mandatory premium.

As far as the effects of insurance are concerned, these do not differ from the contractual effects of the other types of insurance policies.

The main rights and obligations are set out in art.15 and16 of law no.260/2008, amended and completed, as well in FSA Norm no. 7/2013 (art. 11-12, 20-4, 29-34)

In order to be indemnified, the person having incurred the loss must send a written request for compensation to the insurer who has issued the mandatory home insurance policy on behalf of P.I.A.N.D.. This document is the notification of damage. In the case of social housing or of persons who receive social benefits the insurance policy will be issued directly by P.I.A.N.D. and, consequently, the request for compensation must be addressed directly to it, too. (Art. 29, paragraph 1-3 of F.S.A. Norm no.7/2013).

The damage notification must be done within 60 days from the production of the risk insured. The right to indemnification is established on the basis of the documents issued by the institutions authorized to ascertain the state of natural disaster.

The insurer will draw up a damage report and will work out the compensation amount due function of the demands and possible objections raised by the insured or beneficiaries of the mandatory home insurance policy, without exceeding the ceiling set by law or the value of the damage produced. (art. 28 of F.S.A. Norm no. 7/2013)

P.I.A.N.D. will directly reimburse the policy holder on the basis of the report forwarded by the insurer who has surveyed and valuated the damage caused. (Art.29 and 31 of F.S.A. Norm no.7/2013).

In case there are several home insurance policies taken out for the same dwelling, issued by different authorized insurers, all valid at the date the hazard occurred, the indemnification due to the policy holder cannot exceed the effective value of the damage sustained as a direct consequence of the risk covered

1.5. field surrounding the house and that is not associated with the notion of home and is not subject to insurance;

1.6. extensions that are or are not part of the construction designated as insured home (garages, warehouses, sheds, stables, window boxes, pergolas, fences, etc.) and special installations and facilities (pools, saunas, auto ramps etc.);

1.7. any kind of goods, other than the construction designated as insured home (goods or items necessary in order to live, valuable papers etc.)

2) P.I.A.N.D. does not grant compensation for:

2.1. homes built in areas where the competent legal authorities prohibited this by public documents or communications addressed to the insured;

2.2. buildings collapse exclusively due to construction defects, even if it is related to the occurrence of an insured risk; 2.3. temporary accommodation costs until the reconstruction of the house that is subject to the manadtory insurance policy and that was damaged as a result of a covered risk.

[32] Art. 23 – P.I.A.N.D. is entitled not to grant compensation if:

1. The insured/contractor has not fulfilled the obligations arising from the contract;

2. within the statements of the contractor/beneficiary or his representatives, on which the insurance contract is based on or that are made during the claim for compensation or on any other occasion, are being found untruths, forgery, fraudulent aspects, exaggerations or omissions misleading the PA.I.N.D. or the insurer that issued a mandatory insurance policy;

3. The beneficiary does not present sufficient evidence in order to justify his right to pay the compensation, according to the provisions of art. 18 paragraph (2) of Law no. 260/2008, republished, with subsequent amendments and additions;

4. the damages were favored or aggravated by fault, for the part of the damage which was intentionally increased by the insured/beneficiary or by persons living together with the insured/beneficiary in the home insured, by the representatives of the insured/beneficiary, by the persons authorized to represent the beneficiary for compensation or by the insurance contractor.

by insurance. In these circumstances the first mandatory home insurance policy concluded overrides and cancels all later ones and P.I.A.N.D. will return the premiums already paid. (Art. 28 of F.S.A. Norm no.7 /2013)

The penalty for not complying with the obligation to take out mandatory home insurance is an administrative fine ranging from 100 to 500 RON, in keeping with the provisions of art.30, paragraph 1 of Law 260/2008, amend by Law 243/2013.

7. Conclusions

1. Close scrutiny of the special legislation in the matter of mandatory home insurance has brought to light several problems the solution of which, in our opinion, will play a crucial role in achieving the social goal the legislator had in mind when making home insurance mandatory.

2. Thus, in spite of the fact that Law no.260/2008 has been amended twice we think that the legislator has not found yet concrete solutions for several problems. The competence to solve many of these problems mentioned under Art 1 of F.S.A .Norm no.6 /2013 belongs to P.I.A.N.D.: namely, the setting up and administration of a data base recording all buildings for residential use, since there are no records for uninsured dwellings at present, the absence of an updated map of catastrophe prone areas in our country (areas at high risk of flooding, complete records of high seismic risk buildings), raising the minimum registered capital of P.I.A.N.D. (now the equivalent in RON of 12 million euros), closing reinsurance contracts with important reinsurance companies, since occurrence of hazards mentioned in the respective law will entail the accumulation of huge amounts in compensation due, which cannot be paid out at present, working out a highly precise insurance mechanism and description of the role played in it by each insurer that is part of P.I.A.N.D., the statutory conditions in which commissions are charged, and finally, a clear description of the role played by P.I.A.N.D. as an insurance-reinsurance company.

3. The law does not deal with a number of issues such as relations between shareholders, the conditions in which new shareholders can join P.I.A.N.D., the role representatives appointed by F.S.A. will play and the way conflicts of interest can be avoided, conditions in which a shareholder can withdraw from or be excluded from IPNH.

4. Last, but not least, setting up a monopoly on this market segment and restricting market access by imposing the condition of adhering to P.I.A.N.D. need to be closely correlated with the principles and legal norms in force in the matter of competition.

5. In addition to this, given the absence of distinct provisions referring to dwellings classified as posing an extremely high seismic risk, we suggest these should be exempt from the obligation to be covered by insurance, and should form the subject of special regulations.

III. Property insurance subject to mortgage loan agreements

1. Legislative framework. Scope and type of insurance.

Law no. 190/1999 (updated)[33] governs the legal regime of the mortgage loan for real estate investments.

According to the Law no. 190/1999, the mortgage loan for real estate investments is the mortgage loan granted in order to carry out real estate investments meant for dwelling purposes or other purposes than dwelling or in order to repay a mortgage loan for real estate investments previously contracted (art.2, lett. c).

The wording of the legislator according to which "granting the loan is secured *at least* by the mortgage of the estate that is subject to the real estate investment for whose financing the loan is granted" (art. 2, lett. c, paragraph 2 of Law no. 190/1999) is fully consistent with the subsequent provisions of the regulatory document evoked.

Therefore, pursuant to the provisions of section II of the law, entitled "*Compulsory Insurance Contracts"*, "in case of a construction mortgage, the borrower shall conclude an insurance contract covering all its risks. The insurance contract shall be concluded and renewed in order to cover the entire validity period of the loan, and the insured's rights arisen from the insurance contract shall be assigned in favor of the mortgagee for the entire validity period of the mortgage loan for real estate investments". (art. 16 paragraph 1 and 2 of the law).

Consequently, the insurance contract for the property subject to mortgage loan agreements shall be binding due to the express provision of the law, the parties shall transpose this legal provision within the content of the agreement between them.

The insurance of the loan's securities may not be mistaken for the insurance of the secured loans. The scope of the insurance for the insurance of the loan's securities is made of movables and immovables with which the creditor secured the repayment of the loan and the insured risks are represented by the risks of loss, theft or total or partial loss of the respective property (for example: fire, flood, theft, damage, destruction etc.) while for the insurance of the secured loans, the insured risk is represented by the lack of repayment of the loan[34].

Although the property insurance subject to the mortgage loan agreements is an insurance concluded

[33] Law no. 190/1999 was amended and supplemented by Law no. 201/2002, Law no. 34/2006, G.E.O. no. 174/2008 and G.E.O. no. 50/2010;
[34] Vasile Nemeș, „Dreptul asigurărilor", Ediția a 4-a, Editura Hamangiu, 2012, page 280;

in order to ensure the repayment of the loan, in our opinion this insurance is a **property insurance** (and not a suretyship insurance – fifteenth class of general insurances)[35] whereas, even if the borrower doesn't repay the loan on due date, the insurer can not be bound to pay the compensation in the absence of the occurrence of the insured risk. In such a situation the mortgagee will proceed to the capitalization of the movable or immovable that is subject to the security.

Therefore, if regarding the insurance of the secured loans the insurer will grant the compensation due to the non-repayment of the loan, keeping the action for the capitalization of the property used as security, regarding the insurance of the loan's securities the insurer is liable only in case of the loss of the property used as security not seeking for remedy unless it is proven that there is a person who is guilty of the property loss.

In this latter case we are in the presence of a case of legal subrogation, that is carried out in case of insurances, if the insured risk has occurred, when the insurance company subrogates by law the rights of the insured that is indemnified against the person guilty of the occurrence of the damage.[36]

Not the least, distinct from the provisions of the Law no. 190/1999, are also of interest in this matter the provisions of the Civil Code, with reference to the provisions of art. 2330-2332, that we'll develop within chapter IV regarding the assignment of rights from insurance and payment of the compensation.

2. The parties of the insurance contract

The borrower has the capacity of the insured, and it falls under the obligation of the borrower to conclude the insurance contract with an insurance company of his choice, the law expressly prohibits the lender to impose on the borrower a certain insurer (art. 18 of Law no. 190/1999).

The insurer may be any insurance company at the choice of the insured. In practice, there was discovered the abusive nature of the terms which established the obligation of the borrower to conclude the insurance contract with an insurance company that was a partner of the bank or approved by the bank and the bank's right to choose the new insurance company which renews the insurance policy.

Thus, certain Courts have decided that it may not be held the defense of the bank according to which the necessity of choosing an insurance company by the bank is required for the reason of avoiding any risk as the risk of inefficient compensation, total lack of compensation or the risk that the policy may not cover certain situations, etc.[37]

3. Insurance contract duration.

Law no. 190/1999 establishes the rule that the duration of the insurance contract is at least equal to the repayment period of the mortgage loan.

Art. 16 of the law provides that the insurance will be concluded and renewed in order to cover the entire validity period of the loan.

For this purpose, multi-annual contracts or a single insurance contract may be concluded, valid for the entire period provided for the repayment of the loan.

4. Assignment of insurance rights. Holder of the right to compensation.

The insurance contract, regardless of the means chosen, will be concluded in order to cover all risks associated with the construction and the insurance indemnity will be assigned to the mortgagee.

The law provides the assignment of the insurance rights, both in case of insurance of the mortgaged construction and in case of insurance regarding the risk of non-completion of the real estate investment.

The assignment of rights arising from the insurance contract entails the consequence of receipt of compensation by the mortgagee, no doubt within the loan balance, otherwise we would be in a situation of unjust enrichment.

In this regard, by a test case decision[38], interesting consequence of the multitude of issues approached, the jurisprudence has held both the binding nature of the insurance of property subject to mortgage loan agreements and the fact that the right to compensation is assigned only insofar as the non-performance of the contractual obligations and only within the claim credit limit agreed.

Moreover, it was also noted the opposability of assignment to the insurance company, the latter being bound by this agreement.

Pursuant to art. 24 of Law no. 190/1999[39], the mortgage debts that are part of the portfolio of an institution authorized by law, may be transferred to another institution of the same type or to other entities

[35] In this regard, study the classification of the insurances within the Annex no.1 of the Law no. 32/2000

[36] In this regard, art. 2210 paragraph (1) new Civil Code provides: "Within the limits of paid indemnity, the insurer is subrogated to all the rights of the insured or the beneficiary of the insurance against those responsible for the occurrence of the damage, except for insurance of persons";

[37] We mention the Civil Decision no. 17199/17.12.2012 delivered by the District Court of the 2nd District Bucharest as well as the Civil Decision no. 6953/25.10.2010 delivered by the District Court of Targu Jiu, court decisions quoted by Associate Professor PhD Răzvan Dincă in the paper „Abusive clauses in the non-banking financial services contracts", presented within the ALB national conference, Romania, IXth edition, with the title „Revival of the economy lending by rebuilding the confidence in the non-banking financial institutions", conference held at the Intercontinental Hotel Bucharest on November 21st 2013;

[38] Civil Decision no. 64/24.02.2014 delivered by the Court of Appeal Cluj in the file no. ..84/2013, published by the Court of Appeal Cluj Civil Section II, administrative and fiscal courts in the collection of relevant decisions, year 2004, Ist quarter;

[39] By Decision no. 30/2015 delivered on 02.03.2015 and published in the Official Gazette of Romania on 03.25.2015, the Constitutional Court of Romania rejected as inadmissible the critics of unconstitutionality of the provisions of art. 24 of Law no. 190/1999, deciding that the motivation of the authors can not constitute a genuine criticism of unconstitutionality;

authorized and regulated for this purpose by special laws.

The assignee acquires, besides the right under a mortgage associated with the mortgage loan for real estate investments and the rights arising from the insurance contract for the property covered by this mortgage and the other guarantees accompanying the mortgage debt transmitted. No doubt that the assignee may also acquire the rights arising from the insurance of the risk for the non-completion of the construction started with the amount of money borrowed from the bank.

In the specialized literature it has been shown that for property insurances the loss of the legal relationship of the property leads to cessation of the insurance. However, in case of assignment provided by art. 24 paragraph 3 of Law no. 190/1999 this occurs not as an exception expressly regulated by this legal provision, so that the insurance continues to produce effects regardless of the number of assignments occurred, the assignment becomes effective regardless of the insurer's will, on condition of its notification for opposability.[40]

The opposability of the assignment to third parties, except for the insurer, is carried out through its registration with the Electronic Archive of Security Interests in Movable Property, at the expense of the insured (art. 16 paragraph 3).

Towards the insurer the opposability of the assignment is carried out through its notification by registered letter with acknowledgment of receipt or by judicial officers (art. 16 paragraph 4).

We note that, in relation to the provisions of the new Civil Code (art. 1578) which provides for the possibility of notification of the assignment of a debt by written communication of the assignment, on paper or electronically, Law no. 190/1999, a special regulation and previously dated, contains more stringent provisions, the notification is possible only by letter with acknowledgment of receipt or by judicial officers.

We also note that, in practice, the notification of the assignment is accompanied by the remittance to the assignee of the original insurance contract, which is usually in the possession of the assignor, the contract containing the mention regarding the assignment.

The mortgagee, acquiring the capacity of assignee for the insurance rights, will become the beneficiary of the compensation, so that, in case of the occurrence of the insured risk, the insurance indemnity will be paid directly to him.

Law no. 190/1999 establishes that the compensations received by the mortgagee will lead to the settlement of the claim, the imputation and the order of payment are being set: due and unpaid interests related to borrowed capital, the amount of the loan installments remaining to be paid, other amounts owed by the borrower to the mortgagee on the date of receipt of the compensation based on the loan agreement (art. 16, paragraph 5).

We believe that, even in the absence of an express provision regarding the assignment of rights for compensation to the mortgagee, within the loan balance, the issue of granting the compensations in case of occurrence of the insured risk was resolved by the Civil Code. We take into consideration the provisions of art. 2330 - 2332.

In this respect, the legislator of the Civil Code has provided that, in case of the destruction or damage of the property encumbered, if the property encumbered is destroyed or damaged, the insurance indemnity or, where applicable, the amount due as indemnification should be affected by the payment of the preferential or mortgage debts, according to their rank. (art. 2330, paragraph 1).

Regarding the recording procedure of the amounts of money representing the insurance indemnity or compensation, it was provided that the amounts due under this title to be recorded in a separate bank account, bearing interest on behalf of the insured and being available to the creditors who have registered the security in the publicity registers. The debtor can not dispose of these sums until the settlement of all secured claims unless with the agreement of all mortgagees or preferential creditors. But he has the right to charge the interests. In the absence of agreement between the parties, the creditors can satisfy their claims only according to the legal provisions regarding the execution of mortgages (art. 2331).

Moreover the law provides the possibility that, by the insurance contract, the insurer may also reserve the right to repair, rebuild or replace the property insured. In such a case, the insurer shall notify the intention to exercise this right to the creditors who have registered their security in the publicity registers, within 30 days of the date he acknowledged the occurrence of the insured event. The holders of the secured debts may require payment of the insurance indemnity within 30 days of the date of receipt of the notification (art. 2332).

The content of article 2332 of the Civil Code leads to the conclusion that, in case of partial disaster, the insurance indemnity is due to the creditor "only if it is not spent on repairing, restoring or replacing the insured assets". The specialized literature[41] underlines that the right of the creditor is of **subsidiary nature**, because if the insurer repairs the building partially destroyed, the holder of the security interest will not be able to keep the insurance indemnity; instead he will have to give it to the insured debtor.

[40] Vasile Nemeş, "Contractul de asigurare a bunurilor obiect al contractelor de credit ipotecar", article published in "Revista de drept bancar şi financiar" no. 3-4/2008, page 6

[41] Irina Sferdian, „Asigurări. Privire specială asupra contractului de asigurare din perspectiva Codului Civil", Editura C.H.Beck, Bucureşti, 2013, page 188;

5. Conclusions

From the regulations mentioned the following conclusions are drawn:

1. The insurance contract regarding the constructions for which the mortgage has been established in order to guarantee the real estate investment is a contract distinct of the insurance contract of the mortgage loan for real estate investments, but they interact closely, the insurance representing a security made to protect the mortgagee in case of occurrence of one of the insured risks.

2. Despite the indemnity nature and the purpose pursued by the conclusion of the insurance contract (guaranteeing the repayment of the loan in case of destruction or damage of the mortgaged property), the insurance of the property subject to the mortgage loan agreement is a property insurance included in class 8 and 9 of insurance, classification provided in Annex 1 of the Law no. 32/2000 on insurance and insurance supervision.

3. The legislator gives binding nature to the construction insurance contract. Art. 16 of Law no. 190/1999 provides that the borrower shall conclude an insurance contract covering all its risks. The wording of the legislator is imperative, the binding nature of the insurance contract for the real estate purchased under the law no. 190/1999 being construed from both the section title ("compulsory insurance contracts") and the content of the regulation of art. 16.

4. It is possible that the legislator sought to establish the binding nature also to the insurance contract for the risk of non-completion of the real estate investments for which the loan was granted.

5. Thus it explains the introduction in Section II ("compulsory insurance contracts") of the provision regarding the conclusion of an insurance contract for the risk of non-completion of the real estate investment by the borrower (art. 17) and the provision provided by art. 16 ("in case of a construction mortgage, the borrower shall conclude an insurance contract covering *all* its *risks*"- therefore also the risk of non-completion of the construction).

6. However, the provision provided by art. 17 of Law no. 190/1999, that "the mortgagee **may** require to the borrower to conclude an insurance contract for the risk of non-completion of the real estate investment for which the loan was granted" does not induce the idea of incumbency but rather the idea of possibility, faculty, the wording of the legislator not being compulsory.

7. In the specialized literature[42], regarding this issue, it was shown that "the insurance for the risk of non-completion of the construction is optional."

8. The provisions regarding the assignment in favor of the mortgagee of the rights of the insured deriving from the insurance contract (art. 16 paragraph 2, art. 17 and art. 24 paragraph 2 of Law no. 190/1999), as well as the ones regarding the ways to carry out the assignment (art. 16 paragraphs 3 and 4) or imputation of payment for the amounts received as compensation (art. 16 paragraph 5) consequence of the occurrence of the insured risk regarding the real estate, represent the legal provisions meant to ensure the repayment of the loan granted by the financial institution. Legal provisions with the same purpose can be found in the Civil Code, art. 2330 - 2332.

IV. Insurance of assets subject to leasing contracts

1. Legislative framework. Scope and type of insurance.

The leasing operations are governed by the G.O. no. 51/1997.

According to the provisions of ar.1, the Ordinance applies to the leasing operations whereby one party, called lessor/financer, in his capacity of owner, transfers, for a determined period of time, the right of use over an asset to the other party, called lessee/user, at his request, for a periodic payment, called leasing installment, and at the end of the leasing period, the lessor/ financer undertakes to comply with the lessee/user's option right to purchase the asset, to extend the leasing contract without changing the type of leasing or to terminate the contractual relationships.

The subject of the leasing operations may be assets immovable by their nature or that become movable by destination and movable assets, in civil circuit, to which the right to use computer programs is added.

The insurance obligation is expressly provided within the evoked regulatory document[43].

The insured risks are represented by the risks of loss, theft or total or partial destruction of the assets subject to a leasing contract, after the occurrence of certain risks such as fire, flood, theft, damage, destruction, etc.

The insurance of the assets subject to a leasing contract is a compulsory insurance of assets.

The insurance contract of the property subject to the mortgage loan agreements shall be binding, the parties shall transpose within the content of the agreement between them this legal provision, aspect also provided by the law. Thus, according to art. 6 paragraph 1 lett. e, the leasing contract should comprise, beyond the contracting parties, at least the following elements:…e) "the clause regarding the obligation to ensure the asset."

[42] „Contractul de asigurare a bunurilor obiect al contractelor de credit ipotecar", author Vasile Nemeş, article published in „Revista de drept bancar şi financiar" no. 3-4/2008, page 5;

[43] Such provision can be fond within art. 5, paragraph 1 lett. e) art. 6 paragraph 1 lett. e), art. 9 lett. f), art .10 lett. d), art .26 of the G.O. no. 51/1997;

2. The parties of the insurance contract. Rights and obligations from the insurance's outlook.

The parties of the insurance contract are the insurer and the lessor/financer.

In compliance with the provisions of art. 5 of G. O. no. 51/1997, the obligation to ensure the asset is incumbent on the lessor. The obligation of insurance of the asset by the lessor is reiterated in art. 9 lett. f according to which the lessor/financer, in capacity of owner of the asset [44], undertakes to ensure, by an insurance company, the assets under lease.

The provision of art. 5 paragraph 1 of G.O. no. 51/1997 has a double meaning: on the one hand binds the contracting parties to ensure the asset under the leasing operation and, on the other hand, protects the user in case of total or partial destruction of the asset, knowing that one of the obligations established by the law binding the user is to bear the risk of loss, destruction or damage of the asset used including fortuity[45].

The lessor/financer, that is bound to ensure the asset, may also choose the insurer (unless the parties have agreed otherwise) with the mention that the insurance costs are paid by the owner of the asset. (art.5 paragraph 2)

This obligation, borne by the lessor/financer, is expressly provided also within the provisions of art. 10 let. d), the lessee binds to the lessor to pay all the sums owed according to the contract – leasing installments, insurances, contributions, taxes for the amount and on the terms mentioned in the contract.

Since the leasing performance is accompanied by an insurance performance of the asset that is subject to the leasing, concluded by the lessor, from the financial-accounting point of view the operation shall be invoiced by the latter to the lessee.

According to a recent decision of the Court of Justice of the European Union [46] when the lessor under a leasing contract ensures himself the asset subject to the leasing and invoices to the lessee the exact cost of the insurance, such an operation is qualified as insurance and a VAT exemption is applied based on art. 135 paragraph (1) letter (a) of the Directive 2006/112/EC of the Council from 28th of November 2006 on the common system of value added tax.

The Court qualified, in principle, as distinct and independent performance of services for VAT purposes (i) the services performance of the proper leasing and (ii) the services performance of the asset's insurance subject to leasing, especially in circumstances such as imposing an insurance contract conclusion through the leasing contract, but especially when the insurance of the asset subject to the leasing is essentially an end in itself for the lessee, and not the way to benefit from the leasing service in the best conditions.

If the insurance premiums are borne by the lessee/user, their counter value may be financed by the lessor, based on an expressed agreement in this regard.

We state that, as in the case when the payment for the insurance premiums is carried out by the lessee/user, the lesssor/financer shall have the capacity of insured person instead of the lessee/user.

The main consequence arising therefrom is that, if the insured risk occurs, the indemnity insurance will be paid by the insurer directly to the lessor/financer and not to the user, issue on which we shall return.

In this context we specify that the rules governing the insurance relations of the assets contracted by leasing are of optional nature, so that the parties may agree that the lessee/user has the capacity of insured and that he collects the insurance indemnity, or the capacity of insured of the financier may be kept, but it may be provided that the user is the beneficiary of the insurance, in which capacity he will also collect the compensation.

In the event that the insurance is concluded by the user, in practice, an assignment clause of the rights to compensation in favor of the lessor is provided.

Regarding the obligation to conclude a civil liability insurance for car owners (RCA), in case of car leasing, it is borne by the user, who is mandated by contract by the Lessor (leasing company) to conclude it. Constraining the user to conclude the civil liability insurance for cars with the same insurance company where the Casco insurance policy is concluded, represents, in our opinion, a violation of his right to freely choose a contractual partner.

3. Insurance contract duration. Holder of the right to compensation.

Similar to the property insurance subject to mortgage loan agreements, the duration of the insurance contract shall be at least equal to the period of the leasing contract.

For this purpose, multi-annual contracts or a single insurance contract may be concluded, valid for the entire period of the leasing contract.

[44] Before passing the Law No. 287/2006 amending G.O. no. 51/1997, it was not provided the requirement of the financer's capacity of owner of the assets subject to leasing operations. In its current form, however, although G.O. no. 51/1997 maintained the principle of transmission of the right to use of assets subject to the leasing contract, the condition regarding the financer's capacity of owner of the assets was introduced.

[45] Pursuant to art. 10 lett. f of G.O. no. 51/1997, "the lessee undertakes to assume, for the entire period of the contract, unless otherwise stipulated, all the obligations arising from the use of the assets directly or through his representatives, including the risk of loss, destruction or damage of the used asset due to fortuity, and the continuation of payment of the leasing installments until the full payment of the amount of the leasing contract".

[46] Decision no. C-224/11-17.01.2013 of the European Court of Justice may be found on the website http://www.juridice.ro/282621/cjue-prestatie-de-leasing-insotita-de-o-prestatie-de-asigurare-a-bunului-care-face-obiectul-leasingului-scutire-de-tva.html;

In case the insured risk occurs, if all conditions of validity of the contract are met, the obligation to pay the compensation is incumbent to the insurer, we will distinguish between the case of total and partial loss.

In the first case, respectively, the assumption of total loss of the asset subject to the leasing contract, the insurance indemnity will be received by the lessor/financer and he will turn against the user under the leasing contract, if the compensation does not cover the damage caused, i.e. the total value of the leasing contract.

The conclusion is set based on the common law principles regarding the coverage for damages, arising from partial or total loss of the assets, but it also results from the correlation of the provisions of the G.O. no. 51/1997.

Thus, according to art. 10 letter f) of G.O. no. 51/1997, the user bears the risk of total or partial loss of the asset, and has the obligation to continue the payment of the amounts as leasing installments until the full payment of the value of the leasing contract is carried out.

This provision is to be correlated with the provisions of art. 26 of G.O. no. 51/1997, according to which, in the case of damage registration and of payment of the amounts stipulated by the insurance for the assets subject to the leasing contracts, the parties may agree to settle the mutual claims by compensation, under the law.

The principle of settlement of the mutual claims by compensation, in case of loss of the asset, established by art. 26, refers precisely to the financier claim against the user, consisting of the equivalent leasing installments to be paid after the loss of the asset. Therefore, the remaining leasing installments to be paid will be compensated with the insurance indemnity received by the financer as a result of the occurrence of the insured risk.

In practice there has been raised the issue regarding the effective date when the leasing contract is terminated, in case of theft or total loss, aspect relevant with regard to the determination of the amounts to be compensated.

This issue has been judicially solved, the Court establishing that, in relation to the obligation of the user to continue the payment of the monthly leasing installments, there can not be affirmed that the leasing contract was terminated on the date of the theft because the leasing contract concluded expressly establishes the obligation of the user to continue the payment of the monthly leasing installments in case of theft.

The user's obligation ceased on the date when the lessor has received the compensation from the insurer, however, the lessor has the obligation to pay the user the difference between the compensation value and the amount due in relation to the provisions of the leasing contract, allowing the user to claim compensation from the insurer, in other procedural framework, for the delay of the payment of the compensation or the unfounded refusal to pay [47].

In case of liability for the loss of the assets, in common law, the compensation can not exceed its value from the moment of the occurrence of the prejudice. In other words, it is prohibited unjust enrichment of the owner, by receipt of compensation exceeding the value of the asset. Leasing regulations do not contain any derogatory rule, meaning that, as shown above, the financer may turn against the user, only for the difference that does not cover the value of the leasing contract[48].

Admission of another solution would equate to an unjust enrichment of the lessor/financer, consisting of, on the one hand, collecting the insurance indemnity and, on the other hand, the leasing installments due, intolerable situation in our legal system.

In the event of the occurrence of partial damage, to the extent that the user has paid the leasing installments up to date, the lessor may agree that the payment of compensation shall be carried out directly to the user's account, taking into consideration also the fact that he incurred the costs of bringing the asset in the state before the insured risk occurred.

4. Conclusions

Summarizing the aspects presented above, we point out the following:

1. The lessor is the one who has the freedom of choice regarding the insurance company in order to conclude the insurance contract;
2. The insurance premiums will be paid by the lessee/user;

The rules governing the insurance relations of the assets contracted by leasing are of optional nature, so that the parties may agree that the lessee/user has the capacity of insured and that he collects the insurance indemnity, or the capacity of insured of the financier may be kept, but it may be provided that the user is the beneficiary of the insurance, in which capacity he will also collect the compensation.

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FIDUCIA IN THE LIGHT OF THE NEW CIVIL CODE INSTITUTION OF LAW WITH UNREGULATED FINALITY

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Abstract:

The institution of "Fiducia" relatively completely regulated by the content of the art. 773-791 of the New Civil Code, represents, together to the institution of periodic property and the one of administration of one's assets, a premiere in the Romanian civil law. The apparition of this institution of law in the continental law (also in the Romanian law) is the result of a long interface process between the civil continental law and the Anglo-Saxon one, during which many institutions of law or types of contracts have been taken over in the continental law, as a consequence of the globalisation of the business relationships.

The legal mechanism of Fiducia exists in the continental law since its beginnings, more precisely even since the apogee of the Roman law. This way, this legal instrument, of assets administration can be found in the legislation of many European states, among which, we can mention the Anglo-Saxon legislation (trust), German legislation (trauhand), French legislation – legislation which represented the inspiration source of the Romanian legislator in the matter of Fiducia.

Unlike the Anglo-Saxon law, where the trust has three forms (guarantee, administration and the one concluded for performance of a liberality) in the Romanian law, fiducia has only two of these forms, respectively, Fiducia as guarantee and Fiducia as administration.

In the banking field, Fiducia as guarantee, although it has real practical advantages comparing to the most commonly used real estate mortgage, it is not used by the credit institutions, these still preferring that the reimbursement of the loans granted to be guaranteed by a mortgage contract.

Keywords: *Fiducia, Fiducia as guarantee, subjects of Fiducia, the new civil code.*

1. Origin and evolution:

The etymology of the noun "*Fiducia"* originates from the Latin word *"fìdo",* which means to trust (to have faith in someone or something), loyalty.

The origins of "Fiducia", as legal institute, can be found in the Roman law, although the institute of "Fiducia" has been taken over in the continental civil law by adaptation of the *trust*, regulated by the Anglo-Saxon law.

The fiducia contract is one of the oldest real contract, originating in the Roman law – *pactum fiduciae.*[1]

In the Roman law, fiducia was present under two forms, respectively "*fiducia cum amico"* (fiducia for administration) and "*fiducia cum creditore"*(fiducia employed as security).[2] Two elements were indispensable to be able to establish any of the two types of "Fiducie".

The first element, called "*datio*" was representing the ownership transfer and it was characterised by "*traditio*", respectively by physical delivery of the asset. "*Datio*" on its turn, could have two forms, for a "Fiducia" to be established, respectively (i) either it happened in a ritual formula before the magistrate (*in jure cessio*), (ii) either happened before five witnesses. **The second element,** was represented by a document, respectively, the convention called *pactum fiduciae.* It can be noticed that the second element has been kept also in the modern regulations of "Fiducia", meanwhile the element "*datio*" lost its application.[3]

It is also very important to specify that with regard to the modern regulations of the fiducia contract, in the Roman law, the implementation of the "Fiducia" was limited to the inheritance field, and the third party acquirer (the successor) had only the possibility to exercise a strictly personal action against the fiduciary, in case of non compliance with the contract. The Fiducia of the modern age is different from the fiducia regulated by the provisions of the Roman law and also in the light of the separation of the patrimonial assets, in the meaning that, currently, the personal assets of the fiduciary should not be confused with the ones from the fiduciary assets, as was happening in the Roman law.[4]

Although, some elements of "Fiducia" from the Roman law have been taken over in an adopted form, from the contemporary regulations, the resistance structure of the current "Fiducia" is grounded on the Anglo Saxon law, from which the *trust* has arisen, separating this way the fiduciary assets from the personal assets of the fiduciary, by implementation of the *split ownership theory* or *theory of title split.*[5]

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[1] Antoine BUREAU, *Le Contract de Fiducie :* étude de droit comparé Allemagne, France, Luxembourg, *www.juripole.fr*

[2] Alain Berdah – La Fiducie – http://www.avocats-droit-affaires.com/images/pdf/la%20fiducie.pdf – p. 2-5

[3] Alain Berdah – La Fiducie - http://www.avocats-droit-affaires.com/images/pdf/la%20fiducie.pdf - p. 1-2

[4] Cătălin R. Tripon op.cit. p. 178-179

[5] Cătălin R. Tripon op.cit. p. 191

With regard to the regulation from the Romanian civil law, it can be said that it represents a taking over of the French regulations in the matter of "Fiducia", with certain particulars. [6]

In France, as we have already mentioned, fiducia has been reintroduces as legal institute, by the law of 19th of February 2007 , currently being regulated by the art. 2011-2030 of the French Civil Code.

"Fiducia", as polyvalent legal instrument, has fallen in quite a disgrace in the historical moment of the French Revolution, and from the apparition of the Civil Code of Napoleon since 1804 and till the moment of its reactivation in 2007, "Fiducia" was forgotten, having no interest.

The Civil Code of Napoleon of 1804, almost integrally transposed in the Romanian Civil Code of 1864, has expressly prohibited the Fidei-Commissum sub-institutes which were related to the inheritance law. Because "Fiducia" was usually associated, in practice, to the fidei-commissum sub-institutes, it has been arrived to the extensive interpretation – atypical for the civil law – of an interdiction text, in the meaning that it would have in view also the legal mechanism on which we have put our attention. This interpretation *in extenso*, to which we make a reference, has been taken over by the Civil Code of 1864, from the Civil Code of Napoleon 1804, resulting therefore that "Fiducia" has never been prohibited in the private law of Romania, as we have well know, what the law does not prohibit it means that it allows .

The return of "Fiducia" in the legal actuality of nowadays can be explained by the pressure exercised on the continental private law, by the British/American system, respectively, by Common Law, system where the *trust* has born, which although it is not perfectly identified with "fiducia", still it comes near very much, as legal-economical finality, to what we understand by "Fiducia" .

Therefore, we can say that by the legal regulation of the "Fiducia" institute, Romania only follows the example of other European states, such as France, Germany, UK, Italy, Swiss, Luxemburg or Austria, making available to practitioners, of the Civil, commercial and banking law, the legal regulation of a legal instrument, extremely present in the commercial relations on international level.[7]

Now, we can say that there are two fiduciary patterns in the European private law, respectively the British pattern (*trust*), which has been taken over also by the Italian Civil Code and the French pattern (art. 2011-2031 French Civil Code) adopted also by the Romanian Civil Code of 2011, at the articles 773-791.[8]

It is essential to specify that the French pattern prohibits the indirect liberality, interdiction taken over also by the Romanian legislator, who, by the text of the art. 775 of the Civil Code, it provides that the fiducia contract by which an indirect liberality in the benefit of the beneficiary is achieved is subject to penalty of absolute nullity.[9]

2. What is the meaning of "Fiducia"?!

Notion and object of Fiducia

"Fiducia" is a civil law institute, regulated by the Romanian Civil Code, at the art. 773-791.

Therefore, by the provisions of the art. 773 New Civil Code the legislator defines "Fiducia" as being the "*legal operation by which one or more constitutors transferring real rights, receivables, guarantees or other patrimonial rights or an ensemble of such rights, present or future, to one or several fiduciaries who exercise such with a determined purpose, in the benefit of one or several beneficiaries. These rights form an autonomous mass of assets, distinct from other rights and obligations from the fiduciaries patrimonies."*

From the content of the legal definition, it does not result the way how the "Fiducia" shall be used, which will be the application of this institute, but in the doctrine[10] it has been ruled that for fiducie we have to have in view two finalities, respectively fiducia – instrument of administration and fiducia – instrument of guarantee. As voluntary and contractual regime, fiducia allows a person to legally proceed to desisting the personal assets administration, by assigning them to a trustee (the fiduciary) who has to administrate and dispose of with loyalty and attention, in the advantage of a beneficiary.[11]

With regard to the object of fiducia, the text of the art. 773 Civil Code enumerates examples only, the rights that can be object of the transfer, without the legislator refers to the assets on which holds these. But, interpreting the legal text, we shall conclude that the present or future assets – immovable and movable, tangible and intangible ones (receivables, intellectual property, securities etc.) may be subject to fiduciary transfer .[12]

From the real rights, the use and habitation can not be object of fiducia, pursuant to the provisions of

[6] Drept Civil – Drepturi Reale Principale – Editura Universul Juridic 2011– Marilena Uliescu si Aurelian Gheorghe p. 155

[7] Eugen Constantin Iordăchescu - http://www.iordachescu-law.ro/Studii-de-caz/Implementarea-fiduciei-in-practica-bancara-Modalitati-si-conlucrare-institutionala---avocat-Eugen-Constantin-IORDACHESCU--eID81.html

[8] A se vedea Ion Turcu – „Se poartă Fiducia" – 19.02.2013 – article published on the web site http://www.juridice.ro/244256/se-poarta-fiducia.html

[9] În *Common Law* , *trust* does not prohibit the performance of indirect liberalities

[10] I.Popa – The Fiducia Contract regulated by the new Civil Code, in R.R.D.P., p.127 – apud G.Boroi; C.A.Anghelescu; B.Nazat – Curs de Drept Civil – Drepturile Reale Principale –Hamangiu Publishing House 2013 – p.203

[11] A. Rățoi – Noul Cod Civil –Note Corelații Explicații –C.H. Beck Publishing House 2011, p. 269

[12] G.Boroi; C.A.Anghelescu; B.Nazat – op.cit.p.202

the art. 752 Civil code, which prohibit the assignment of these rights.[13]

The Fiducia contract is a property transferring contract, the property right of the constitutor being provisory transferred and for a determined purpose to the fiduciary, this way the fiduciary achieving the three attributes of property. Although, with regard to the ambiguity of the institution, it can be alleged that the fiducia entails only a dispossession of the assets or rights of the constitutor in the benefit of the fiduciary. In this orientation, a fiducia does not imply a veritable transfer of the property right, in the classic meaning of the notion, because at the end of the contract, pursuant to its provisions or to the law, the assets and the rights return to the patrimony of the beneficiary or constitutor. Practically, the fiduciary shall enjoy extended rights on the object of fiducia, which will make it different from the administrator of the property of others.[14]

In a quite recent article, dedicated to Fiducia, it has been affirmed for good reason, that ***the fiduciary is and is not an owner,*** the author having in view to allege such affirmation, the atypical character of the prerogatives acquired by the fiduciary, obviously relating to the common characteristics of the property right[15].

As a matter of fact, the obligations imposed by contract to the fiduciary are obligations in the interest of other person (beneficiary) and the character of the fiduciary property right is a temporary one which leads to a limitation of the exercise of the owners prerogatives, for the fiduciary the property right not being absolute nor perpetual, being transferred to the fiduciary by the constitutor, strictly in the consideration of a determined objective.

The second thesis of the text of the art. 773 New Civil Code presents also a great importance representing a taking over of the technique used in the regulation of the trust of the Anglo-Saxon and establishing, this way, dedicated assets for the fiduciary, the text corroborating to the general regulation of the dedicated assets, regulation provided by the art. 31 paragraph (2) and (3) New Civil Code. In conclusion, the assets, object of fiducia do not mingle to the assets which were in the patrimony of the fiduciary on the date of the agreement with regard to the fiducia contract, because the assets trusted shall form a particular, distinct mass – the fiduciary patrimony.

In the French doctrine[16] the affirmation according to which *fiducia makes from property a simple instrument in the benefit of a particular finality* has been made.

Starting from the legal definition, we can affirm that *"Fiducia" is the legal operation by which the constitutor provisory transfers some patrimonial rights such as the real estate right/movable property right, receivables, guarantees to the fiduciary, as the fiduciary becomes their holder for the whole period of the fiducia contract, exercising such rights for the purpose established in the contract and at the end of the fiducia contract the fiduciary shall transmit such rights to the beneficiary*.

We can notice that fiducia appears as a complex contractual operation characterised by the existence of a transfer of rights for good and valuable consideration, of an atypical mandate (irrevocable) consisting of the administration of dedicated assets in the benefit of the beneficiary and this entity – transfer, mandate, administration – practically forms the contractual relation resulted from the fiducia contract.

Also, from the content of the legal definition, it can be deducted that the object of fiducia is represented by a series of successive phases, such as: **transfer of the patrimonial rights from the constitutor to the fiduciary; administration of these rights by the fiduciary in the benefit of the beneficiary and finally the transfer of the dedicated assets from fiduciary to the beneficiary.[17]**

As it has been noticed in the specialty literature[18] the content and meaning of transfer, as it is set forth by the art. 773 of the New Civil Code, is vague, relating to the provisions of the art. 32 paragraph (2) of the New Civil Code, because the transfer of rights and obligations from one mass to the other is not an alienation.

In the reduced literature dedicated to fiducia, a series of opinions related to the regulation of the property transfer have been issued, therefore, according to one of the opinions[19] the regulation would have in view both the situation in which the transfer of the assets takes place between two different persons who have the capacity of constitutor and fiduciary, and also the situation of one single patrimony, of a person who has a double capacity, of constitutor and beneficiary. According to other opinion[20], we would find ourselves before of a property transferring synallagmatic contract, but with the existence of legal innovation according to which the transferred patrimony would not superpose on the fiduciary patrimony, each of the two patrimony having an independent existence.

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[13] Pursuant to art. 752 Civil code *The right of use or abitation can not be assigned and the asset, object of this rights can not be rented, or as the case may be, leased.*

[14] A. Rățoi – op.cit. p. 269

[15] For details, see Ion Turcu – „Se poartă Fiducia"- 19.02.2013- article published on the web site http://www.juridice.ro/244256/se-poarta-fiducia.html

[16] Ph.Malaurie, Laurent Aynes – op.cit.p.235

[17] Cătalin R. Tripon – op. cit. pag. 166

[18] M. Uliescu and A.Gheorghe op. Cit. pag 157

[19] see Cătălin R. Tripon – op. cit. pag. 187

[20] Alain Berdah, op. cit. p. 14 (http://www.avocats-droit-affaires.com/images/pdf/la%20fiducie.pdf)

3. Legal characters of the Fiducia Contract

a) Pursuant to the provisions of the art. 774 paragraph (1) thesis I of the New Civil Code, the fiducia contract has to be concluded under penalty of absolute nullity, in authentic form (*ad validitatem*), from this legal provision practically resulting a first legal character of the fiducia contract, respectively, its **solemn character**.

The correspondent of the art. 774, in the civil legislation of France is the art. 2012 Civil Code (French), with the specification that the obligatory character of the authentic form has a more limited implementation in the French civil provisions.

Therefore, pursuant to the art. 2012 paragraph (2) French Civil Code "*if the assets or guarantees transferred in the patrimony of the fiduciary depend on the community of property existing between spouses or a joint property, the fiducia contract is established by authentic document under penalty of nullity".*

In addition to the authentic form imposed by the art. 774 paragraph (1) thesis I, the legislator has provided also a minimum, compulsory content that the fiducia contract should have under penalty of absolute nullity.

Thus, pursuant to the art. 779 New Civil Code, the contract of fiducia has to comprise (under penalty of absolute nullity) all the real rights, receivables, guarantees and any other patrimonial rights object of the transfer provided by the art. 773 New Civil Code. Also, the period for which the transfer is performed has to be specified, it can not exceed 33 years from the conclusion of the contract (*in France the period of the transfer of the fiduciary property is three time longer, respectively 99 years)*, and also the parties identity but also the identity of the beneficiary or at least the rules allowing its determination and also the purpose of fiducia and extent of the administration and disposal powers of the fiduciary.

b) In principle, the fiducia contract is a contract **for good and valuable consideration** therefore the art. 784 paragraph (2) New Civil Code provides that *"Fiduciary shall be paid according to the parties agreement, and in lack of such agreement, pursuant to the rules regulating the administration of the property of others"*.

By exception, the fiducia contract can be free of charge, in the way that the activity of the fiduciary shall not be paid (disinterested act), having in view that pursuant to the provisions of the art. 793 paragraph (1) Civil code. „*except for the case in which, according to the law, the establishing document or subsequent agreement of the parties or actual circumstances, the administration is performed free of charge, the administrator has the right to a remuneration established by the establishing document or by subsequent agreement of the parties or by law, or, in absence, by court order(judgment). In this last case, the practices shall be taken into consideration and in the absence of such a criterion, the value of the services provided by the administrator"*[21]

c) From the Contract of Fiducia, mutual and interdependent obligations arise as we find ourselves before a **synallagmatic contract .**

d) The Fiducia Contract is also a **commutative contract**, the parties being aware of the extent of the obligations and rights they have one to each other since its signature.

e) The Fiducia Contract is a real rights or receivables or other patrimonial rights or an ensemble if such present or future right transferring document.

f) As for the criteria based on which the fiduciary choices are made, the fiducia contract is a ***intuitu personae*** contract.

4. Sources of Fiducia

The current regulation of the civil code admits that fiducia can arise by law or by contract. The wording given by the legislator to the article 774 New Civil Code is quite unclear, the more so as there was no special law which regulates the fiducia in addition to the civil code and neither to do at least a reference to a series of legally established fiducie or that shall be established pursuant to the law.

Probably the legislator has guessed the apparition of such normative documents by which the legal fiducia is being regulated, but till that moment we can talk only about the conventional fiducia.

Even the modifications brought to the Tax Code, or better said, its integrations, by implementation of the civil code, mention the fiducia contracts concluded pursuant to the Civil Code at the art. 25^1 C.f..

The second thesis, paragraph (1) art. 774 Civil code, provides that the fiducia should **be express,** which leads us to the conclusion that it can be established only by law or by contract concluded in authentic form, so not by court order(judgment), unlike the regulation of the *Anglo-Saxon trust*, which can be established also by the judge.

The paragraph 2 of the art. 774 New Civil Code provides that the law in basis of which the fiducia is established is integrated with the provisions of the relative civil code, to the extent in which it does have contrary provisions, which leads us to the above alleged hypothesis with regard to the apparition in the future of normative documents based on which legal fiducia shall be established.

Also, it can be noticed the exclusion of the legacy from the sources of fiducia, this exclusion being justified by the way in which the fiducia institute has been adapted in the system of continental law, not being acknowledged to fiducia the finalities specific to legacies or donations. Therefore, the legislator has inserted the art. 775 in the civil code, text that sanctions with absolute nullity the contract of fiducia, in the situation in which, through this legal operation an indirect liberality in the benefit of the beneficiary

[21] G.Boroi; C.A.Anghelescu; B.Nazat – op.cit.p.204

would be achieved. The supreme sanction in civil matter, provided by the legislator at the art. 775, follows the prohibition of the utilisation of fiducia in the purpose of elusion of the provisions of legacies and/or donations, protecting this way the forced heirship and avoiding the possibility of debtors to avoid paying the creditors.

5. Subjects of Fiducia

In the doctrine[22] it is considered that only two would be the subjects of the contract of fiducia, without making a difference between the subjects of the contract of fiducia and the subjects of the legal operation of fiducia, although if we shall refer to the legal definition, we shall notice that fiducia is a legal operation – notion more complex that the one of contract.

This way, we consider with regard to the subject of the legal operation provided by the title IV of the Civil Code that these are three, respectively (i) the constitutor, (ii) the fiduciary and (iii) the beneficiary (when the beneficiary is a third person). In conclusion, the term of subject of fiducia as legal operation should not be confused by subject of fiducia as part of the contract of fiducia, because, pursuant to the art. 776 New Civil Code part in the contract of fiducia is only the constitutor and the fiduciary, the beneficiary could be, pursuant to the art. 776 New Civil Code, both the fiduciary and the constitutor, and also a third person – situation in which the beneficiary would have the capacity of assignee(successor) case in which the fiducial operation shall represent a veritable stipulation for another.

The constitutor can be any individual or legal person, with the mention that in case of individuals these persons should have full capacity of exercise, respectively to have the right to conclude acts of disposal. With regard to the legal person, this person is presumed by the law of having full capacity of exercise, considering that among its management bodies there are individuals with full capacity of exercise.

To be considered that pursuant to the art. 778 New Civil Code, text practically taken over from the art. 2017 of the French Civil Code, the constitutor, *in absence of contrary provisions*, has the possibility to appoint a person who represents his/her interests in the execution of the contract of fiducia and to exercise the rights arisen from this contract. This text of law practically representing a legal definition of the conventional representation (art. 1295 New Civil Code), resulted from the parties will.[23]

The reasoning of this provision lies in the fact that the legislator did not limit the area of the persons who can have the capacity of constitutor, and because this capacity can be held also by an individual and many of the individuals do not have the necessary competence to supervise a contract of fiducia, the possibility to resort to the services of a third person is totally justified.[24]

With regard to the **fiduciary**, the legislator has imposed for the fiduciary a qualified character, paragraph (2) and (3) of the art. 776 New Civil Code restrictively mention the persons who have the right to conclude contracts of fiducia in capacity of fiduciaries.

Therefore, the legal text provides that "*can have the capacity of fiduciaries*" **only** the credit institutions, the investments companies and the ones of investments administration, companies of financial services, insurance and re-insurance companies, dully established, paragraph (3) completing this enumeration with other two categories of professionals, respectively, the notaries public and the lawyers, regardless the form of exercise of their profession.

We consider that this restriction imposed by the legislator with regard to the persons who have the right to be fiduciaries, was grounded on protection reasons, the purpose being the one to the try to avoid the operations of money laundry and tax evasion, because at international level it is well known that the fiducia is an institute that can be used to hide the money laundry or tax evasion operations.

We also consider that the legislator had in view, by restricting the area of the persons who can hold the capacity of fiduciary to certain categories of persons, the reduction of the above mentioned risks, because the persons specified in the legal text are subject to a a severe control from specialised authorities, such as BNR, ASF etc.

It has to be pointed out also the fact that the fiduciary independently exercises administration powers on the fiduciary patrimony, pursuant to the contractual objective. Therefore, the fiduciary has to be not confused by the employee nor the proxy of the constitutor because the property of the assigned assets is transmitted to the fiduciary[25].

With regard to the fiduciary attorney at law or notary, it can be noticed that any of them could have at least three patrimonies in the meaning of the provisions provided by the art. 31 and 33 New Civil Code, respectively a personal patrimony, a dedicated patrimony for the profession of notary or attorney at law and one or several dedicated patrimonies related to the fiduciary assets.

Till the new civil code became effective, the law 51/1995 on the exercise and organisation of the profession of attorney at law, and also the statutes of the profession, contained, as we have already mentioned above, a series of provisions regarding the

[22] M. Uliescu si A.Gheorghe op. pag 157; Dr. Bujorel Florea – Drept Civil – Drepturile Reale Principale –UJ 2011 Publishing House– p. 217

[23] See A. Răţoi –op.cit. p. 270

[24] R.Constantinovici – Noul Cod Civil – Comment on articles – work in coauthors –CH Beck 2012 Publishing House-comment of the art. 778 C.civ – p. 826

[25] See A. Răţoi – op.cit. p. 270

fiduciary activities, but these were not representative in the light of the actual civil code, being currently modified and in compliance with the common law in the matter of fiducia.

The Beneficiary of fiducia can be any person, the law having no restrictions to a particular category of persons. Pursuant to the art. 777 New Civil Code, "*the beneficiary of fiducia can be the constitutor, the fiduciary or a third person".*

In other words, both the constitutor and the fiduciary can be the beneficiary of the fiducia, the situation becoming instead very interesting when the beneficiary is a third person, this person not being a part in the contract, having a similar position to the one of the beneficiary third party within the stipulation for another (1284 and following New Civil Code).

Also, it is very interesting the issue of the plurality of capacities of the contracting parties, making us analyse whether the capacity of fiduciary could be cumulated to the capacity of constitutor!! the more so as the art. 777 N.C.C. mentions only who can be beneficiary of the fiducia illustrating also the possibilities of the plurality of this capacity but the legislator makes no reference to an eventual incompatibility or inadmissibility of superposing of the person of the fiduciary with the one of the constitutor.

According to a doctrinary[26] opinion as lons as the law does not prohibit such, it results that the two capacities can be cumulated.

Although the law does not prohibit, existing the possibility to interpret that the two capacities could be cumulated, we consider that this doctrinary opinion finds no legal support, by reference even to the definition of the contract, which according to the art. 1166 Civil code *„represents the agreement of two or several persons with the intention to establish, modify or extinguish a legal relationship".*

This way, in the hypothesis of superposing of the constitutor with the fiduciary we would not be in front of a contract, but in front of an unilateral deed. As a conclusion, no plurality of the capacity of fiduciary and the one of constitutor can exist.

Certainly the three capacities (constitutor, fiduciary, beneficiary) can not be cumulated in one single person, because this way, it could be a fiduciary relationship.[27]

With regard to the plurality of capacities provided by the art. 777 N.C.C., we specify that it is very important in the banking field, in the situation in which the bank establishes a guarantee by a fiducia contract, situation in which we shall meet two beneficiaries, but both, under condition.

This way, if we think to the hypothesis in which the debtor transfers an asset by fiducia to his/her creditor (the bank) in order to guarantee the reimbursement of the loan granted . We find ourselves in the situation in which the debtor is the fiducia constitutor and the creditor is the fiduciary, the creditor receiving an asset as subject of fiducia, asset that the creditor shall assign to the beneficiary mentioned in the contract of fiducia at the end of the contractual period. In this situation, there is the possibility that both the constitutor (the debtor) and the fiduciary (the bank) are the beneficiary of the fiduciary, in the same time.

Therefore, it can be noticed that in the above mentioned situation, we shall have a plurality of capacities – constitutor and beneficiary and fiduciary - beneficiary. To note that in order to benefit of fiducia, both the constitutor and the fiduciary depend on the fulfilment or non fulfilment of a condition. With regard to the constitutor (debtor) the constitutor shall benefit of fiducia subject to compliance with all the obligations of the credit contract and the fiduciary (the bank) shall practically become a beneficiary only in the event of non observance by the debtor of the payment obligations resulted from the credit contract.

Obviously, that in the hypothesis of guarantee a credit contract by fiducia, fiduciary can be also a third person to the bank institution, the last being only the beneficiary of the fiducal, and as well as the debtor-borrower is not a condition to be the constitutor but a third person, case in which we would found ourselves in a condition similar to the one of the third party, constitutor of a security.[28]

With regard to the beneficiary individual, we mention that it is necessary that the beneficiary have full capacity of exercise, this conclusion resulting from the fact the acceptance or waiving the fiducia are disposal acts that can not be concluded by persons with limited capacity of exercise pursuant to the art. 41 and 42 New Civil Code.

6. Content of the Contract of Fiducia

Having in view the particular importance of certain assets that can be object of fiducia, the legislator has provided *ad validitatem* also a minimum content that has to be specify in the content of the contract of fiducia. Therefore, the art. 779 New Civil Code provides, under penalty of absolute nullity, a series of minimum requirements in order for a contract of fiducia to be validly concluded.

This way, the contract of fiducia has to contain, **under penalty of absolute nullity**, all the real rights, receivables, guarantees and any other patrimonial rights that are object of the transfer provided by the art. 773 New Civil Code. It has also be specified the period for which the transfer is done, period that can not be longer than 33 days from the date of the conclusion of the contract and also the identity of parties, but also of the beneficiary or at least the rules that allow its

[26] Cătălin R. Tripon – op. cit. pag 197

[27] Hunor Burian - http://jog.sapientia.ro/data/tudomanyos/Periodikak/scientia-iuris/2011-1/5-burian.pdf

[28] For details, see http://www.iordachescu-law.ro/Studii-de-caz/Implementarea-fiduciei-in-practica-bancara-Modalitati-si-conlucrare-institutionala---avocat-Eugen-Constantin-IORDACHESCU--eID81.html

determination, and also the scope of fiducia and the extent of the powers of administration and disposal of the fiduciary.

The article 779 N.C.C. represents a reproduction of the content of the art. 2018 of the French Civil Code with the major difference of the maximum period of the fiduciary transfer, which, as we have already mentioned above, in the French legislation is of 99 years. From the regulation of the art. 779 let. c) it is deducted that the period of the contract of fiducia can be prolonged by agreement of the parties, but only within the maximum period of 33 years.

Although the Romanian legislator has provided a smaller period than the one provided by the French legislation, the Romanian legislator has still kept the provisions regarding the moment of the beginning of the term, respectively, from the date of the conclusion of the contract.

With regard to the scope of fiducia, the art. 773 New Civil Code provides that it has to be determined, the legislator feeling the need to introduce among the compulsory elements of the contract of fiducia also the obligation to insert in the contract the mentions regarding to the scope of fiducia (art. 779 let. f).

Indirectly it is made reference to the scope of fiducia also in the imperative provision provided by the art. 775 New Civil Code, according to which "*the contract of fiducia is subject to absolute nullity if by this contract an indirect liberality is done in the benefit of the beneficiary".* With regard to this interdiction, provided by the art. 775 Civil Code, it has been affirmed[29] that the solution adopted by the Romanian legislator slows down the development of a new law institute, reported to the trust institute from the Anglo-Saxon law systems (England, USA, Canada) where in absence of such limitation, the regulations are much more permissive, the trust implementation having a bigger variety.

Not at last, we have to specify that besides the special regulations provided by the art. 775 and 779 letter f) New Civil Code, fiducia is also subject to the general rules with regard to the scope, which has to be real, licit and moral.

With regard to the **object of fiducia,** it is represented as we have already showed above, by a series of successive stages, respectively the transfer of some of the rights provided at the art. 779 letter a), transfer which is made, pursuant to the art. 779 letter b), by conclusion of a mandate of administrations in the conditions of the art. 792 New Civil Code, but also by the transfer of the use from the fiduciary to the beneficiary. We notice that these operations, although distinct are in a closed interdependence.

Even if the mandate of administration within the contract of fiducia is similar to the mandate of administration of assets of other (792 and following of the New Civil Code), it should not be confused by this, these two mandates being different by their sources and by the capacity of the administrator of the two legal operations.[30]

With regard to the limits of the powers of administration of the fiduciary, the code provides that the extent of the powers of administration and disposal of the fiduciary has to be provided in the contract of fiducia, under penalty of absolute nullity.

This way, it results that the powers of administration and disposal of the fiduciary can be limited by contract, limitation that I consider that it can not be excessive because it would change the nature of the contract.

Still in the content of the contract of fiducia, it can be mentioned also the obligation of the fiduciary to specify the capacity in which the fiduciary acts, as it results from the interpretation of the art. 782 New Civil Code.[31]

As it has been declared[32] the text of the art. 782 represents the bridge between the institute of fiducia and the institutes of conventional representation, administration of assets of others and mandate, the delimitation from the mandate with representation being given by the lack of the obligation of specification of the capacity of fiduciary.

In the situation in which by the contract of fiducia, it is provided the obligation of fiduciary to specify the capacity in which the fiduciary acts, and the fiduciary acts failing to comply with such obligation, concluding an act in the damage of the constitutor, pursuant to the thesis II of the paragraph (3) of the art. 782 New Civil Code it shall be considered that this act has been concluded by the fiduciary on his/her own behalf.[33]

Also, by the manner of drawing up of the art. 783 New Civil Code, the legislator has integrated the provisions of the 779 New Civil Code, establishing, this way, other compulsory element, additional one, that has to be specified in the content of the contract of fiducia, respectively, the conditions in which the fiduciary should be held liable for the fulfilment of his/her obligations.

The legislator did not provide, in exchange, the content of the obligation to be held liable and neither the period in which the fiduciary has to comply with this obligation, letting both the content and the period at the free choice of the parties. From the second thesis of the art. 783, it results that the fiduciary has to be held liable to the constitutor and his/her representative, but also to the beneficiary, upon request of any of them.

It can be noticed the existence of a striking similarity between the obligation to be held liable of

[29] Cătălin R. Tripon op. cit. pag. 172
[30] see M. Uliescu și A. Gheorghe – op.cit. pag. 156
[31] see also G.Boroi; C.A. Anghelescu; B.Nazat op.cit.p.207
[32] A. Rățoi - op. cit. page 272
[33] R. Constantinovici op.cit.p. 829-830 – comment of the art. 782 Civil code

the fiduciary and the same obligation of the proxy within a contract of mandate.

With regard to the sanction that may appear for failing to insert in the contract of fiducia the conditions in which the fiduciary shall be held liable with regard to the fulfilment of his/her obligations, we consider that it can not be absolute nullity.

Therefore, although the text of the art. 783 New Civil Code is imperative, it can be noticed that the legislator did not specify also the sanction applicable in the event of failing to insert in the contract of fiducia the conditions in which the fiduciary shall be held liable with regard to his/her obligations, or if we could apply the sanction provided by the art. 779 New Civil Code, we would adopt a really illegal situation, having in view that the art. 10 of the New Civil Code prohibits the interpretation by analogy when such an interpretation would lead to the enforcement of a sanction. (the text of the art. 779 New Civil Code besides it provides a sanction is still of strict interpretation).

7. VALIDITY AND OPPOSABILITY OF THE CONTRACT OF FIDUCIA

As we have previously mentioned, the contract of fiducia is validly concluded only if the authentic form provided by the art. 774 New Civil Code and also the minimum content specified by the art. 779 New Civil Code are complied with.

For reasons of social safety, in order to eliminate the possibility of committing tax evasion and money laundry (the constitutor – beneficiary being able to take advantages of the funds illicitly obtained through fiducia) the legislator felt the need to impose another ***ad validitatem requirement*** of the contract of fiducia, respectively, the one provided by the art. 780 New Civil Code, text according to which the contract of fiducia has to be registered with the competent fiscal body or with the local public administration, under penalty of absolute nullity.

Also, the eventual modifications of the contract of fiducia have to be registered with the competent tax body, under the same penalty of absolute nullity. The registrations are performed upon request of the fiduciary within one month from the conclusion of the contract or, as the case may be, from the conclusion of the amendments.

The paragraph (2) of the art. 780 New Civil Code provides the situation in which the fiduciary assets contain real estate rights, imposing their registration, of course, subject to absolute nullity, with the specialty department of the competent local public administration authority, within the property is located, the legislator concluding that the regime of land book stays applicable, from which we can interpret that it is necessary also the registration of the contract of fiducia.[34]

The obligation of registration is kept by the legislator and in case in which the beneficiary of fiducia was not mentioned in the contract, it being subsequently appointed, the sanction in case of failure to register being also the absolute nullity.

We can draw the conclusion that the tax registration represents a validity condition of the contract of fiducia, its failure to comply being punished by the absolute nullity of the contract.

Still, this conclusion is no longer valid in the case provided by the art. 780 paragraph (4) New Civil Code, text that provides that if for the transmission of rights is necessary to fulfil special form requirements, a separate act shall be concluded, under compliance with the requirements imposed by the law, in these case, the eventual lack of tax registration attracting the enforcement of the administrative sanctions provided by the law.[35]

Unlike the regulation of the New Civil Code, in the Anglo-Saxon law, the trust is not subject to any tax registration, because the trust character is preponderantly contractual and not institutional as the case of fiducia.[36]

In view to achieve the opposability of the contract of fiducia toward third parties, the Romanian legislator, in the content of the art. 781 of the New Civil Code has regulated the fact that by its registration in the Electronic Archive for Security Interests in Movable Property the fiducia becomes opposable to third parties.

The paragraph (2) of the art. 781 New Civil Code provides that "*the registration of real estate rights, including the security interests object of the contract of fiducia can be done also the in the land register for each land separately"* emphasising this way the rights transferring character of the contract of fiducia, the legislator imposing this way a double publicity of the real estate rights.

8. POWERS OF FIDUCIARY AND ITS REMUNERATION

In relation with third persons, in which the fiduciary shall enter, it shall be considered having full powers on the fiduciary patrimony, *"acting as a true and sole holder of the respective rights except for the case in which it is proved that third parties knew the limitation of these powers*".

As specified by the provisions of art. 781 N.C.C. (*New Civil Code*), a fiduciary is opposable to third parties in the form and at the time of its listing in AEGRM (*Electronic Archive for Security Interests in Movable Property*), whereas art. 779 letter f) provides, under the penalty of absolute nullity, to insert within the contents of the fiduciary contract the scope of the fiduciary's powers, so it can be construed that, in case the fiduciary contract was listed in AEGRM, the third parties knew or ought to know any power limitations

[34] M.Uliescu and A. Gheorghe op.cit. pag 159
[35] See also R.Constantinovici op.cit.p.828 – comment of the art. 780 paragraph (4) Civil code
[36] A. Rățoi op. cit. pag. 272

of the fiduciary or, better said, it is presumed that third parties would be aware of such limitations at the time of listing the fiduciary in AEGRM.

Such an interpretation, although obviously possible in the future legal practice in the matter of fiduciary contracts, would be unfair, as it is well known the fact that in AEGRM is only mentioned the existence of the contract and not its contents, which leads to the idea that the correct solution would be the one in which the fiduciary would provide the third parties with the contents of the contract, so that they can be physically aware of the limitations of the fiduciary's powers.

It can be observed that the fiduciary acts "*as a genuine and sole holder of the rights in question*", thereby consolidating the conclusion that under the fiduciary contract no genuine transfer of ownership is performed.[37]

The fiduciary's powers may be limited under the contract, as follows from the *per a contrario* ("*on the contrary*") interpretation of the provisions of art. 779 letter f) N.C.C., following that such limitations to be specified, under the sanction of absolute nullity, in the contents of the fiduciary contract.

Even though under the contract, the constitutor has the possibility to limit the fiduciary's powers, we believe that the fiduciary will exercise its powers exclusively, and the respective constitutor will not have the ability to interfere throughout the contract's duration in the manner of fulfilling the fiduciary's obligations, having instead the opportunity to held the fiduciary accountable, and if the fiduciary either will fail to fulfil its obligations or will fulfil them poorly, thereby jeopardizing the interests entrusted to him, the constitutor will be able to request the court to replace the fiduciary, pursuant to Article 788 of the Civil Code.

Paragraph (2) of art. 784 provides that the fiduciary's remuneration shall be effected by agreement between the parties, and in the absence of such an agreement, according to the rules governing the administration of the property of others (art. 793 N.C.C.).

9. FIDUCIARY'S LIABILITY

According to art. 787 N.C.C., the fiduciary is liable, only subject to the rights contained in its patrimony, for damages caused by acts of conservation or administration of the fiduciary patrimony.

It can be observed that the law text does not also cover liability for directives that the fiduciary may order in the performance of the fiduciary contract, the legislator considering, perhaps, that they can be assimilated to certain acts of administration in relation to the entire fiduciary patrimony[38] .

Obviously, the fiduciary's liability may be enforced only by court order.

The legislator also provided the sanction of fiduciary's replacement, if he fails to fulfil its obligations or jeopardizes the interests entrusted to him, for this purpose, granting to the constitutor, his representative or to the beneficiary, a right of legal action to obtain a court order for the fiduciary's replacement.

The institution of fiduciary's replacement, as regulated by art. 788 N.C.C., a text which provides both cases of fiduciary's replacement and a number of procedural issues, according to which, **until settling the replacement request**, it shall be appointed a provisional administrator of the fiduciary patrimony, subject to the provisions of art. 792 and the following of the N.C.C.

The provisional administrator shall be appointed [39] according to paragraph (2) of art. 788 N.C.C., by the constitutor, its representative or, in the absence thereof, by the beneficiary, and if each of them simultaneously appoints one provisional administrator, the appointment made by the constitutor or the one made by its legal representative shall have priority.

Given the wording of art. 788 para. (4) N.C.C., a text according to which *"the appointment of a new fiduciary and provisional administrator may be ordered by the court only with the consent thereof"*, we consider that the text of paragraph 2 should be redrafted (by the legislator) for the purpose of replacing the verb "to appoint" with the verb "to nominate". There are two theses which would lead, *de lege ferenda* ("*with a view to the future law*"), to the need of such replacement, namely (i) the one according to which an administrator cannot be unilaterally appointed, considering the necessity for its acceptance of the provisional mandate and (ii) the one for removing the contradiction between the text of paragraph (2) and the text of paragraph (4) on the appointment of a provisional administrator.

Paragraph (3) provides that the mandate of the provisional administrator shall cease when the court shall rule on the replacement request, irrespective of the judge's ruling, and the second thesis states that the fiduciary's replacement request shall be settled urgently and with priority.

We believe that the regulation on the fiduciary's appointment by the court may hinder this operation in practice, because it would be much easier for the court to limit itself to ordering the fiduciary's replacement, following that the constitutor in question, based on the court order for replacement, to obtain the consent of a new fiduciary and, subsequently, to operate the amendment of the fiduciary contract, according to art.

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[37] A. Răţoi - work, quote, page 273

[38] A. Răţoi - work, quote, page 274

[39] We believe that the correct expression would be ***shall be nominated***, given that an appointment is to be made by the court after having first obtained the prior express consent of the provisional administrator

788 para. (6) reported to art. 780 and 781 N.C.C. so that the fiduciary's replacement shall take effect.

It can be seen that, compared to the registration provided by art. 780 N.C.C., that is to be undertaken by the fiduciary, art. 788 para. (6) requires that both the constitutor and his representative, as well as the new fiduciary or the provisional administrator, may register the amendment to the fiduciary contract.

We do not understand why the provisional administrator is listed among the people mentioned in para. (6), given that its mandate ended at the time the court ruled on the request for replacement, probably the legislator intended to also highlight the need for the emergence "on scene" of the provisional administrator, only that the wording of the legal text is really unclear.

10. LIMITATION OF FIDUCIARY'S LIABILITY IN CASE OF INSOLVENCY AND DEPENDING ON THE SEPARATION OF PATRIMONY ASSETS

By drafting art. 785 N.C.C., the legislator regulates the cases of limitation of fiduciary's liability in the event of opening the insolvency proceedings against him, stating that, in this situation, the fiduciary patrimony assets are not affected.

The wording of art. 785 N.C.C. is merely a takeover of the provisions of art. 2024 of the French Civil Code, and stresses not only the separation of the fiduciary patrimony assets from the rest of the patrimony strictly owned by the fiduciary, but also the limitation of the fiduciary's liability when he acts in his own name and concerning his own patrimony assets, without prejudice to the fiduciary patrimony.

Please note that the application of article 785 cannot be extended in the case of a notary - fiduciary or attorney - fiduciary, because Law no. 85/2014 does not apply to these categories of individuals. [40]

Art. 786 N.C.C. provides when can be pursued the goods contained in the fiduciary patrimony assets, the purpose for which the legislator restrictedly lists, in the contents of para. (1), the cases in which the constitutor's lenders may pursue such goods. Thus, the goods contained in the fiduciary assets may be pursued by the holders of claims arising in connection with such goods or by those lenders of the constitutor who have a security interest over his goods, and whose enforceability is acquired prior to the conclusion of the fiduciary contract.

With regard to the other lenders of the constitutor, the second thesis of article 788 para. (1) provides that they have the right to pursue the goods contained in the patrimony assets only where they would produce a definitive court order by which it would be admitted a Paulian action (to revoke), provided by article 1562 N.C.C., so that the fiduciary contract will be terminated with a retroactive effect, or in case a fiduciary contract shall become unenforceable subject to a court order, but also with a retroactive effect.

Considering that the listing of such cases has a limitative nature, it follows that the two situations set out above represent the exception, and the rule being the one according to which the constitutor's lenders may not pursue the goods forming the fiduciary assets.

Under paragraph (2) article 786 N.C.C., the legislator instituted the rule according to which fiduciary lenders benefit only from a general specialized pledge over the fiduciary assets, **except** when the fiduciary contract provided for an obligation of the fiduciary and/or the constitutor to be liable, with their own personal assets, for a part or all of the liabilities of the fiduciary contract.[41] In the exceptional circumstances referred to in paragraph (2), the liability of the fiduciary and/or the constitutor will be assumed only when the fiduciary lenders did not settle their claims following the execution of the fiduciary assets, such liability resembling the one of the guarantor who has not waived the benefit of discussion provided for in article 2294 N.C.C.

11. TERMINATION, AMENDMENT AND RESCISSION OF THE FIDUCIARY CONTRACT

The provisions of art. 789 N.C.C. provide for the situations in which the fiduciary contract may be terminated, amended or, as appropriate, rescinded, stating that as long as it was not accepted by the beneficiary, the fiduciary contract may be unilaterally terminated by the constitutor, highlighting the fact that only upon the beneficiary's acceptance the fiduciary mechanism becomes complete.

Basically, para. (1) of art. 789 N.C.C. states an exception to the irrevocability principle of the legal act's effects, thus making possible, in the matter of fiduciary contracts, the unilateral termination of the contract, but only by the constitutor and only until its acceptance by the beneficiary. For that matter, the wording of art. 789 para. (1) of the Civil Code represents an application of the provisions of art. 1276 of the Civil Code, generally regulating the unilateral termination.

We can see that the legislator does not stipulate whether the acceptance of the fiduciary contract by the beneficiary must take a certain form. It is obvious that in a situation of plurality of qualities, the acceptance is no longer worth discussing, because the acceptance of a fiduciary contract coincides with the conclusion of such contract.

Alternatively, in the case of a third-party beneficiary of the fiduciary contract, what form should take its manifestation of acceptance of the fiduciary contract?! As mentioned above, in the case of a third-

[40] According to art. 3 para. (1) of Law no. 85/2014 - *The procedures provided by this law apply to professionals, as defined in art. 3 para. (2) of the Civil Code, **except for those exercising liberal professions**, as well as those in respect of which special provisions are provided concerning their insolvency regime.*

[41] R. Constantinovici – work, quote, page 832 – comment of art. 786

party beneficiary in relation to the contract, the fiduciary contract appears as a real provision of another contract, so that the acceptance of the contract by the beneficiary shall be also made by reference to the provisions of art. 1286 Civil Code, but not even this legal text provides for the acceptance form and manner *ubi lex non distinguit nec nos distinguere debemus (where the law does not distinguish, we ought not to distinguish)*, it appears that acceptance can be both explicit and tacit.[42]

As a personal opinion, we reckon, for a better practical accuracy, that the acceptance of the beneficiary should take at least a written form, *ad probationem*, though it should not be ruled out the fact that the form of acceptance should be the same as the one of the fiduciary contract, in view of the particular importance that fiduciary assets may have and, at the same time, of the power that an authentic document confers to a legal civil act.

In the event that the beneficiary expresses its acceptance, the law provides that the act of recognition of the fiduciary contract can no longer be amended or rescinded by the parties or unilaterally terminated by the constitutor, except when the beneficiary gives its consent for this purpose or, in the absence of such consent, only with the authorization of the court.

The text of paragraph (2) may be regarded as an application of the theory of unpredictability, mentioning that the amendment or adaptation of the contract may also be required for other reasons than those restrictedly provided by art. 1271 N.C.C., since the law does not distinguish between such reasons.

12. CESSATION OF THE FIDUCIARY CONTRACT

The fiduciary contract ceases after the expiry of the term for which it was concluded or if the purpose for concluding the contract was achieved and occurred before the expiry of the term.

Also, the fiduciary contract may cease if all beneficiaries waive it and, without existing a clause in the contents of the contract stating how fiduciary relations are to be conducted in such a situation, the cessation of the contract shall occur on the date on which registration formalities are completed for the last waiver.

Last but not least, the fiduciary contract ceases at the moment of ordering the opening of insolvency proceedings against the fiduciary or when, according to the law, the effects of the legal entity's reorganization are occurring.[43]

In addition to the causes provided for in art. 790 N.C.C., we believe that there is a fifth case of cessation of the fiduciary contract, respectively the situation of cessation of the statute of attorney or notary, under the law.

Last but not least, regarding the *intuitu personae (on a personal basis)* nature of the fiduciary contract, the death or cessation of the fiduciary's existence, may lead to cessation of the effects of the contract.[44]

13. EFFECTS OF THE CESSATION OF THE FIDUCIARY CONTRACT

According to art. 791 N.C.C., upon cessation of the fiduciary contract, the fiduciary patrimony assets existing at that time are transferred to the beneficiary, and in his absence, to the constitutor.

The cases in which the transfer is operated towards the constitutor are provided by art. 790 para. (2) N.C.C., in the remaining cases the transfer is operated only towards the beneficiary.

Also, we can distinguish between the assumptions according to which, at the time of cessation of the fiduciary contract, there is a beneficiary or not, and not because he would have waived the fiduciary contract, but because he either has not been determined under the rules of the contract, or because the beneficiary - a natural person, is deceased and has no heirs, or the beneficiary - a legal person, has ceased to exist under the law.

After cessation of the fiduciary contract, the fiduciary patrimony assets transmitted to the beneficiary or the constitutor shall exist until performing the payment for fiduciary debts, as a patrimony of affectation regulated by law, according to art. 31 para. (3) final thesis N.C.C., so that after paying the fiduciary debts, the fiduciary patrimony assets shall merge with the patrimony of the beneficiary or the constitutor, as appropriate.

The wording of art. 791 N.C.C. is obviously unclear, if we consider the situation where among the goods forming the fiduciary assets we can also find real estate, thus wondering how is to be conducted the transfer of ownership from the fiduciary to the beneficiary or the constitutor? Under the law? Under the contract, which has just ceased? But how will such ownership be tabulated, under which act? We believe that the legislator should complement the provisions of art. 791 N.C.C., and must clearly regulate the situation in which the fiduciary patrimony contains real estate.

14. THE MAIN EFFECTS OF THE FIDUCIARY CONTRACT

A. The transfer effect

As shown in this paper, upon the conclusion of the fiduciary contract, it is operated a transmission with a private title of one or more patrimonial rights, from the constitutor to the fiduciary.

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[42] Cristina Zamşa - the New Civil Code - Comment on articles - co-authored paper - CH Beck 2012 publishing house - comment of art. 1286 Civil Code – page 1354

[43] For details on this manner of cessation of the fiduciary contract, see Ion Turcu - "Se poartă Fiducia" - http://www.juridice.ro/244256/se-poarta-fiducia.html

[44] G. Boroi; C. A. Anghelescu; B. Nazat – work, quote, page 212

The patrimonial rights subject to the transfer may be, under art. 773 N.C.C., real estate rights (movable or immovable property), rights for claims, but also guarantees, such as mortgages or even a specific claim that was previously assigned (*anticipated*) to the constitutor as a guarantee, indicating that such rights can be both present, thus existing at the time of conclusion of the fiduciary contract, and also in the future.

As soon as the fiduciary contract was concluded and registered under art. 780-781 N.C.C., the fiduciary becomes the exclusive owner of the rights forming the object of the fiduciary contract, and the constitutor no longer has the opportunity to exercise such rights throughout the period for which the fiduciary contract was concluded, the only one able to stand on such rights is the fiduciary.

As we have seen, the transfer of property or other rights from the constitutor to the fiduciary is temporary (throughout the duration of the fiduciary contract) and with a contractually determined purpose, thus bringing a number of limitations to the rights transmitted to the fiduciary.

Although there is a transfer of ownership or other rights from the constitutor to the fiduciary, we must not confuse the fiduciary property with the common property, the fiduciary having, besides rights, a series of obligations established under the fiduciary contract, obligations that must be met in order to achieve the purpose for which the fiduciary contract was concluded in the first place.

Throughout the entire period for which the fiduciary contract was concluded, the fiduciary, even though it "*acts as a genuine and sole holder of the rights in question"*, must not lose sight of the purpose of the fiduciary contract, the mission entrusted to him by the constitutor under this contract, and the fiduciary cannot exercise at its sole discretion the fiduciary ownership.

We can conclude, in this respect, the fact that the fiduciary property confers only a temporary exclusivity to the fiduciary and is not an absolute one, thus observing the major difference compared to the common property, which is of an absolute and perpetual nature.

By its nature, the legal operation of the fiduciary contract involves a number of limitations, the parties being able to limit, in their turn, the legal operation itself, under the powers of the convention.

For this purpose, the parties to a fiduciary contract may decide, in the event that the object of the fiduciary contract would be the ownership over a building, that such constitutor shall use, during the performance of the contract, the building in question, although the fiduciary has acquired, as guarantee, the ownership over that building. The example given resembles very much the situation of the real estate lease contract of the **leaseback** type **(*sale and leaseback*)**, where the landlord alienates the property to the leasing company, which thus becomes the owner, afterwards concluding a lease contract for the building in question, so that at the end of the lease contract, the funder (the leasing company) will transfer ownership back to the user.

Also, under art. 779 letter f) N.C.C., the parties may impose a number of limitations on the acts of administration or directives that the fiduciary may conclude in the exercise of its prerogatives obtained under the fiduciary contract. From the wording of the regulations regarding fiduciary contracts, it can be inferred that in the absence of a stipulation to the contrary, the fiduciary may conclude acts of conservation, administration and/or directives, without needing the consent of the constitutor or beneficiary; however, it is necessary to mention that, according to art. 779 letter f) N.C.C., in the contract it must be provided, under penalty of absolute nullity, the extent of the powers of administration and directive of the fiduciary.

Interpreting *per a contrario* the provisions stipulated by art. 779 letter f), it follows that the parties to the fiduciary contract may establish a limitation of the fiduciary's powers, thus allowing him to conclude solely acts of conservation or acts of conservation and administration. However, we consider that limiting the powers of the fiduciary to the extent that he shall be entitled to perform only acts of conservation, would lead to a change in the legal nature of the contract, resembling more to a storage or mandate contract, by onerous title, is true, rather than a fiduciary one. In conclusion, we believe that the fiduciary's powers may be limited under the contract, but such limitation should not be a major one because it could lead to a requalification of the contract.

The Romanian legislator did not provide, in the matter of fiduciary contracts, the method for bearing the risks associated with losing movable or immovable property, in the event where such goods are included in the fiduciary assets.

Given the absence of a legal provision expressly providing the taking over of the risk of property destruction, within the fiduciary contract, we believe that, in the matter of fiduciary contracts, the general provision is applicable, as established by art. 558 N.C.C., covering the risk of destruction of the property, thus resulting that, in the absence of a provision to the contrary, the fiduciary, after becoming the owner of the property, will also bear the risk of fortuitous destruction thereof.[45]

The fact that under the fiduciary contract is operated a transfer of ownership, atypical for that matter, but still operated, the fiduciary must be guaranteed as well. The law provides for the right of the constitutor to hold the fiduciary accountable; however, the law provides no specific liability in what concerns the constitutor, in the event where the

[45] See also G. Boroi; C.A. Anghelescu; B. Nazat – work, quote, page 203

fiduciary would be prejudiced either by the defects of the goods forming the fiduciary patrimony or by third parties that would be entitled to claim such property or even by acts attributable to the constitutor, and even if such acts occurred after the conclusion of the fiduciary contract.

We believe, regarding this situation, that the constitutor must borne the obligation to guarantee the fiduciary, just like the seller guarantees the buyer in the matter of a contract of sale and purchase, following that such application will be made without restrictions, and in the matter of the fiduciary contract, of the provisions of art. 1695 and the following N.C.C., but also those of art. 1707 and the following N.C.C., provisions that regulate the guarantee against eviction, respectively the guarantee against defects of the property in question.

B. Separation of the fiduciary's personal patrimony from the fiduciary patrimony assets

Patrimony separation, in the matter of fiduciary contracts, is of the utmost importance, being governed by the second thesis of art. 773 N.C.C., a regulation which is corroborated by the general provision regarding the patrimony of affectation, as provided by art. 31 para. (2) and para. (3) N.C.C.

Patrimony separation, in the matter of fiduciary contracts, gives rise to a fiduciary patrimony distinct from the personal patrimony of the fiduciary, thus protecting the fiduciary against incurring obligations arising in relation to the goods forming the fiduciary assets.

At the same time, the fiduciary, under the fiduciary contract and within the powers which have been conferred by it, may give directives regarding the goods forming the object of the patrimony of affectation, following that any goods acquired in exchange for the alienated ones to be also included in the fiduciary assets.

In conclusion, we believe that through the conclusion of a fiduciary contract, there is a transfer of patrimonial rights from the patrimonial assets of the constitutor to a fiduciary patrimony, which is distinct from the personal patrimony of the fiduciary. However, we must not confuse the transfer of patrimonial rights conducted according to art. 773 and the following N.C.C., with an alienation of such rights, as art. 32 N.C.C. provides that in case of affectation, the transfer of rights and obligations from a patrimony asset to another does not constitute an alienation.

C. The effects of the fiduciary contract in relation to the constitutor's lenders

As we mentioned above, the parties to the fiduciary contract are represented by the constitutor and the fiduciary, whereas the beneficiary, if not confused with one of the contracting parties, has the status of *habentes causam*, and in relation to the constitutor's lenders, the contract is merely *res inter alios acta (a contract concluded between others, which cannot adversely affect the rights of those who are not parties to it).*

Usually, the third parties are not affected by the conclusion of a certain legal document, in the meaning that the act is not in their benefit neither in their detriment. With regard to the contract of fiducia, it can be quite a lot in the detriment of the creditors of the constitutor, who will no longer foreclose the assets of fiduciary mass, unless to the extent in which they hold security interests on the fiduciary assets, registered prior to the establishment of fiducia.

This way, as we have already showed at the point 10 above, the Art. 786 of the New Civil Code provides when the assets from the fiduciary patrimony can be seized, purpose in which the legislator has restrictively enumerated at the paragraph (1) the cases in which the creditors of the constitutor can put these assets under seizure.

In practice, it shall be probably, the tendency of some legal persons to protect a series of patrimonial rights, using the legal operation of fiducia in the detriment of its creditors, than, after the establishment of fiducia, the respective constitutor, legal person, to ask the court to open the procedure of insolvency.

We consider, that in the light of the provisions of the art. 117-118 of the Law 85/2014 the legal administrator can make a request to the syndic judge by which it can request the annulment of the contract of fiducia, request that shall be allowed by the syndic judhe, but only subject to the conditions provided by LPI.

Short opinion on the implementation of fiducia in the contemporary legal practice

Although, more than 3 years have passed since the appearance of the Civil Code, the fiducia is not used in practice in any of its forms[46] situation that leads to a penury of case law.[47]

We can not understand why, from the multiple applications of the fiducia as guarantee or fiducia as administration, in practice, at least the fiducia as guarantee of the banking loan is not used.

A mortgage contract concluded in view to guarantee the reimbursement of a banking loan does not grant to the mortgagee the same advantages as the ones of which it can benefit in case in which it should conclude a contract of fiducia to guarantee the reimbursement of the loan.

This way, if a bank concludes a loan credit for the reimbursement of which the borrower guarantee with a mortgage on a property, in case of opening the proceeding of insolvency of the borrower, the bank shall file lodgement of claim, this way, acquiring the capacity of participant in the procedure of insolvency

[46] Unlike the Anglo-Saxon law, where the *trust* has three forms (guarantee, administration and the one concluded for performance of a liberality) in the Romanian law, fiducia has only two of these forms, respectively, ***Fiducia* as guarantee and *Fiducia* as administration**.

[47] Ion Turcu – „Se poartă Fiducia" - http://www.juridice.ro/244256/se-poarta-fiducia.html

of the borrower, but without foreclose the mortgaged property, waiting either to collect the receivables according to an eventual reorganisation plan either it shall assist to the bankruptcy procedure till the liquidation of the asset of the debtor.

In exchange, having in view the same hypothesis but replacing the contract of real estate mortgage with a contract of fiducia as guarantee, in which content the lending bank shall cumulate the capacities of fiduciary -beneficiary, the opening of the procedure of insolvency of the constitutor – borrower shall not cause more problems to the credit institution with regard to the recovery of the debt, because in its capacity of fiduciary, the bank is the owner of the property subject to fiducia, and if the constitutor-borrower shall not pay the loan, the bank shall not be restricted by the procedure, the bank being able even to alienate the property, object of fiducia.

In this case, the bank could be in the table of the obligations of the constitutor debtor, strictly to recover the unpaid remuneration, established by the contract of fiducia, and even for an eventual difference uncovered by the value of the asset, subject to fiducia.

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PERSONAL INSOLVENCY

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Abstract

In 2014 a draft bill on personal insolvency reached public debate, stirring controversy in both financial and academic environment. The current paper aims at analyzing the merits and weak points of the draft bill.

Keywords: *insolvency, debtor, creditor, restructuring, bankruptcy.*

1. Introduction

The international insolvency proceedings' regulation extends now not only to trade entities, but also to the municipal and individual proceedings.

Many European countries have a long standing practice in restructuring the financial situation for individuals who are unable to efficiently cover their debts.

2. Content

Personal insolvency, also known as "personal bankruptcy" (which is scientifically inaccurate) has been generating significant doctrine and ethical controversy, even in jurisdictions with an old and constant practice. The inaccuracy comes from the fact that –traditionally-the notion of bankruptcy proceedings ends with the dissolution / liquidation of the entity (such as in trade companies' case). Of course, this rule could not apply accordingly in insolvent individuals.

Therefore, this notion appeared from the need to protect the indebted citizen, a more understanding approach than the one which characterized the nineteenth century: the debtors prison.

Almost two centuries ago, in order to obtain a bank loan, Romanian traders had to be registered with the Trade Register, to be debt-free and not been sentenced to the debtors' prison.

The drastic approach from the nineteenth century (which characterized that historical time) left a strong imprint on society, as we see it reflected even in the literature of the time. The work of Charles Dickens would have clearly had another profile, would the author not been scarred as a child by his family's sentence in the debtors prison, after unnecessary expenses his parents made.

Therefore, individual insolvency requires a 'personal' approach, different from the "technical" one (appliccable to trade companies) because the regulation borderline touches upon individual rights and freedom and because, without aiming at that, the proceedings also affect the rights of third-party individuals, who need not be affected.

We cannot help wondering if regulating this procedure isn't a form of legislative regression after the human rights' expansion from the twentieth century.

Also, the current Romanian legislative bill breaks the rule according to which liability is personal, given the fact that the procedure affects third-party individuals who are dependent on the subject of the procedure (e.g.: minors, etc.). Given the fact that liability occurs where there is lack of responsibility, and dependent individuals had no contribution to the subject's deteriorated financial situation, one may notice that the grounds for liability is missing (the prejudicial deed).

The need for such regulations has been extensively debated in Romania. The procedure itself -theoretically- supports the individual debtor (non-trader), and its main creditors (in this historical stage) are the banks and the financial institutions. Under these circumstances, banking associations have been putting substantial pressure on the (not only) Romanian legislative against such proceedings.

This regulation blocks the banking creditors' direct foreclosure, including banks in the wider cathegory of guaranteed creditors.

This is one of the reasons why there were several attempt to regulate the issue in Romania, all far from materializing, given the existing agreement between Romania and the International Monetary Fund.

Critics argue that such a regulation could undermine the bank loan payments discipline, stating that that the credit discipline contributes to strengthening the country's financial stability.

As a consequence, the Romanian National Bank estimates an increase in the level of guarantees required by the financial and banking institutions for offerring a loan.

Studies conducted by the European Commission concluded Romania is a country with very weak protection for overindebted individuals.

Another aspect of the issue generated by personal insolvency is that of managing and protecting personal data during the restructuring plan's

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implementation, given the fact that international law takes stronger measures for securing data.

In other legal systems, the procedure was regulated by separate laws (e.g.: Australia, Italy), or as a mere section included in the insolvency proceedings law (e.g.: Germany, France, Czech Republic, Austria).

At the moment, the Romanian legislation, doctrine and consequently, practice are almost absent, with just the recently published project-bill to debate on.

Personal insolvency aims at ensuring a balance between the protection of the good faithed debtor and defending the creditors' interests.

Should the restructuring procedure end with full debt coverage, the good-faithed debtor (confirmed with such conduct) is given the chance for a „fresh start", as stated in Chapter 11 of the US Insolvency Code.

The doctrine follows two contrary directions: the strict enforcement of the "*pacta sunt servanda*" principle and sharing the debtor's responsibility with the contracting creditors. The first opinion denies the need to regulate this institution, while the second deems it as necessary.

There are three models for individual insolvency: the North-European one, the German one and the Latin one.

The advantages of regulating the procedure are: foreclosure suspension for procedures in progress on commencement of the proceedings; ceasing the flow of interest and penalties for late payment; all debs become chargeable and liquid and termination of all debtor's proxies (mandates).

The subject of the procedure will be an individual without entrepreneurial activities, insolvent, which will reimburse debts according to a plan and/or due to asset capitalization.

The terms to meet for undergoing this procedure are: residence in Romania; assets or sources of income in Romania; the individual does not act as an entrepreneur at the time of application and the absence of debt resulting from commercial activities conducted in their own name.

The debtor is deemed to be unable to pay its debts, two or more claims, towards two or more creditors within 30 days of the due date.

The creditor might also apply for insolvency for an individual debtor, but will need to prove that the debtor is unable to pay its due debts and its claim against the debtor exceeds the amount of Lei 25000.

In other legal systems, the threshold is Pounds 750 (in the UK) or AUD 5000 (in Australia).

In case the procedure is initiated at the debtor's request, they will state the reasons for which they are unable to pay the due debts on their own responsibility .

The request to initiate the procedure will be accompanied by a report of available income and assets, including data on revenues expected to be achieved over the next five years and information on their income in the last three years, along with the debt situation and details of the involved creditors. All statements are given on own responsibility.

The debtor needs to highlight individual assets with a value over Lei 1000 they alienated in the four years before the application and draft a proposal for the debt payment plan.

In order to support the debtor and based on the above-quoted principle of joint liability of the creditor and debtor, at the debtor's request, creditors must provide a written statement on their claims against the debtor, to assist in preparing the report on property and income, highlighting the amount of debts, interest and other costs.

The only party allowed to suggest a plan is the debtor, even though it might add an extra responsibility for them.

This regulation generates a theoretical dilemma: if the debtor oneself is able to draw up a viable and efficient debt payment plan, then:

a. How did one become insolvent (excluding fraud)? and

b. Why would the whole procedure be necessary, if they can manage their financial restructuring alone? Under these circumstances, isn't the procedure a form of law abuse (to suspend foreclosure) and an additional, unnecessary expense?

Regarding the above-mentioned procedural expenses, these will be covered from the debtor's assets, and if the funds are insufficient, the court shall not be able to dismiss the application for commencing the proceedings on these grounds only, and the source of the funds will be a budgetary one.

From this point of view, one could conclude that the legislative applies the principle of (social) solidarity by covering private costs from budgetary sources, while this is a quite unfair to other taxpayers.

Concerning the application of the "good faith test", we might consider that the draft which is currently under consideration adopts the North-European model, given the fact that the court will refuse to open the insolvency proceedings in case the failure to pay is due to the debtor's fraudulent or irresponsible behavior.

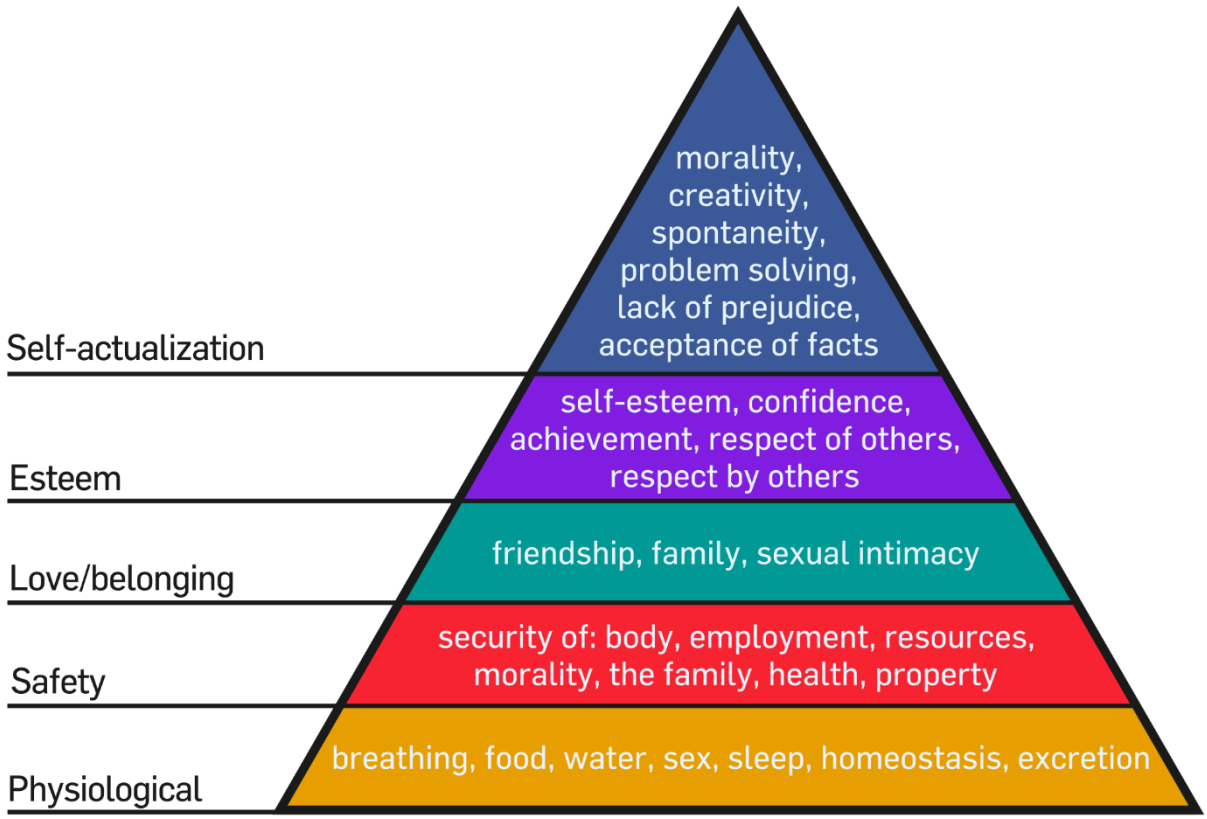
The theoretical dilemma is generated by the exact definition of the debtor's irresponsible behavior of (the fraud is ruled by law).

How can one deem as irresponsible behavior the acts of an individual who freely exercises personal rights and freedom, who cannot anticipate that (in 3 or 4 years) will undergo a strict financial evaluation procedure?

In the 21st century, the exercise of most individual rights (e.g.: access to culture, to higher education, etc.) is financially conditioned, so the draft bill does not state how one will appreciate the

responsible / irresponsible investment in cultural or professional improvement, for instance.

of the nominal value of its claim as recorded in the list, unless they agree in writing to a lower percentage.



Regarding the „personal" feature of these proceedings, one must emphasize that, given the complex character of the human being, a "technical", accounting assessment of previous expenses and of those recommended during the restructuring plan implementation cannot be a rigid, accounting one.

The individual features of the subject are a factor which must be taken into account in assessing the necessary costs of living, such as the bill indicates.

Abraham Harold Maslow's pyamid of needs[1] suggests a landmark which is necessary, but not sufficient in auditing financial statements of the previous three years and planning for the future.

The draft bill states that the judicial administrator shall approve the minimum allowance for the debtor and the people who depend on them which shall cover basic needs, and cannot be larger than the minimum wage.

Other reasons for dismissing the insolvency proceedings commencement application are: if the individual is in (financial) default or has undergone a similar procedure in the past 7 years.

By means of the restructuring plan, an unsecured creditor should receive compensation of at least 40%

One of the most controversial effects of the procedure regulated by the current project is the automatic cancellation of donations and other transactions carried out by the debtor free of charge within three years prior to the personal insolvency proceedings' commencement.

Such justified and very suitable measure in commercial insolvency cannot, however, be copied *mutatis mutandi*s in the personal insolvency proceedings.

It unreasonably affects the rights of an individual (quite solvent at the time who freely exercises their rights on private property), and of the beneficiary of the donation who did not know and could not anticipate the reinstatement of the parties in the initial situation by returning the property to the initial owner.[2]

In addition, any transaction with a related person (spouse, partner, children, grandchildren, parents, grandparents, siblings, their spouses, partners and children who live with them, as well as any other individuals who live with them and depend on the subject of the insolvency proceedings) will be considered a suspicious transaction according to the definition from the Romanian Insolvency Code.

[1] Abraham Harold Maslow, The Pyramid of needs, source: Wikipedia.

[2] One should take into consideration the irrevocable feature of a donation (from the Civil Code), with very few exceptions, which are not to be found in such cases.

As a result of commencing the personal insolvency proceedings, the debtor shall comply with the instructions on the judicial administrator regarding the assets which are subject to the procedure, will provide all the information requested, will not be able to alienate their assets and is required to identify additional sources of revenue, in case they are unemployed.

The debtor must refrain from any transactions and behaviors that may lead to the restructuring plan's failure (while the notion „improper behavior" is not deemed a proper definition), must submit the judicial administrator all amounts collected from legacies, donations, compensation and the extraordinary income and must not take on new responsibilities that they cannot meet to the due date (again, the notion of "new responsibility" is not defined in the draft bill).

The debtor may not refuse a reasonable opportunity to obtain income, and must inform the court and the judicial administrator on any and all changes of residence or their professional activity.

These last ideas of the draft bill (although possibly justified by the need to prevent the debtor from failure to observe the timetable) are more similar to the criminal measure of Court supervision (Court order), regulated in article nr. 215 of the new Criminal Procedure Code. But, such measures are justified in the criminal supervision area, based on the assumption of alleged crimes and aimed at controlling the social threat that the alleged criminal poses[3].

Another restriction of personal freedom may be the fact that should the a legal document by means of which the individual debtor refuses to accept a gift or inheritance without the judicial administrator's consent is not valid.

Another unfounded consequence stated by the draft personal insolvency bill which breaches a number of rights is the fact that the debtor against whom personal insolvency proceedings were initiated and completed may not be the sole associate in a limited liability company for five years from the moment the personal insolvency proceedings end.

Or, the purpose of the procedure is that the individual becomes once again become a viable taxpayer, so that, the measure is unjustified, since it can not be a sanction for fraudulent acts, and, therefore, appears as an unjustified limitation.

As an exception to the rule that a debtor subject to personal insolvency proceedings may be acting as an entrepreneur (authorized), the insolvency proceedings may commence should the creditors agree, the main debt does not exceed Lei 45000 and the debtor has no more than 20 creditors at the time of the application is initiated.

The recorded claims shall be analyzed and reviewed by the judicial administrator within 15 days of the end of claims registration period, who shall draft a list of the debtor's assets within 20 days of the personal insolvency proceedings commencement.

Considering the fact that the draft insolvency bill aims at protecting the interests of debtors and sanctioning the less diligent creditors, the unrecorded claims cease to exist on the date the plan is actually enforced.

As a common feature of this project bill with the regulation concerning the municipal insolvency proceedings[4], we find the lack of a proper ending.

Namely, the draft bill does not state which is the consequence of failure in reimbursing all debt at the end of the period indicated by law.

If in commercial insolvency, failure to reimburse debt and restructure leads to bankruptcy (liquidating the entity), in the case of the other two subjects of law, the individual and the municipality, in which cases, liquidation is not an option, there is a legislative void.

Clearly, individual insolvency proceedings is resumed, and is not to be restarted, while the situation remains difficult for both creditors and debtor, with a lack of perspective of protecting and promoting the interests of both parties.

3. Conclusions

In terms of a rigorous multidisciplinary regulation, personal insolvency proceedings have the potential to be, along with the municipal and the commercial one, a legal solution for the high indebtedness level.

Such a law should observe the limits of individual rights and freedom (not only of the debtor, but also of those depending on them).

But more than that, it should be efficient, and so it should have a purpose (a trading one for creditors by covering liabilities), representing not merely a procedural extra cost and an opportunity for law (judicial) abuse, but a fair and advantageous solution for both debtor and its creditors.

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[3] Article nr. 215 from the new Romanian Criminal Procedure Code states: […]
b) one must inform the authority of any change in their residence;
f) one must periodically inform the authority of their financial means
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SHORT CONSIDERATIONS ABOUT THE PRECIPUT CLAUSE IN RELATION TO MATRIMONIAL CONVENTIONS

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Abstract

The preciput clause is a subject of dispute since the new Civil Code entered into force.Several question arise in this field: is this clause a liberality or a donation, which matrimonial regime is compatible with the preciput clause, for what reason the legislature choose to regulate preciput as a clause and not as an agreement and the expressed doubts can be continued as regard to the new civil law.The authors of this article are not having in mind to put an end to all those debates they are just proposing an investigation of the preciput clause under two aspects:legal nature and aplicability as related to the matrimonial regimes – legal community, separation of assets and conventional community with accents on the normative evolution as a result of social and economic changes.

Keywords: *preciput clauses, matrimonial conventions, liberality, donation, agreement*.

Introduction

The patrimony benefits that are not a current creation in the different legislative systems will always be a debate theme of the doctrine makers, if we consider their effects on the patrimonies of persons who are alive, but especially the consequences of their establishment over the patrimonies sent to the heirs. The reasons that lead to their genesis and the change step by step of the optics concerning the implementation means in the variable positive norms depending on each community are especially of our concern. As species, the matrimony benefits at the crossroad between the family law and the inheritance law integrate the idea of "freely interested" which is set at the crossroad between the bounds and donations without being yet able to be embedded with arguments in any of both categories.

It is imposible to talk about the preciput without analyzing the matrimonial conventions, organizing the patrimonial relationships between spouses or future spouses.As will be pointed during this study the evolution of those notions is indestructibile attached to the evolution of society, of the position of the separation of the wife"s fortune from the husband"s fortune and at last but not least of the intention of the spouses by reference to their relationship and in the same time to the heirs.This connection makes it so difficult to define, beyond the aplicable legal provision, the true intention and also the moral one when a preciput clause is intervening.

Evolution

The preciput clause is not a novelty, being known as a mechanism since the II B.Ch. millennium, proofs of the practices regarding the preferential partition being identified in the Ur or Nipur[1] cities. The first new born right as patrimony benefit of him is even mentioned in the Old Testament, as in the case of father's death, he received two parts of the inheritance, and the others, one part[2] . Although "the paradigm of legal relation between the giver and receiver", loaded with a certain "moral consistence", having its origins in the principles applicable to an old testamentary heir right, was taken over by either forms in the encodings along the times. [3] However, we think that the delimitation of civil authority areas from the ecclesial area in the matrimony field or in its related one is one of the most acute, by the sociologic change of approach of the family institution and implicit of the subsequent inheritance rights (by the Decision of French Cassation Court, this was decided as not being contrary to the good habits, the liberality whereby its author follows the maintenance of an adultery

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[1] for the details about the inheritance vocation, based upon the heirs' masculinity principle and the benefits granted by inheritance to husbands, who did not have a dovery see Bianca Albu, Daniel Chelariu, "The husbands' preciput – a protective "Legal arachnea"?, scoaladreptuluiorganic.ro/aplicațiimetodologice/preciputul_sotilor.pdf, Nadia Cerasela Aniței, Preciput clause in the matrimonial agreements, http://edituralumen.ro/wp-content/uploads/2012/07/jurnalul-de-studii-juridice-supliment-3-2012.pdf

[2] Eugeniu Safta - Romano, Legal archetypes in the Bible, Polirom Publishing House, Iasi 1997, p 99

[3] Ion Chirilă, Marriage and inheritance law elements in church legislation, p.8 and further, http://www.studia.ubbcluj.ro/download/pdf/713.pdf

relationship he had with the beneficiary of liberality[4] ; the distinction of French doctrine makers between the effects of adultery and non-adultery liberalities, the progress of moral and interpretation of deciders' will or of an agreement parties, either we talk about a matrimony agreement, or we are in front of a civil solidarity pact, there are issues converging to the need of a careful reading of intention, irrespectively of its anchoring in the micro-reality of relationship or in the social macro-reality; on the other hand, we must not forget that affectio maritalis and concubinatio had been present institutions since the Romans' time).

Whereof the inspiration source of the Romanian law giver with respect to the preciput clause, namely the French civil code, we shall focus on certain progress marks of it, specific to French law. In this system, the matrimonial regime (generally the family law) knew a demarcation between the North side of the French territories, where a customary law is applied, which allows the bound of both husbands' fortunes and the South side, where the condominium of the husbands' assets was unthinkable, the rule being given by the dovery system. From the analysis of royal documents, Edit des meres(1567), Ordonnance de Blois(1579), it results the intention to protect the children by the first marriage, against consequences (considered as suspect sometimes) which a new marriage could have. In the case of widows, on the other side, their protection was expressed by the taking over of their own assets, of a half of movable assets shared and a dovery computed sometimes at the value of a half of the deceased husband's own assets, on the north of the country and by retaking the dovery brought on the time of marriage and procurement of an amount of the deceased husband's own assets, computed rated to the value of dovery originally brought into marriage, in the south. The establishment of a community of common assets has been materialized along time by the marital agreements that included, besides the dovery, the wife's own assets, provided that the value brought by each of both husbands to be equal. By the same deed, yet, after the establishment of common assets, the assets that wife was to take over after her husband's death (douaire) were specified before the notary.

The above mentioned system does not represent itself a novelty if we return in time to the age of Justinian emperor and to *dos profecticia* or *dos adventicia* (the doveries brought on the marriage, by the bride's father or even by wife) or to *donatio propter nuptias* (donation on the account of marriage, made by the husband), intended to serve the wife's and children interests, in case of dissolution of marriage or husband's decease[5].Besides *douaire*, in the most of the marriage of 17th century, in Paris, we find the preciput clause, having a similar profile at least at the intentional level, to the one mentioned by this paragraph, namely the establishment by the husband, for his wife, of the right of taking over a certain part of his fortune, before its division between the heirs. Whereof, as shown by the written law of 16th century (inheritance of the Roman Empire) specific to the French South, the wife's assets were under the husband's management, only the dovery and iota of assets received by her by inheritance or donation (paraphernalia) being for the benefit of wife, the right of poor widow to a quarter of assets (quarte du conjoint pauvre), which she acquired under ownership provided that there were no children resulted by marriage or with usufruct title, provided that there were up to 3 children alive that time, will be warranted by the initiated reforms.

It is still required the clarification of the fact that the preciput could overlap on the right of the first new born, but, as resulted by the mix of French condominium law, with the French law, it results that preciput could be found, too, in the donation or as testamentary clause, so that between the droit d'ainesse (the equivalent of primogeniture)[6], which means the right of the new born and cannot be altered by the will of decuius and preciput, at least at the historical level, a full similarity of meanings does not exist.

Legal notion

The clause of preciput is found in our civil law, as inspired from the French regulation, the correspondent of French civil code being identified by articles 1515-1519. The term included by Art. 333 par. 1 of the Civil code is not clear, but rather a report to the content of matrimonial agreement, irremediably binding the existence of preciput to the existence of the agreement. We don't understand why the law maker builds a definition of the clause with no respect to terms like: "decision", "provision", "stipulation" if we only consider the meanings existing in the explicative dictionaries[7], being only limited to the description of the object and effects of such a clause. Additionally, the text of Art. 1516 of French Civil code refers to preciput as a matrimonial agreement between partners, too[8], so it would have been more appropriate, by the opinion of the authors of this study, the definition of preciput (not of the clause) resulted by other arguments shown below, as an agreement between the man and wife or the future man and wife. In the same meaning,

[4] Cass., 1-ere civ., 3 februarie 1999, H. Capitant, F. Terré, Y. Lequette, *Les grands arrets de la jurisprudence civile*, Dalloz, ed. a 11-a, 2000, Tome 1, p. 143

[5] George Mousourakis, Fundamentals of Roman Private Law, Springer, 2012, p 104 and further

[6] Ralph E.Giesy, Succession before and after the Civil Code, http://www.regiesey.com/Fox/ProjetFoxFiles/03_07_Succession_and_Civil_Code.pdf

[7] http://dexonline.ro/definition/clause

[8] art 1516 - Le préciput n'est point regardé comme une donation, soit quant au fond, soit quant à la forme, mais comme une convention de mariage et entre associés

we underline, too, the provisions of Art. 367 of Civil code, which provide that in the case of adoption of conventional community, the matrimonial agreement may refer to one or several issues listed at letters a-d, letter d referring to the clause of preciput. Provided that, according to the text of Art. 367, the matrimonial agreement may only refer to one issue, namely "inclusion of the clause of preciput", the law maker's option to bind the conclusion of a matrimonial agreement with a single issue of it, namely the preciput, which simultaneously represents the object of the matrimonial agreement and a clause of it, seams again not understandable.

The Romanian doctrinaires tried too the definition of the clause of preciput as an agreement of husbands, an agreement of will of husbands or, as the case may be, of the future husbands[9], a donation[10], a partial liberality[11], under certain circumstances, a matrimonial benefit established for the surviving husband, if its object[12] is taken into account.

Before analyzing the legal kind of the clause of preciput, it must be specified that neither the French doctrine was unanimous on the issuance of a definition of preciput, because, although Art. 1516 French Civil code refers to preciput as an agreement and excludes it from the category of donations, the Latin etymology of the term *proc* - before and *capio* - to take) does not automatically place on either of categories, so that, it was considered, in turn, as a preferential characteristics of an asset[13], a matrimonial benefit granted by marriage[14], and not the latest a contractual establishment of heirs (if we consider the donations allowed by matrimonial agreements) [15].

It is also required a terminological specification, namely that by Law no. 2006-728 of June 23rd, 2006, regarding the reform in the field of assets and liberalities, french legislator replaced of the text of Articles 843 and 844, the term of preciput by the phrase "hors part succesorale" (outside the assets part). This way, provided the exit from timeshare, the phrase *hors part* is intended to explain the benefit duly or conventionally granted, that an amount of money, a certain asset or a group of assets of being able to be sampled, before the partition, the preferential assignment being of property title, private property or usufruct. Such a clause also exists in the French assets law, so that the donations made outside the assets part cannot be claimed by the heir came to partition, unless they surpass the available quotity (the surplus being subject to reduction).

Legal nature

By the analysis of text of Art. 333 Civil code, it undoubtedly results that by the insertion of a clause of preciput in the content of matrimonial agreement, a benefit of surviving husband will be procured, but not anytime, just before the partition of inheritance, so that we are in front of a possibly affected right by a suspensive condition (survival). It is easy to notice that a heir of succesoral law and of the family law is born(to keep the tone of Art. 333) that seams to be adopted yet with full effects by the great family of civil law, but without identifying itself a clear position within it and losing the connections to his predecessors strangely, because he had all the premises of inheriting the most important qualities from them. But the law maker sets the clause of preciput within Book II About family, Title II. Marriage. Chapter VI. Patrimonial rights and obligations of husbands, Section 1. Common provisions, §4 Selection of matrimonial regime. The selection of the matrimonial regime, although the regulation included in par. 1 and 2 of Art. 333 is full of provisions specific to succesoral law, an issues that is explicable considering the fact that the legal effects are produced on the date of the opening of the inheritance, therefore it is logical that they are subject to the provisions of Book IV About inheritance and liberality. We recognize that the romanian legislator position is not the the happiest one because the structure of the Civil code is not similar to French Civil code which brings together in the Book III: Des différentes manières dont on acquiert la propriété both the provisions that are incident in the matter of inheritance and liberalities and those applicable to the matrimonial regimes, but beyond the empathy, we consider that the separation of the legal notion from the effects of clause would be more appropriate. We support this because, by joining the provisions included in Art. 333, it legitimately incurs the question: the clause of preciput is a liberality?

Starting from the classification of legal acts , it is defined as a liberality the legal document with free title, whereby the decider decreases his patrimony by the procured patrimonial use, opposed to the disinterested acts , whereby no decrease of patrimony is produced, although the decider procures a

[9] Dan Lupaşcu, Cristiana-Mihaela Crăciunescu, Regulation of the clause of preciput in the new Romanian Civil Code, as amended by Law no.71/2011, Pandectele române no.8/2011, p 39

[10] Iolanda Elena Cadariu-Lungu, The right of inheritance in the new Civil code, Publishing House Hamangiu, 2012, p.74

[11] M.Avram, C.Nicolescu, Matrimonial regimes , Publishing House Hamangiu, 2010, p.315

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[13] Pothier, Traite de la communaute nr.440, apud Ph.Malaurie, L.Aynes, Les regimes matrimoniaux, 3 eme ed, Defrenois, 2010, p 327

[14] G.Cornu, Vocabulaire juridique.Association Henri Capitant, Quadrige, 4 eme ed, 2003, p 676

[15] Ioana Popa, Preciput clause, RRDP no.4/2011, p 172 apud Ph.Malaurie, L anyes, Les succesions.Les liberalites, 4 eme ed, Defrenois, 2010, p.367 and Code civil francais, Livre III - Des différentes manières dont on acquiert la propriété, Titre II - Des liberalites, Chapitre VIII - Des donations faites par contrat de mariage aux époux, et aux enfants à naître du mariage, http://www.legifrance.gouv.fr

patrimonial benefit [16]. In the same meaning, the definition of contract with free title also surprises the intention of procuring the other parties a benefit without the procurement in exchange of a benefit (Art. 1172 par. 2 Civil code). Maintaining the intention of grouping the study instruments, it must not be forgotten the hypothesis of par. 2 of Art. 984, whreby the law maker undoubtedly established the fact that no liberalities may be made, but by donation or adjuncted to the contents of testament.

With respect to donation, certain similarities of the clause of preciput may be noticed to this contract and a certain authentic form (specific to direct donations and matrimonial agreements), the fact that both of them may be considered bilateral legal deeds (if we consider the provisions of Art. 367 letter d), both of them are legal deeds with free title, translative of property, the donation affected by the suspensive condition of the donor's decease, having a similar effect to the clause of preciput, mentioned for the surviving husband, both of them are subject to reduction, and under the aspect of advertisement, they make object of registration at the Notary National Registers, provided by Law 36/1995, republished, of the notaries public and notary activity. The clause of preciput cannot be considered yet as a donation, as mentioned by Art. 1516 of French civil code, neither as form, nor as fund conditions. The Romanian doctrinaires follow the line of French code, "not regarding" the clause of preciput as a donation.

The arguments for this position are represented by the different regulation method of both agreements (the donation is regulated in the Book IV "About inheritance and liberality", Title III "Liberalities", the clause of preciput is regulated within Book II, intended to Family), on the differences regarding their object (the object of donation may be only the donor's own assets, while we talk about the common assets in the clause of preciput), about the time when caducity occurs (on the one hand, the donor's heir constitutes a caducity reason of donation, while in the clause of preciput case[17], the production of effects depends on the decease of one of the husbands, and on the other hand, the divorce and ceasing of the community state represent a caducity cause of the clause of preciput, but not the caducity clause of donation).

Approaching the legacy as issuance method of liberalities, we consider that the basic difference between the two institutions is given by the fact that the legacy is an unilateral legal document, an expression of the exclusive will of testator (Art. 1036 Civil code, undoubtedly establishing that, under the penalty of absolute nullity of testament, two or more persons cannot decide, by the same testament, cannot decide one for the other's benefit), while the right of surviving husband incurs by the agreement of both husbands.

Returning yet to history, it must not be omitted the analysis of surviving husband's position, initially intruder among the other heirs of the deceased, the ideas of the French Civil code 1804 being taken over. These provided priority to the maintenance and preservation idea of assets by the blood relatives. Rough. The Civil code 1864 admitted to the surviving husband the vocation of only inheriting in default of legitimate or natural heirs of twelfth degree, the only concessions being the food receivables, granted to the widow (Art. 1279 Civil code 1864) and the right of poor widow to inherit even if she competes against the heirs (Art. 684 Civil code, 1864). A major optics change occurs on the appearance of Law 319/1944, which changes the surviving husband into rezervee heir, acquirer of special assets rights and especially provides him a competition to any of the four categories of heirs, independently of his material statement. The social dynamics clarifies therefore the status of surviving husband, in the matter of assets law. An adaptation to realities specific to modern states is established, on the other hand, by the possibility of choosing by husbands of the matrimonial regime that will characterize optimum the way that the patrimonial relationships between them will develop, so that, according to Art. 312 par. 1 Civil code, the husbands may opt to classic legal community, conventional community or to the regime of assets separation. It is obvious that since conventionally, the husbands establish the matrimonial regime, unless we start from the idea of fictive marriage (whereof nullity may be covered, however, after 2 years from its conclusion), the partners undoubtedly look to the first rank relative, but especially to the heirs. In this circumstance, it must be understood and it is desirable the clarification of intersection between the provisions concerning family and the matrimonial agreements and those regarding the assets and rules applicable to them. Returning to the clause of preciput, we consider that the provisions that regulate it strictly represents the intersection of these two categories of norms, just with the notice that it would have been probably avoidable the insertion of par. 2 in Art. 333, considering the possibility of its insertion as distinct provision of Book IV, About inheritance and liberalities.

Therefore, we consider that the clause of preciput may be defined as an agreement, whereby the husbands stipulate for the benefit of one of them or either of them that before the partition of inheritance, the surviving husband takes over without payment one or several common assets. Also, it would have been more indicated to define preciput as an agreement, because even in the hypothesis of art .367 letter d), the marriage covenant concluded, in fact will concern the parties and the object, specifying the legal grounds and it is somehow unnatural that, if only this clause exists in the contents of the covenant, its normal form should

[16] Gheorghe Beleiu, Romanian Civil Law, Publishing House 'Şansa', Bucharest, 1993, p 121

[17] for details about caducity of preciput clause and about the legal nature of it see Liviu Stanciulescu, Inheritance Law, Publishing House Hamangiu, Bucharest, 2015, p 94-95

not be given priority, being necessary to acquire the form specific to another covenant (the matrimony one).

However, referring to the legal provisions establishing the preciput, we will eventually try to identify how we may find oursleves in the presence of such a clause by reference to a certain matrimonial regime.

Preciput clause and matrimonial regimes

In essence, the preciput clause is a covenant between the spouses, although it is regarded as being accessory to the marriage covenant.

Two questions arise from here, related to the issue of matrimony systems, that we intend to answer:

§1. May preciput apply only in case of conventional community or also in case the spouses or future spouses adopt either the matrimony system of community of property, or the system off separation of property?

§2. May the preciput clause have a main character, and if yes, if this clause represents the sole object of the concluded marriage covenant, and the spouses are married, under the legal community system, by signing the marriage covenant, does the matrimony system change, from a legal community one, into a conventional one?

§1. Introducing the preciput clause in a sub-section containing only general provisions is not the only argument justifying the opinion that the spouses may give each other this benefit even if they are subject, for instance, to the legal community system[18].

In addition, art. 333 para. (1) of the new Civil Code foresees that, by marriage covenant, it may be stipulated that the surviving spouse may take over without any payment, before the partition of the inheritance, one or several of the joint goods, *owned **in condominium** or in **joint tenancy***. Or, the alternative feature of the norm in art. 333 of the new Civil Code is strengthened by the well-known fact that condominium is specific to community systems (legal or conventional), and joint tenancy is specific to the system of separation of property.

Therefore, *de lege lata*, the preciput clause is compatible both with the system of conventional community, and with the matrimony system of separation of property, and, *de lege ferenda*, it should become compatible with the system of legal community.[19]

Contrary to the French law (art. 1515-1519 in the French civil law), admitting the possibility to stipulate the clause only in a covenant concerning the condominium of the spouses[20], the majority Romanian doctrine[21] rejected this hypothesis, and the conclusion was that the preciput was compatible both with the conventional community system, and with the system of separation of goods.

Part of the doctrine, which states an opinion that we agree with,[22] has suggested that such a clause should be compatible with the legal community system in order to avoid the discrimination between the spouses or the future spouses that are getting married choosing the system of legal community, compared to those that are getting married choosing the system of conventional community or of separation of goods. The surviving spouse must be equally protected, regardless of the chosen matrimony system. Reasoning otherwise, the choice of the matrimony system could be therefore determined by the advantages „created by the law-maker" for certain matrimony systems (and we are not convinced that this was the law-maker's intention when adopting the new Civil Code), which we believe it would seriously affect the spouses' or the future spouses' freedom of choice.

An additional argument, concerning the solution to admit the conclusion of a preciput clause in the system of separation of properties is also the fact that the latter system is created by signing a marriage covenant and, as highlighted, it may generate the spouses' joint tenancy (art. 362 of the new Civil Code), and the goods that are held in joint tenancy may constitute the object of the clause of preciput.[23]

§2. Although the text of the law expressly stipulates that such a clause may make the object of a marriage covenant, a covenant in itself representing the result of an agreement of will, the doctrine[24] asked whether, however, the legal provision has an imperative character, which one cannot waive, or will the preciput clause be able to have a main character. The provided answer was negative, departing from the provisions of art. 333, corroborated with those of art.

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[18] A. Bacaci, V.-C. Dumitrache, C.C. Hageanu, Family Law, ed. a 7-a, Publishing House C.H. Beck, Bucharest, 2012, p. 84. (Family Law)

[19] I. Popa, quoted works, p. 173.

[20] Also see the relevant French Doctrine: Fr. Terré, Le couple et son patrimoine, Ed. Jurisclasseur, Paris, 2002, p. 227; G. Cornu, Les regimes matrimoniaux, Presses Universitarires de France, Paris, 1997, p. 583; J. Champion, Contrats de mariage et régimes matrimoniaux. Stratégies patrimoniales et familiales, ed. a 12-a, Dalloz, Paris, 2007, p. 175.

[21] C.M. Crăciunescu, "Spouses' right to use the goods belonging to them, in different matrimony systems", Publishing House Universul Juridic, 2010, p. 118; T. Bodoaşcă, A. Drăghici, "Discussions related to the clause of preciput in the regulation of the new Romanian Civil Code", Dreptul no. 10/2013, p. 33; N.C. Aniței, Matrimonial convention in the new Civil code, Publishing House Hamangiu, Bucharest, 2012, p. 70; I. Popa quoted works, p. 173; D. Lupaşcu, C.M. Crăciunescu, quoted works.; Fl.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordonatori),New Civil Code.Coments by articles, 1st edition, Publishing House C.H. Beck, Bucharest, 2011, p. 354.

[22] See D.Lupaşcu, C.-M. Crăciunescu, „Regulation of the clause of preciput in the new Romanian Civil Code, http://www.juridice.ro/100156/reglementarea-clauzei-de-preciput-in-noul-cod-civil-roman.html; I. Popa, quoted works, p. 182.

[23] For this purpose, see also T. Bodoaşcă „System of separation of property in the regulation of the new Civil Code", in Dreptul nr. 11/2010, p. 65 and the next; T. Bodoaşcă „Some opinions related to the joint goods of the spouses acquired during the matrimony, in the context of the new Civil Code", in Dreptul nr. 10/2011, p. 90.

[24] I. Popa, quoted works, p. 173.

329 of the new Civil Code, according to which marriage covenants may be signed only in case of choice of matrimony system.

In our opinion, this point of view cannot be accepted. The interpretation of the provisions of art. 329 of the new Civil Code must be made in the sense that only the choice of another matrimony system may be made by matrimony covenant, and not in the sense that a marriage covenant may exclusively include clauses concerning the choice of the matrimony system. Moreover, art. 367 letter d) of the new Civil Code expressly states that the object of a marriage covenant may consist in the clause of preciput, without conditioning this provision to the insertion of other clauses by the spouses or by the future spouses in the contents of the same covenant. This happens because, on the one hand, the law does not forbid such a solution, and, if the law does not make a distinction, neither should the person interpreting it (*ubi lex non distinguit nec nos distinguere debemus*), and, on the other hand, a contrary solution would create a discriminatory treatment according to the applicable matrimony system.

Obviously, we do not abjure that, according to art. 329 of the new Civil Code, if the spouses wish to apply another matrimony system, they will sign a marriage covenant. However, if the spouses sign a marriage covenant (the discussion being relevant only as regards the legal community system) and it contains exclusively the stipulation of a preciput clause and no other additional clause, it does not mean that they choose another matrimony system than the legal one, and they are not under the incidence of a conventional matrimony system.

This is why we do not exclude the possibility to sign a marriage covenant when the parties wish to obey to the rules of legal community system, but at the same time they wish to introduce a clause of preciput providing comfort to the surviving spouse. By this covenant we are however appraising, contrary to the opinions expressed in the doctrine[25], that the matrimony system does not automatically change from a legal one into a conventional one, governed, in terms of composition of patrimony, of its management, of the rules related to the issue of legal community, the matrimony system remaining the one chosen by the spouses, namely that of legal community. It would mean to admit, *mutatis mutandis*, that the conclusion of such a will whose object would consist only in the recognition of a child or indications concerning the ritual of funeral, would determine us to automatically speak of a testamentary inheritance.

Therefore, the fact that the preciput may be instituted only by marriage covenant is not capable of turning in itself the legal system into a conventional system, and this does not determine an incompatibility of the clause of preciput with the matrimony system of legal community.

Conclusions

Although the liberty in choosing the most appropriate matrimonial regime is consacrated by the Civil Code, not allways, transposition of a provision in the romanian legislation from a foreign system, as the French Civil Code, is proven to be the most efficient mechanism to pertinently give to that provision its real meaning.As we tried to illustrate in this study, there are situations when a clause is in fact a real convention with defined characteristics so there is no need to hide it behind the clothes of another convent just for the sake of respecting the setup in a law structure. This could be often also the reason for not using such an interesting option for the spouses and when a legal norm finds itself into such a position its initial scope is not achieved.Being optimistic we believe that until some needed legislative interventions, the arguments presented in this paper will help in practice in finding flexible and effective solutions to assign to the preciput clause the real sense.

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THE LEGAL STATUS OF THE SHARES TRADED ON RASDAQ MARKET

Cristian GHEORGHE[*]

Abstract

RASDAQ Market was launched in Romania in 1996, appeared as a mirroring of the well-established American market NASDAQ (which stood for National Association of Securities Dealers Automated Quotations). The role designated for RASDAQ was as platform for valuing papers issued in the privatization program in Romania (mass privatization process - MPP). In fact the participating companies to MPP had the legal obligation, under first Romanian Capital Market Law, No 52/1194, to be listed on a stock exchange.

Although it attended a US regulatory model, RASDAQ had to adapt to European rules with the accession of Romania to the European Union. The relevant EU rules (i.e., Directive 2004/39/EC on markets in financial instruments – MiFID, about to be replaced by Directive 2014/65/EU – MiFID II) provide for only two types of trading systems, i.e. regulated markets and multilateral trading facilities (MTF), while the RASDAQ Market securities fall under none of these two trading systems regulated by MiFID1.

After an entire decade of uncertainty concerning the status of the RASDAQ, Romanian legislator settled the situation of shares traded on this market. This regulation means the end for RASDAQ. Law No. 151/2014 provides that the RASDAQ Market is to be closed within twelve months as of the effective date of such law (October 27, 2014). To this end companies listed on the RASDAQ Market will have to opt for listing on a regulated market or on a MTF or for becoming private companies. Such option rests on the hands of shareholders. Going private asks for shareholders' rights protection so Romanian Financial Supervisory Authority (FSA) provides a procedure implementing the right to withdraw from the company of the dissenting shareholders and for computing compensation for their shares (FSA Regulation No. 17/2014).

Keywords: *capital market, investments, RASDAQ, multilateral trading facility (MTF), regulated market, shareholders protection.*

1. Introduction

RASDAQ Market was launched in Romania in 1996, with the support of the well-established American market NASDAQ. The role designated for RASDAQ was as platform for valuing papers issued in the privatization program in Romania (mass privatization process - MPP). In fact the participating companies to MPP had the legal obligation, under first Romanian Capital Market Law, No 52/1194, to be listed on a stock exchange, so that most of them got listed on the RASDAQ Market. Subsequently, in 1999, there were about 5,500 Romanian companies listed on RASDAQ making it the European market with the most issuers.

As the mother platform, NASDAQ, evolved from an OTC legal status (over-the-counter or off-exchange trading is done directly between two parties, without any supervision) to a regulated exchange (in 2006, the status of NASDAQ was changed from a stock market to a licensed national securities exchange), RASDAQ itself faced a long time of ambiguities regarded its legal status.

Therefore RASDAQ Market started trading in 1996 under the initial name Electronic Exchange RASDAQ, as a trading platform for shares in state owned companies converted into public companies under the mass privatization program. That market was authorised by decision of the National Securities Commission (CNVM, now become ASF – Financial Supervisory Authority) of 27 August 1996 and thus was regarded as a market organised and regulated by the Romanian competent authorities.

On 1 December 2005, Electronic Exchange RASDAQ merged with Bucharest Stock Exchange, the former being incorporated into the latter as a distinct section. The legal person resulting from that merger, Bucharest Stock Exchange Company (public limited liability company), operated two different markets: the regulated market (Bursa de Valori Bucureşti – Bucharest Stock Exchange) and the RASDAQ Market. The first market (BSE) was then authorised by the competent authority of the market (NSC at that time). That authority, under its statutory powers, also controls and regulates the functioning of the RASDAQ Market, but the latter has not been included in any of the categories of negotiating platforms European rules provided for[1]. Such irregularities were the starting point for long term controversy about the legal status of shares traded on RASDAQ Market. As important rules, i.e. the compulsory offers or market abuse offences, were to be applied on regulated market only, the status of RASDAQ Market knew various interpretations. Even the European Court of Justice was asked to deliver a preliminary ruling regarding the regulated market concept and its meaning.

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[1] CJEU, C-248/11 Para (19), (20).

Although it attended a US regulatory model, RASDAQ had to adapt to European rules with the accession of Romania to the European Union. The relevant EU rules (i.e., Directive 2004/39/EC on markets in financial instruments – MiFID, about to be replaced by Directive 2014/65/EU – MiFID II) provide for only two types of trading systems, i.e. regulated markets and multilateral trading facilities (MTF), while the RASDAQ securities market fall under none of these two trading systems regulated by MiFID1[2].

The judgement of the European Court stated that a market in financial instruments which does not satisfy the requirements laid down by Directive (Title III Directive 2004/29/CE, MiFID 1) does not fall within the concept of 'regulated market', as defined in that provision, notwithstanding the fact that its operator merged with the operator of such a regulated market[3].

In last year was set out the legal procedure to be followed for the clarification of the situation of the shares traded on RASDAQ Market (and of the shares traded on the unlisted shares market too)[4]. The assumed purpose of the law is to align the RASDAQ market with Capital Market Law No. 297/2004 and European Law[5].

2. Legal solution. Cessation of the activity of RASDAQ Market.

After an entire decade of uncertainty concerning the status of the RASDAQ, Romanian legislator settled the situation of shares traded on this market. This regulation means the end for RASDAQ. Law No. 151/2014 provides that the RASDAQ market is to be closed within twelve months as of the effective date of such law (October 27, 2014). To this end companies listed on the RASDAQ market will have to opt for listing on a regulated market or, as the case may be, on a MTF or for becoming private companies. Such option stays on shareholders' hands. Going private asks for shareholders' right protection so Financial Supervisory Authority (FSA) provides a procedure implementing the right to withdraw from the company of the dissenting shareholders and for computing compensation for their shares (FSA Regulation No. 17/2014).

3. Shareholders decision

Cessation of activity of RASDAQ Market rise to shareholders decision on the future fate of their company: it will remain on the exchange floor or it will exit the public area and will go private.

The shareholders shall debate on the status of the company as RASDAQ Market wasn't licensed for future operation. They shall make a decision regarding the legal actions to be taken by the company required for the admission to trading of the shares issued by the company. Future trading implies admission on a regulated market or trading within an alternative trading system (ATS or MTF), based on the provision of Capital Market Law No. 297/2004 and regulations issued by the Financial Supervisory Authority (FSA)[6].

In the absence of such a decision for market admission or subsequent to an explicit decision, the company will exit the trading floor and it will go private.

4. Shareholders rights.

The shareholders shall have the right to withdraw from the company if the General Meeting of shareholders resolves that the company takes no legal actions required for the admission to trading of the shares issued by the company on a regulated market or trading thereof within an alternative trading system (ATS)[7]. The same right is recognized if the shareholders decision is not accomplished by any cause.

Right to withdraw is subject to the conditions of Company Law No. 31/1990, as subsequently amended and supplemented[8]. This law recognizes such a right of dissenting shareholders in the case of articles of incorporation alteration if such alterations change the initial incorporation of the joint stock company in an essential manner. Thus the shareholders who do not agree with the decisions of the General Meeting regarding the changing of the main object or the legal form of the company, the moving abroad of the registered office, have the right to withdraw from the company and to receive from the company consideration for the shares they possess, at the average value determined by an authorized expert, by using at least two methods of assessment recognized by the European Assessment Standards[9].

[2] Cristian Gheorghe, *Capital Market Law*, Bucharest: C.H. Beck, 2009, p. 34-39.

[3] Judgment of the Court of Justice of the European Union (second chamber) in case C-248/11, Criminal proceedings against Rareş Doralin Nilaş and Others, http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dbd281f1af23294c8cb5a9a432709a697a.e34kaxilc3qmb40rch0saxukahn0?text=&docid=120763&pageindex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=263962.

[4] Law No. 151/2014 on the clarification of the legal status of the shares traded on RASDAQ Market or on the unquoted securities market

[5] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

[6] FSA Regulation No. 17/2014 on the legal status of the shares traded on RASDAQ market or on the unquoted securities market, Law No. 151/2014, Art. 2.

[7] Law No. 151/2014, Art. 3.

[8] Cristian Gheorghe, *Romanian Commercial Law*, Bucharest: C.H. Beck, 2013, p. 421.

[9] Company Law No. 31/1990, Art. 134.

5. **Procedure**

Convening the General Meeting. The board of directors of the companies whose shares are traded on RASDAQ Market must call and take all necessary arrangements for holding the Extraordinary General Meetings of shareholders within 120 days after the entry into force of Law No. 151/2014[10]. All these actions are subject to the conditions of Company Law No. 31/1990[11].

The shareholders debate on the situation created by the extinction of RASDAQ Market and they decide further actions within the new legal framework.

In order to timely and thoroughly inform the shareholders the company's board of directors shall draw up and provide shareholders with a report in accordance with Art. 117^2 of Company Law No. 31/1990 .The report shall comprise at least the legal framework applicable to trading shares on a regulated market or within a multilateral trading facility and a presentation of regulated markets and multilateral trading facilities (ATS) on which the companies' shares may be traded[12].

If the decision taken asks for listing on a regulated market or multilateral trading facility company must follow the steps imposed by such a procedure. Capital Market Law No. 297/2004 and NSC (now FSA) Regulation No. 1/2006 provides an exhaustive set of instructions for admission to a stock exchange. As a result, the company, after the date of adoption of the resolution of the General Meeting of shareholders, shall send FSA the prospectus for the admission to trading, drawn up in accordance with the legal provisions laid down for this procedure[13].

Admission to regulated market. The Extraordinary General Meeting of shareholders may decide the admission to trading on a regulated market. In this situation the company the shares of which are traded now on RASDAQ Market shall fill with the Financial Supervisory Authority (FSA) the request for approval of the prospectus for the admission to trading on a regulated market. Such request shall be submitted within 90 days after the date of adoption of the resolution of the General Meeting of shareholders, in compliance with the regulations[14].

The prospectus for the admission to trading on a regulated market shall be drawn up in accordance with the provisions of Law No. 297/2004 and European Regulation[15].

The company shall also submit to the market operator which runs the regulated market the company intends to be admitted to, a request for admission to trading[16].

The company requesting admission to trading shall send FSA the decision of the market operator regarding the agreement in principle on the admission to trading of securities on the regulated market managed by such market operator. After its analysis of the request for approval of the prospectus, FSA may approve (or refuse) the admission to trading of the shares in accordance with the provisions of Law No. 297/2004[17].

Admission to a Multilateral Trading Facility. The procedure for admission to a trading facility (alternative trading) is very similar to admission to a regulated market. In such case the provisions the company have to comply with are less than in the case of admitting to a regulated market.

The Extraordinary General Meeting of shareholders may decide the initiation of the process for trading the company's shares in a multilateral trading facility (or alternative trading system in American view). In this case the company shall submit to FSA the request for trading in such trading facility (alternative system) together with the system operator's agreement (in principle) on the trading of the shares in the alternative system managed by it.

FSA's decision for admission to trading or refusal of the request for admission to trading in an alternative trading system shall be made based on the regulations applied to alternative trading system[18].

Right to withdrawal. Right to withdraw from the company is recognized for shareholders if the company the shares of which are traded on RASDAQ market is not to be traded on a regulated market or on any alternative trading system once RASDAQ ceases to exist. The term within which shareholders may exercise their withdrawal right is 90 days after the publication of the resolution of the General Meeting of Shareholders in the manner prescribed by the law.

In order to establish the price to be paid by the company for the shares held by the shareholders having exercised their right to withdraw, the board of directors shall request the Office of the Trade Register to appoint an independent authorised expert. This request shall be submitted to the Office within five

[10] Law No. 151/2014, Art. 2 Para (1).

[11] St. D. Cărpenaru, *Romanian Commercial Law Treaty*, Bucharest: Universul Juridic, 2014; Cristian Gheorghe, *Romanian Commercial Law*, Bucharest: C.H. Beck, 2013, p. 361.

[12] Law No. 151/2014, Art. 2 Para (2).

[13] Law No. 151/2014, Art. 6 Para (1).

[14] FSA Regulation No. 17/2014, Art. 3 Para (1), NSC Regulation No. 1/2006, on issuers and operations with securities, as subsequently amended and supplemented, Art. 89 Para (6).

[15] Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/CE of the European Parliament and of the Council as regards the information contained in prospectuses, as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements,.

[16] FSA Regulation No. 17/2014, Art. 3 Para (3), NSC Regulation No. 1/2006, Art. 94 Para (1).

[17] FSA Regulation No. 17/2014, Art. 3 Para (4), Law No. 297/2004, Art. 214, and Art. 217 Para (3).

[18] FSA Regulation No. 17/2014, Art. 4 Para (1), (2).

days following the day of receiving by the company of the first request for withdrawal from shareholders.

The report drawn up by independent expert should be prepared within 30 days after expert appointment and should contain the modalities whereby the shareholders may consult the report and also the price computed by the appointed expert for a share[19].

The company shall inform FSA and the Bucharest Stock Exchange (BSE) through the submission of current reports about all relevant aspects regarding withdrawal procedure, as follows: the registration of the first request for withdrawal, the appointment (by the Office of the Trade Register of the independent expert; the price for one share to be paid to the shareholders intending to withdraw from the company; the deadline for shareholders for submission of the requests for withdrawal from the company.[20]

De-registration with FSA. The company the shares of which are traded on RASDAQ market may decide to go private or fails to complete the procedure for the admission to a regulated market or trading facility. In this case the shares traded on RASDAQ Market shall be withdrawn from trading and deregistered from FSA. The withdrawal rights of the shareholders have to be satisfied first.

De-registering with FSA is the proof that the company is not a subject of Capital Market regulations any longer.

There are many cases, under Law no. 151/2014, when the company the shares of which are traded on RASDAQ Market fails to be admitted to a stock exchange: the companies did not take the actions necessary for holding the Extraordinary General Meeting of shareholders within the 120 days' term laid down by Law No. 151/2014; companies did not hold the Extraordinary General Meeting of shareholders due to the failure to fulfil the legal quorum; the companies did not adopt any decision in the Extraordinary General Meeting of shareholders due to the failure to fulfil the legal majority rules; the companies adopted in the Extraordinary General Meeting of shareholders the decision that the company takes no legal actions necessary for the admission to trading of the shares issued by the company on the regulated market or in an MTF (ATS); companies' request for admission of the shares issued by it on a regulated market or MTF (ATS) was rejected by FSA[21].

Obviously, in all these cases the right of withdrawal of the shareholder is granted in accordance with the provisions of Law No. 151/2014 and the company have to conduct the procedure for withdrawal of the shareholders from the company.

The shares traded on RASDAQ Market shall be withdrawn from trading and deregistered from FSA's records, in the case of the companies which conducted the withdrawal procedure or did not receive any request from the shareholders for withdrawal from the company in all those abovementioned cases.

6. Conclusions

The regulation of RASDAQ Market situation is a radical one. Between the choice of adapting the market in order to fit within the limits of present normative framework and its abolition, with the related options for companies, the legislator chose the last option. The alternative for the companies that are still looking for a trading floor is to apply for admission to established markets that already existed.

Basically the choice is not that difficult: regulated markets in Romania are: Bucharest Stock Exchange (BSE) administrated by the BSE Company (market operator) and SIBEX managed by SIBEX Company (administrator of the market). Alternative trading systems (or MTF) are managed by the same two companies (BVB and SIBEX as system operators).

The chosen normative solution involves carrying out from zero the procedure for admission to trading for companies that decide to follow this path (prospectus for admission to trading, ASF's decision after the approval in principle of the operator concerned). This option involves an administrative effort large enough for the company... And against its inertia: companies need to follow this procedure voluntary, but as the reward is. Besides the benefits of trading usually recognized (visibility, access to a cheaper financial market, secure and easy transfer of ownership of shares, etc.) admission to trading floor allows the company to avoid payment of shareholders' withdrawal rights.

Refusal of admission to trading or failure to complete the procedure draws a considerable burden for the company: obligation to pay the shareholders' withdrawal rights which shall become due once the company behaves in this manner (explicit decision of non-admission, failure of deliberation in assembly, failure of the process of admission to trading).

Although the decision of non-admission to trading belongs to the shareholders majority, not on them press the burden of claims (as in squeeze out/sell-out procedure[22]) but on company. These claims consist in withdrawal rights and they imply on the one hand the uncertainty of determining their fair value (independent evaluation should be performed) and on the other hand, are subject to economic pressure on the company. In fact the impossibility of their payments

[19] FSA Regulation No. 17/2014, Art. 6.
[20] FSA Regulation No. 17/2014, Art. 8.
[21] FSA Regulation No. 17/2014, Art. 9.
[22] Cristian Gheorghe, *Capital Market Law*, Bucharest: C.H. Beck, 2009, p. 242-247.

calls an insolvency procedure so that company may face the dissolution. Even the majority shareholders' may decide to exercise these rights, in such a case the company will cease definitely to exist.

We consider the solution of placing the burden of these rights on the shareholders who decide to keep the company out of the trading market, instead on company itself, would have been fairer. Last but not least, the legislator's intervention is disproportionate as long as the authority (FSA) was able to solve RASDAQ legal status through administrative arrangements. The pendant solution may be qualifying (and authorizing) RASDAQ Market as Multilateral Trading Facility (MTF) with the recognition of a general and time-limited withdrawal procedure from trading together with the recognition of a right of withdrawal from the company for the shareholders in this case. Indecision (perpetuated at least ten years) shown by the FSA has led to present disproportionate legal solution that effectively discourages companies from remaining to trading floor: cessation of the activity of RASDAQ.

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RELEVANT ISSUES CONCERNING THE RELOCATION OF CIVIL PROCEEDINGS UNDER THE NEW CODE OF CIVIL PROCEDURE (NCPC)

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Abstract

The change of the new code of civil procedure and obvious the entry of the new provisions at 15th February 2013, has been thought with the hope to accelerate the procedures related to judgement with a noticeable simplification of procedures, all designed with the aim of unifying the case law and to lower the costs generated by lawsuits , costs both borne by the State as well by citizens involved the cases in court .

Thus, the implementation of the New Code of Civil Procedure, desired the compliance right to a fair trial within a optimal time and predictable by the court, by judging the trial in a speedy way , avoiding unjustified delays of the pending cases and to the new petitions introduced, by excessive and unjustified delays often.

By the noticeable changes that occurred following the entry into force of the new Code of Civil Procedure, it identify and amend the provisions regarding requests for displacement, in terms of the grounds on which it may formulate the petition of displacement and the court competent to hear such an application.

Keywords: *displacement, institution processual, contested issue.*

1. Introduction

The application field of the present study, regards the way in which, the new civil procedure code regulations of the new code of civil procedure modifies the procedure of the wording and justify of the displacement requests, in direct comparison with the old Code of Civil Procedure.

Thus, through a short study but concise, the author attempts to identify the main changes brought of the procesual institution of the displacement requests in the light of the new Code of Civil Procedure, regarding the legal fond of the displacement requests.

The importance of this study is to identify the best means procedurals of protective and to follow the impact of new legal dispositions by comparing with the old procedural rules regarding the institution of resettlement and to show their importance as clearly as possible. The author considers it is relevant the analysis based on theoretical and practical issues on the displacement cases in terms of legal standing, such evaluations are made to justify the desire of legislative intervention in national plane.

2. Analysis of displacement procedural institution of civil cases, theoretical and practical implications:

2.1. Preliminary issues concerning the nature of displacement

The resettlement of the civil litigations can be seen as an procesual institution which establishes the reasons and the rules of transfer of solving procedure of the causes from a competent court to another court of the same rank.

Resettlement should not be confused with the incompatibility, hypothesis in wich the judge either ruled the case in which he pronounced already a judgement of the issue disputed wich is likely to disinvest the court, or he is found in one of the situations explicit provided by law and regulated as such by Article 42 NCPC and that can cause the removal of the judge from the panel of judges.

One of the new regulations of NCPC consist in disappearance of the resettlement reason based on kinship and affinity, this situation being quite rare and it is unjustified a separate legal treatment. Also,the cases of kinship and affinity can always be included in the grounds of legitimate doubt on the quality of parts. Therefore, in present there is two exclusive founded grounds of resettlement of the civil processes, namely, public safety and legitimate doubt.

Analysis of the displacement of causes have certain peculiarities in terms of procesual legitimation, NCPC making a difference depending on the reason indicated, in the meaning that request for displacement on grounds of legitimate suspicion can be made by the interested party, opposed to the application on grounds of safety public, which can only be made by the General Prosecutor of prosecuting magistracy near the High Court of Cassation and Justice. The resettlement request grounded on the reason of legitimate doubt is, in reality, a procedural incident created by the legislature for the party that has doubts about the impartiality of the court before which the dispute is analysed .

Another issue that has novelty character, is the alteration regarding the jurisdiction for settling claims

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for resettlement , which in present is different, depending on the cited reason. Compared to the previous regulation, in wich the application for resettlement on grounds of legitimate doubt was in the jurisdiction of the supreme court, we believe, mainly to avoid overload of the supreme court, the legislature stated in the situation stated above, that the demand for resettlement is resolved by the court of appeal if the court from wich is required the case of displacement, is a first level court or a tribunal, both located under its jurisdiction.

2.2. The grounds of the resettlement requests

The procesual regulations occurred once the entry into force of the NCPC, are likely to ensure the impartiality climate and objectivity necessary of resolving civil cases according to law and truth.

When implementing the new rules of procedure, was taken considered the situation where a civil action exercised against a judge, or a civil action exercised by a judge to the court in which it operates, may give rise to some serious doubts regarding the conduct the process and how the case will be solved , by the colleagues judges..[1]

According to the former procedures , such suspicions could be removed through the institution trial of resettlement of the civil case to another court .

The author believes that by adopting and implementing new regulations procedural legislators, the legislator has watched , among other things , the eduction of existing cases on the role of the High Court of Cassation and Justice, sense in which it is necessary to be mentioned that prior to the new regulations, the competence in solving resettlement requests was exclusively to the High Court of Cassation and Justice, situation that at this moment it presents modificated in the sense that the solving competence of the resettlement requests , belongs to the court of appeal in whose jurisdiction lies the court from where the case resettlement is required.

Was maintained, however, the jurisdiction of the High Court of Cassation and Justice in resolving resettlement requests based on public safety[2].

In connection with these procedural changes, we note that the legislator of the New Code of Civil Procedure preferred the attribute "determined" instead of the traditional expression "a mere presumption" acceptation that was discussed in the literature in the way that the basis of the resettlement application for reasons of legitimate doubt in the view of the new regulations, has envisaged the serious circumstances that threatens the judges objectivity and impartiality, circumstances that , although a general nature must shall be always relate either to the circumstances of the case or to the quality of the parties or to local conflicts.[3]

Thereby, the new rules require in a rigorous and clearly way the examination of the circumstances alleged in the application for resettlement formulated, for the concrete interest of the innovations implemented in the field.

It is noticed through the new regulations a clear distinction, on grounds of resettlement application in terms of competence and capacity exclusive of the initiator of a resettlement request , in this case the Attorney General of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Regarding the second ground of removal, which is based on the public safety ,ground that was not clearly defined by the legislator, since, as it was highlighted in the specialist legal literature , the term used by the legislature , is able to suggest those circumstances that could endanger the public order and tranquility right in the village.

In the literature was emphasized that, the resettlement regarding for public safety it can be required in a exceptional way, this reason it meets sometimes in criminal cases, but much rarer in the civilian cases.[4]

Another unique aspect we consider that will provoke debate among both academics and among legal practitioners,is that concerning the admissibility of an application for resettlement submitted to the High Court of Cassation and Justice regarding a case pending resettlement having as object the application for resettlement filed to the Apel Court in connection with the resettlement of a case pending before the court with lowest level or tribunal.

In other words , in the event That a request of resettlement is made regarding to a process pending before the court (Tribunal, Judecatorie) , the Jurisdiction belongs to the Court of Appeal in Whose Jurisdiction is the court. The resettlement request is Recorded to the competent Court of Appeal to resolve it , but the Interested Party ,is having serious the doubts That appeal court of appeal is impartial , and then he make an another request of resettlement with the scope to resettlement the first application for the resettlement pending case before the court.

Some authors have argued that the amendments made by NCPC in the matter of resettlement will not be able to ensure in all cases the right to a fair trial, as is enshrined in the European Convention on Human Rights. Suspicions may occur especially in those situations where a resettlement request of a case in pending, is at the court or court is in a small provincial town , and in the same city is also the headquartered competent court in solving the resettlement request.

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[1] Ioan Leș, NCPC comentat pe articole, pg.211, pct.2 Editura C.H.Beck 2013 București.

[2] Art.142 alin.2 NCPC.

[3] I. Deleanu,Tratat procedură civilă, vol.I,Ed. W.Kluwer,p.265-266; I.Leș, Tratat de drept procesual civil, p.316; I.Stoenescu,S.Zilberstein, op.cit.p.226.

[4] NCPC-comentat -Prof.univ.dr. Gabriel Boroi, Octavia Spineanu Matei, Andreia Liana Constanda, Ed. Hamangiu 2013, op.cit.p.356-Andreia Constanda.

In such cases , the ties between individuals are much closer and more obvious, inclusive between judges and the litigants will not have fully guarantee of the independence and impartiality of solving the request.

Other authors have argued that the resettlement will be decided by a court of equal degree in the same town as the appeal court , but this opinion does not remove the doubts about the impartiality of judges , knowing in fact that , between judges in the same town may from case, there is direct or indirect influence unconcerned of the courts to which they belong.

In such cases the issue is the non observance of the right to a fair trial by the existence of at least some doubts about the impartiality of courts of appeal.

We consider this interpretation as an excessive one , under the conditions that in consideration of the highest position of the court of appeal in the legal hierarchy , it offers sufficient guarantees as to the impartiality of judges.

We consider that it would be inadmissible a request for resettlement of the resettlement reached trial before a court of appeal, for the following reasons, on the one hand would violate the will of the legislator who wanted to decrease of the cases number that are less important before the supreme court, and in the other way the provisions of article 140 NCPC other hand refers to the resettlement process itself , the demand for resettlement is a procedural incident , even if the Court of Appeal shall constitute a new folder, which is not in the true sense of the word "a process " within the meaning given by Article 140 NCPC the legislator when drafting the new legislation civil procedural, wanted to remove a such an inadmissible application.

If such a situation would be admissible , it would be like a bypassed way , a relocation request made in respect of a case before the courts or tribunal to be tried all the High Court of Cassation and Justice , which the legislature wanted to overthrow the drafting of new legislation civil procedural.

If such a situation would be admissible , it means that would be like an devious way , for a resettlement request made in respect of a case before the courts or tribunal, arrive to be solved by the High Court of Cassation and Justice , situation in wich the legislator wanted to remove and to overthrow legislator wants to remove and to overthrow by drafting of new legislation civil procedural.

2.3. Exercise of the application of resettlement procedure and its solving.

The request for resettlement , shall be in writing, in accordance with Article 141 para. 1 C.proc.civ at any stage of the process. Paragraph 2 of the same Article states that the resettlement for legitimate grounds for suspicion can only be claimed by the claimant , and that on grounds of public security only by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

The request for resettlement based on Article 140 paragraph 1 and paragraph 2 of the NCPC provisions , shall be submitted to the competent court to resolve it, namely, the Court of Appeal.

If The request for resettlement based on Article 140 paragraph 3 of the NCPC provisions , shall be submitted to the competent court to resolve it, namely, the High Court of Cassation and Justice.

The competent court to settle the claim must immediately notify the court from which was asked the resettlement.

The one who is interested may request suspension of judgment , and the court panel may order the suspension by paying bail in the amount of 1,000 lei.

If the court is competent to settle the claim must immediately notify the court from which was asked the resettlement.

If considered that there are reasonable grounds and good reasons, the suspension may be willing under the same conditions ithout summoning the parties even before the first hearing.

The conclusion on suspension no motivates and is not subject to appeal.

The solution of the suspension of the process is communicated to emergency to the court from where has been requested the resettlement.

The demand for resettlement is judged in emergency way in the council chamber , summoning the parties to the process.

During the resettlement can be formulated only accessory intervention for action due to their simple defense, regarding the resettlement. However, no principal intervention is not allowed.

Decision on resettlement, according to art. 144, paragraph 2, is given without motivation and is final, it is in fact a conclusion.

In fact the solution of the resettlement application for admission or rejection of resettlement is not motivated.

Because it is a final and only solution the decision on relocation can not be appealed in any way.

However the solution may be the subject of the analysis under art. 503 alin 1. for illegal citation regarding the term when the final solution is given.

On the other hand the final solution can't be analized under art. 503 alin 2 pct 1.

Court from where has been requested relocation will be notified immediately the solution regarding the demand for resettlement.

If it accepts the application for removal, the litigation will be sent by the Court of Appeal for judgment of another court of the same grade in his constituency.

High Court of Cassation and Justice will move the proceedings in one of the courts of the same level under the jurisdiction of the courts of appeal to any court of appeal neighboring in which the court is required to displacement.

Judgment will show to what extent the acts performed by the court before resettlement is to be kept.

If in the meantime, the court that ordered the relocation proceeded to the trial, the judgment is abolished by law in effect admitted the transfer application.

Under art. 146 displacement process may be required again, unless the application is based on circumstances known at the date of settlement of the previous application or arising after its settlement, otherwise the rejected as inadmissible if the cause is the role of the same court.

Certainly, remain on the issues related to establishing clearly that the grounds of legitimate doubt on the impartiality remain before all courts in the jurisdiction of the Court of Appeal which will be sent the case for trial, given the fact that the person whose quality is the reason for the transfer application can have on judges ascending fund, because of the position of the superior court of which it forms part.

3. Conclusions

Challenge, problem analysis as is presented in this paper consists in interpretation efficiently and correctly the provisions of the new code of civil procedure , regarding the possibility of promoting a new resettlement requests motivated by the impartiality felt of the court invested with a case of resettlement of a legal dispute. Literature specialized has extensively discussed the issue of promoting such an application, but certainly, it is concluded clearly as inadmissible the request for resettlement of a litigation concerning the resettlement request, because, the amendments and supplements to the new civil procedure code, were meant to relieve the High Court of Cassation and Justice.

Considering the legal issues commented , analyzed and presented by the author in this material, some times we could say that the ideas included in this material would violate the Constitution, respectively art. 21 para. (1) and (3) on access to justice and the right to a fair trial, art. 124 para. (2) the uniqueness, fairness and equal justice, as they are interpreted according to art. 20 para. (1) of the Constitution and the provisions of art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, however this can not determine the admissibility of such a request.

Therefore in the case that we accept as admissible the resettlement of a case having as object resettlement, is resulting unquestionably that the reason for which it was thought the new code of civil procedure would no longer have practical efficiency.

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THE LACK OF FUNCTIONAL JURISDICTION OF THE DIVISION FOR ADMINISTRATIVE AND TAX DISPUTES IN SETTLING THE APPEAL PETITION WITHIN THE APPEAL AGAINST ENFORCEMENT IN TAX MATTERS ARGUMENTS REGARDING THE CIVIL NATURE OF THE DISPUTE

Andrei Costin GRIMBERG[*]

Abstract

The Romanian legislation sets out the practical and theoretical manner of establishing the legal nature of disputes in the light of the applicable legal dispositions, establishing a specific statutory system for challenging enforcement proceedings.

The characterization of a dispute as civil or commercial in character should be done based on the legal standards applicable to the legal relationships existing between the parties.

As regards the challenge against tax enforcement, establishing the legal nature of the dispute under judgment and establishing the functional jurisdiction of the court that is asked to judge on the substance of the challenge against tax enforcement, as well as of the court invested to settle the appeal has generated over time a number of controversies and opposite solutions.

There were and still are some discussions and confusions regarding the functional jurisdiction of the enforcement courts having jurisdiction to judge on the substance of the challenge against tax enforcement, lodged on the basis of a writ of execution issued under some administrative tax acts.

Keywords: *challenge, enforcement, object, admissibility, functionality, administrative tax acts***.**

1. Introduction

As it is well-known, the civil trial consists of two complementary phases, the judgment (cognitio) and the enforcement (executio), which are at the same time autonomous. The judgment is a condition of enforcement, when the creditor has no writ of execution at its disposal, but when, for various reasons, regarding especially the discharge of the courts of law, the consolidation of credit, the law acknowledges as writs of execution not only the court judgments but also other orders and instruments[1], an instance in which the enforcement is established as being actually the only phase of the civil trial under such circumstances.

All those concerned or injured by enforcement may lodge an appeal against enforcement.

The appeal against enforcement may be defined as the procedural means specific to the enforcement phase, whereby one may request from the court with jurisdiction either the annulment of the illegal enforcement acts, or the obligation of the enforcement body which refuses to enforce a writ of execution to implement it according to law, or the clarification of the meaning, scope and application of the writ of execution.

The appeal against enforcement is a special means of appeal for dismissing some procedural acts fulfilled illegally by the enforcement bodies, and should not be confused with the action for annulment.

As regards the tax enforcements applied according to the Code of Fiscal Procedure, the writs of execution are the result of tax administrative acts issued by the tax authorities, whereby rights and liabilities in charge of taxpayers were established.

The tax administrative act is defined under art. 41[2] in the Code of Fiscal Procedure, as being the act issued by the tax authority with jurisdiction to apply the legislation on establishing, changing or settling tax rights and liabilities. The following are, for example, tax administrative acts: the taxation decision, the tax return, the certificate of tax registration, the certificate of tax record, the reimbursement decision, the decision on applicable measures, the setoff note, the deduction note, the decision on settling a challenge, etc.

The enforcement of the writs of execution issued pursuant to the dispositions of the Code of Fiscal Procedure is a simplified procedure regarding the initiation of enforcement proceedings and the procedural stages in these matters, by comparison with the enforcement implemented according to the dispositions of the Code of Civil Procedure.

The tax procedure establishes that any person concerned, who proves to have an interest may appeal[3]

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[1] Art. 632 par. 2, art. 635, art. 638 par. 1 point 2 and 3 in the NCCP

[2] Art.41 Code of Fiscal Procedure. In the meaning of this Code, the tax administrative act is issued by the tax authority with jurisdiction to apply the legislation on establishing, modifying or settling tax rights and liabilities.

[3] Art.172 Code of Fiscal Procedure „(1) The persons concerned may lodge an appeal against any execution act implemented through the execution bodies breaching the provisions of this code, as well as if such bodies refuse to implement an execution act according to law."

against the enforcement proceedings, against any mode of enforcement, any enforcement act issued and implemented by the enforcement bodies with jurisdiction, the refusal of the enforcement body to fulfill an enforcement act according to law.

The legislator set forth that the appeal against enforcement may be lodged also against the writ of execution based on which the enforcement proceedings were initiated, if such a writ is not a judgment pronounced by a court of law or another jurisdictional authority, and exclusively if there are no other proceedings according to law for challenging it.

As regards tax enforcement challenges, we should mention that the dispositions of the Code of Fiscal Procedure prevail and are supplemented by the dispositions of the Code of Civil Procedure, and this is the reason why, as regards the relevant issue set forth by the Code of Civil Procedure, in case another writ than a court judgment is applied, the appeals may be lodged also against the substance.

As regards this last consideration, some courts of law set forth correctly that there are two categories of challenges in tax matters, namely:

- the appeal against the tax administrative act, within which the injured person is to follow the procedure expressly set forth in the dispositions of the Law no. 554/2004 on administrative disputes, corroborated with the dispositions of the Code of Fiscal Procedure;
- and the appeal against enforcement lodged against the writs of execution issued within the execution procedure of the tax administrative acts executed, such as expressly set forth in the dispositions of the Code of Fiscal Procedure, supplemented by the dispositions of the Code of Civil Procedure.

We should mention that the tax administrative acts generating writs of execution, applied subsequently by the specialist divisions/ departments of the tax authority may not be annulled through the appeal against enforcement, these being appealed against exclusively under the laws aforementioned, avoiding thus to evade some express dispositions on the appeal against tax administrative acts.

Thus, although there is a clear distinction, from a legal point of view, between the appeal against tax administrative acts and the appeal against tax enforcement, there are opposite opinions and customs in practice, due to some wrong decisions or abusive defenses of the debtors.

As a general rule, the legislator established clearly the manner of appeal or annulment of the tax administrative acts issued and applied by a tax authority, therefore, I consider that the solutions pronounced by the enforcement courts invested to settle on the merits an appeal against tax enforcement, whereby also the annulment of the tax administrative acts generating rights and liabilities is requested, without observing the special procedure pre-established by the legislator, are wrong solutions, directly against the dispositions of the Law 554/2004 on administrative disputes, corroborated with the Code of Fiscal Procedure.

The nature and qualification of the appeal against tax enforcement is determined by the purpose considered in proceeding to such an action, in this respect the legislator setting forth that by proceeding to an appeal against enforcement, the annulment of some execution acts or measures considered illegal is envisaged, therefore the annulment of some execution measures is envisaged, whether these are enforcement acts drawn up by a bailiff or by a tax officer.

In all the cases, the challenge has the nature of a means of appeal, given that, by using it, the appellant aims at the annulment of a court judgment or another jurisdictional act, respectively the annulment of some execution measures.

2. Content

Pursuant to the provisions of the Code of Civil Procedure, the enforcement court has jurisdiction to settle the appeal against the enforcement as such, as well as the appeal regarding the clarification of the meaning, scope or application of the writ of execution, if this is not issued by an authority with jurisdiction.

The enforcement court is the court of law within the jurisdiction of which, the enforcement is implemented, except for cases when the law disposes otherwise.

The nature of the appeal against enforcement is determined, undoubtedly, by the civil or commercial nature of the right under dispute, considering that, within it, substantive defenses may be invoked against the writ of execution, according to the hypothesis regulated by the Code of Civil Procedure.

Given that, by enforcement proceedings, the effective implementation of the right claimed is pursued, it results that all the requests during the entire trial, inclusively the ones in the enforcement stage, due to the civil nature of the right acknowledged through the writ of execution, should be judged by the civil court, more precisely by its specialized division.

Even if we accept that the appeal against enforcement poses only procedural problems, the civil court has the jurisdiction to judge all the disputes involving such matters, notwithstanding the main issue that resulted in the conflict between the relationships between the parties.

As far as the appeal against the enforcement as such or the appeal against a writ of execution that is not issued by an authority with jurisdiction are concerned, these shall be settled by the enforcement court with certain exceptions, as stipulated by the Code of Civil Procedure, and, pursuant to the dispositions of the same code, the enforcement court is the court of law within the jurisdiction of which, the enforcement should be performed, unless the law sets forth otherwise.

As regards the means of appeal against the solutions pronounced within the appeals against

enforcement, the same procedural rules apply, the control court being a civil court, and the nature of the writ of execution being irrelevant; therefore, the means of appeal shall be settled always by the civil division of the hierarchically higher court.

This opinion is consistent with the letter and spirit of the law.

The exceptions aforementioned regard the impossibility for the enforcement court to check the legality within the appeal against enforcement, or to annul a debt instrument, or to review the legality of other tax administrative acts issued by the tax authority, given that the legislator set forth a special procedure for appealing against administrative acts, inclusively the preliminary administrative procedure, which is often confused with an appeal against enforcement, therefore an interpretation contrary to the special law[4].

On the other hand, we should mention that the legislator set forth that the appeal against enforcement may be lodged also „if clarifications are required regarding the meaning, scope or application of the writ of execution, if the procedure mentioned under art. 443, in the New Code of Civil Procedure was not used."

The law regulates also the institution called generically by the specialist literature „appeal against the writ", whereby the writ of execution itself is challenged, as regards its meaning, scope or application, and also its validity, by comparison with the existence, scope and validity of the debt challenged.

Therefore, also as regards the appeal against the execution as such, or the appeal against the writ, when such an appeal is against a writ of execution that is not issued by an authority with jurisdiction and, unless the law sets forth for this purpose another means of appeal, the court of law within the jurisdiction of which, the enforcement is performed is the one having jurisdiction to judge territorially and materially.

The interpretation of the legal standards stated shows undoubtedly that the enforcement court is always the court within the jurisdiction of which the enforcement is performed and which has no connection whatsoever territorially or materially with the court that pronounced the judgment to be enforced, and, as such, with the nature of the liability to be enforced.

The appeal against the enforcement invokes, as a rule, the illegality of the enforcement act or the appearance of a cause for settling the liability after the issuance of the writ, such matters being related exclusively to the enforcement itself, the civil nature of the cause being irrelevant.

The fact that the appeal against enforcement may invoke issues related to the validity of the writ of execution, when the enforcement is performed under a writ that was not issued by a jurisdictional body, establishes the civil nature of the enforcement and is a grounded reason for the judgment of the appeal against enforcement, in these matters, by specialist judges.

At the same time, pursuant to the dispositions of art. 717 par. (1) in the Code of Civil Procedure, „the judgment pronounced on the challenge may be appealed against only by lodging an appeal".

Therefore, apart from the exceptions expressly and limitedly set forth by the law, the means of appeal as regards the challenge against the enforcement as such, as well as against the writ that is not issued by a jurisdictional body is the appeal; the court immediately higher than the one that pronounced the relevant judgment, respectively the civil division of the tribunal has the jurisdiction to settle it and not the division for administrative and tax disputes, not having the tax relevance of the writ of execution[5].

We should mention this specifically, given that, many times, the enforcement court invested to settle on the substance of an appeal against enforcement initiated under a writ of execution issued by a tax authority extends its functional jurisdiction, and, as such, orders the annulment of such a writ. The solution thus pronounced is subject to the legally regulated means of appeal, more precisely the appeal, to be settled by the court that is higher hierarchically, on the docket of its civil division. There were cases when such an appeal was allocated exclusively to the division for administrative disputes, although the case for the judgment on the substance regarded a real appeal against the enforcement and not an appeal against the writ according to special standards.

Therefore, it should not be accepted that an enforcement court would have the jurisdiction to examine the legality of an administrative act, given that such an assessment would infringe upon the express dispositions set forth by the law regarding the challenge against tax administrative acts.

The legislator set forth, through the dispositions of the Law no. 554/2004, the possibility that the person harmed as to one of their rights or a legitimate interest by an individual administrative act issued by tax authorities is able to address the court for administrative disputes with jurisdiction, after following the preliminary proceedings. On these lines, the legislator stated clearly, through the provisions of art. 10 in the same law, the court with jurisdiction to settle such actions for the annulment of administrative acts on substance and also the material jurisdiction, to be established according to the value of the debt

[4] Lg.554/2004 – The law on administrative disputes

[5] The High Court of Cassation and Justice - ÎCCJ

Decision no. 15/2007 on the review of the appeal in the interest of law, as regards establishing the jurisdiction for settling challenges against execution, in first instance and within appeals, having as its subject matter court judgments pronounced on commercial disputes, as well as on other writs of commercial nature.

challenged, namely the Tribunal or the Court of Appeal through the divisions for administrative and tax disputes.

3. Conclusions

In conclusion, based on the analysis above, we should mention that, on the one hand, as regards the appeal against the enforcement as such, or the writ that is not issued by a jurisdictional authority, the court of law has full jurisdiction, as a court of first instance, and the civil division of the tribunal, within the appeal, without distinguishing as to the nature of the writ, according to the principle "*ubi lex non distinguit nec nos distinguere debemus*".

On the other part, the definition according to which enforcement is the second phase of the trial has fallen into disuse, given that, at present, enforcement is a stage in its own right, being the effect of a writ of execution being pronounced and not a repetition of the jurisdictional stages.

The dispositions regarding the enforcement and the appeals lodged within it are included in the Code of Civil Procedure separately from other dispositions, the legislator stating clearly what courts are the enforcement courts having the jurisdiction to settle the incidents arising during enforcement.

Therefore, based on the legal acts presented above, we may conclude pertinently that the division for administrative and tax disputes has no functional jurisdiction to judge the appeal lodged against the solution pronounced by the court of first instance as regards the challenge against tax enforcement, even if the writ of execution was issued by a tax authority or local or county public authority.

By interpreting and applying in a unitary manner the dispositions of the Code of Civil Procedure, it results at all times that the court of law has the territorial and material jurisdiction to settle the challenge lodged against the enforcement as such and the challenge regarding the clarification of the meaning, scope or application of the writ of execution that is not issued by a jurisdictional authority, and the means of appeal against the judgment pronounced on the challenge is the appeal as such, to be judged by the civil division of the tribunal.

Any interpretation contrary to the facts reviewed above shall certainly generate some different practices as regards establishing the functional jurisdiction of tribunals (civil, commercial or for administrative and tax disputes) upon settling the appeal as regards the challenge against the enforcement as such, given that the functional jurisdiction of tribunals should be established without referring to the nature of the writ of execution.

Thus, although the lack of functional jurisdiction of the division for administrative and tax disputes of the tribunal upon settling the appeal regarding the challenge against enforcement is a real problem in practice, in the absence of a clear, unequivocal law in these matters, this procedural incident is liable to generate among law specialists a lot of legal debates in the future.

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PRE-CONTRACTUAL INFORMATION IN CREDIT AGREEMENTS FOR CONSUMERS

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Abstract

The article provides an image to the point on information provided to consumers before the conclusion of a credit contract, starting with the importance of information and ending with the legal framework.

A high consumer protection may be achieved primarily through consumer information. The complexity of banking services but also the vulnerability of consumers in relation to the banks and the unbalanced relationship led to the need to develop specific legislation that clearly establishes the rights and obligations of the parties of a credit agreement for consumers. In this regard, in 2008, after many debates, Directive 2008/48/EC of the European Parliament and of the Council on credit agreements for consumers was adopted.

At national level, the Directive was transposed by the Government Emergency Ordinance no. 50/2010 on credit agreements for consumers. Taking into account national specificities, such as lack of experience of consumers in financial products, the irresponsible lending and the unfair practices of creditors, the national act includes wider provisions than the European Directive, such as those relating to fees limitations or those related to the calculation of the variable interest rate. Also the GEO no 50/2010 applies to all credit agreements concluded by consumers and creditors.

As regards the advertising, any advertisement shall include a series of standard information. Also, pre-contractual information is standard information, is provided to consumers 15 days before the contract is concluded and is transmitted through the "European Consumer Credit Information sheet Standard".

The article presents when, how and what information should be given to consumers and insists on the importance of annual percentage rate and to what consumers should pay attention in order to be able to compare different offers.

Keywords: *pre-contractual information, pre-contractual costs, credit agreement, lenders, distance contracts.*

1. INTRODUCTION

During the last years, a highly debated issue in Romania concerns consumer credits and, in particular, the risks associated with them, which make their presence felt after several years of borrowing. Different stakeholders from the market - consumers, banking institutions, state authorities - launch in various discussions or even organize in diverse structures, with the intention either to claim their rights or to defend their interests, and sometimes some interests do not necessary coincide with the legal rights. These discussions are oscillating from the stage of finding the guilty to finding a solution. Both of the tasks prove cumbersome. Consumers are accused of not reading the contract and of not being educated enough. Banking institutions are accused of failing to conduct proper creditworthiness assessment, and everybody remembers the period in which credit was given on the base of identity card; they are also accused of not offering the proper or the complete information to their clients, or that they took unilateral decisions, especially when it came to unjustifiable increasing interest rates and charges during the contact. Authorities are accused of delayed reactions. In turn, all find explanations.

The fact is that, at least at the level of the legislators, it became clear that the complete, correct and accurate information is the base of balanced contractual relations.

2. Content

Consumer information in the field of banking services concur in pursuit of a high level of consumer protection. The complexity and the importance of banking services offered to consumers as well as the inferior position in which consumers usually are, led to the conclusion, both at European and national level, that special legislation is needed in order to protect consumers – natural persons.

The legislation protects the *average consumer* which is defined by the judgments of the Court of Justice of the European Union as being reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. Nevertheless, even the average consumer is the weaker and vulnerable part from a contract in comparison with a creditor taking into account the consumer's level of knowledge and his bargaining and economic power.

Moreover, recent empirical research in behavioural economics shows that factors influencing the way individuals interpret and act upon information are more sophisticated that once thought. It is a truism to mention that the consumer is dependent on the information provided by the creditor when taking the decision to conclude a contract.

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European legislation

At European level, in April 2008, Directive 2008/48/EC on credit agreements for consumers (the "Consumer Credit Directive") was adopted. The Directive aims to ensure a high level of consumer protection by focusing on transparency and consumer rights. It stipulates that a comprehensible set of information should be given to consumers in good time, before the contract is concluded and also as part of the credit agreement. In order to allow consumers to compare more easily the various offers and to better understand the information provided, creditors have to provide pre-contractual information in a standardised form (Standard European Consumer Credit Information). Moreover, they will also provide consumers with the Annual Percentage Rate of Charge (hereinafter called "APR"), which is a single figure, harmonised at EU level, representing the total cost of the credit.

National legislation

Directive 2008/48/EC was transposed into national legislation by Government Emergency Ordinance no 50/2010 (hereinafter called "GEO 50/2010") on credit agreements for consumers.

Low financial literacy of Romanian consumers during the past period, their lack of experience in financial products, the irresponsible lending and the unfair practices of creditors made necessary that the national legislator impose specific national measures to counterbalance the above-mentioned problems.

With certain exceptions, strictly defined by law, the legal provisions are applicable to all credit contracts concluded between consumers and creditors after the entry into force of GEO 50/2010. Therefore, among others, credit agreements for personal needs and real estate or mortgage contracts are also included, without there being any limit to the granted amount.

GEO 50/2010 regulates the information that should be provided to consumers in different stages – advertising, pre-contractual and contractual, and also issues related to interest and charges.

Information at early stages

Appling the principle that it is easier to prevent than to cure later, it is important for consumers to be the beneficiaries of all useful information before making a decision and concluding the contract. Only in this way, consumers can make appropriate choices for their needs.

Advertising

Standard information is required to be included in any form of advertising - radio, TV, newspapers, etc.

Standard information shall specify, by means of a representative example, the following:

- the fixed and/or variable borrowing rate of the credit, together with information on any charges included in the total cost of credit;
- the total amount of credit;
- the annual percentage rate;
- duration of the credit;
- in the case of a credit in the form of deferred payment for a specific good or service, the purchase price and the amount of any advance payment;
- if applicable, the total amount payable by the consumer and the value of the rates.

In any kind of advertising, the information must be written in a clear, concise, visible and easy to read, in the same visual field and with characters of the same size.

If the conclusion of a contract regarding an ancillary service relating to the credit agreement, particularly an insurance, is compulsory to obtain the credit itself or to obtain it according to the terms and conditions, and the cost of that service cannot be determined in advance, the obligation to conclude such a contract is also stated clearly, concise and visible, along with the annual percentage rate.

The information should be presented in a way that does not distort the economic behaviour of consumers or is not likely to distort the economic behaviour with regard to the product of the average

consumer whom it reaches or to whom it is addressed, and should respect the requirements of professional diligence.

Pre-contractual information - when, how and what?

When?

According to GEO no 50/2010, information should be provided enough time in advance, but not less than 15 days before the consumer concludes a credit agreement. The 15-days may be reduced by written consent of the consumer.

How?

Pre-contractual information must be provided on paper or on any other durable medium, written clearly and easy to read, using the Times New Roman font, 12p minimum. If the information is written on paper, the paper color of the drawn form must be in contrast with the font used;

Lenders must use "the Standard European Consumer Credit Information". Any additional information which the creditor may provide to the consumer must be provided in a separate document that can be attached to the "Standard European Consumer Credit Information form".

In addition to the "Standard European Consumer Credit Information form", the consumer shall be provided, on request and free of charge, a copy of the draft credit agreement.

Pre-contractual information must be written so as not to mislead consumers through the use of technical expressions, legal or specific to banking area, using abbreviations or initials of certain names, except as provided by law or common language. The technical terms shall be explained at the consumer's request, in writing, at no additional charge.

Explanations should include at least the following:

- explaining of the pre-contractual information;
- the essential characteristics of the products proposed and the specific effects they may have on the consumer;
- an explanation of costs that are part of the total cost of credit to the consumer, so that consumers understand what they pay;
- the consequences of not paying for the consumer.

Creditors should be able to prove that the pre-contractual information was received by consumers.

What?

In order to meet its role of offering the consumer the possibility make the best choice, consumers should be aware that it is important to shop around asking the offers of different credit institutions. It is essential to ask for the personalized offer, meaning for exact the amount and period one wants (and can) to borrow. In this situation, the Standard European Consumer Credit Information form offered by different creditors will enable consumers to compare the data.

Once this learned, consumers should read carefully all the information of the standard form. Before mentioning the information provided in the standard form, I would like to call the attention to one key element – the annual percentage rate - APR.

APR is the total cost of the credit to the consumer, expressed as an annual percentage of the total amount of credit. APR encompasses all the known costs for consumer like the interest rate, the charges and so on. APR is not just a simple addition of those costs, but it is calculated according to a mathematical formula used by all creditors from the Member States.

APR is an useful comparison tool but only under the condition to obtain personalized information from creditors on similar offers - meaning the same amount, the same duration of the contract, the same number of rates, the same type of interest. APR changes if the values of one element of the credit offer changes.

In case of credit offers with fixed interest rate, APR will be the same during the whole period. However, in the case of variable interest rate, the value of the APR will be available only at the moment of calculation.

The information of the "Standard European Consumer Credit Information form":

- the type of credit;
- the identity and the address of the headquarter and of the office of the creditor as well as, if applicable, the identity and geographical address of the headquarter and/or of the office, or, if applicable home adress of the credit intermediary involved;
- the total amount of credit and the conditions governing the drawdown;
- the duration of the credit agreement;
- in the case of a credit in the form of deferred payment for a specific good or service and linked credit agreements, that good or service and its price;
- the borrowing rate;
- the conditions governing the application of the borrowing rate, calculation method of the the borrowing rate, as well as the periods, conditions and procedure for changing the borrowing rate and if different borrowing rates apply in different circumstances, the above mentioned information on all the applicable rates;
- the annual percentage rate of charge and the total amount payable by the consumer, illustrated by means of a representative example mentioning all the assumptions used in order to calculate that rate; where the consumer has informed the creditor of one or more components of his preferred credit, such as the duration of the credit agreement and the total amount of credit, the creditor shall take those components into account;
- if a credit agreement provides different ways of drawdown, with different charges or borrowing rates it shall indicate that other drawdown mechanisms for this type of credit agreement may result in higher annual percentage rates of charge
- the amount, number and frequency of payments to be made by the consumer and, where appropriate, the order in which payments will be allocated to different outstanding balances charged at different borrowing rates for the purposes of reimbursement
- where applicable, the charges for maintaining one or several accounts recording both payment transactions and drawdowns, unless the opening of an account is optional, together with the charges for using a means of payment for both payment transactions and drawdowns, any other charges deriving from the credit agreement and the conditions under which those charges may be changed;
- existence of taxes, fees and costs which the consumer has to pay in connection with the conclusion, advertising and/or recording the credit agreement and ancillary documents, including notary fees;
- the obligation, if any, to enter into an ancillary service contract relating to the credit agreement, in particular an insurance policy, where the conclusion of such a contract is compulsory in order to obtain the credit or to obtain it on the terms and conditions marketed;
- the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, any charges payable for not compliance with the contract;
- a warning regarding the consequences of missing payments. The warning must contain the terms for reporting to the credit bureau and the minimum time at which the creditor may initiate foreclosure procedure;
- the sureties required;
- the existence or absence of a right of withdrawal;

- the right of early repayment, and, where applicable, information concerning the creditor's right to compensation and the way in which that compensation will be determined;
- the consumer's right to be informed immediately and free of charge of the result of a database consultation carried out for the purposes of assessing his creditworthiness;
- the consumer's right to be supplied, on request and free of charge, with a copy of the draft credit agreement;
- consumer's right to receive a free copy of the draft credit agreement in case of mortgage loans;
- if applicable, the period of time during which the creditor is bound by the pre-contractual information.

Pre-contractual information requirements for certain credit agreements in the form of an overdraft facility

The legal provisions also apply to "overdraft facilities" and taking into account the nature of these products, specific pre-contractual information is mentioned:

- the type of credit agreement;
- the identity and geographical address of the creditor as well as, if applicable, the identity and geographical address/ office of the credit intermediary involved;
- the total amount of credit;
- the duration of the credit agreement;
- the borrowing rate;
- the conditions governing the application of that rate, calculation method, any applicable costs from the moment of concluding the credit agreement and conditions under which those charges may be changed;
- the annual percentage rate of charge, illustrated by means of representative examples mentioning all the assumptions used in order to calculate that rate;
- the conditions and procedure for terminating the credit agreement;
- in the case of credit agreements as "overdraft" an indication that the consumer may be requested to repay the amount of credit in full at any time;
- the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, where applicable, any charges payable for default;
- the consumer's right to be informed immediately and free of charge, of the result of a database consultation carried out for the purposes of assessing his creditworthiness;
- in the case of linked credit agreements, information about the charges applicable from the time such agreements are concluded and, if applicable, the conditions under which those charges may be changed;
- if applicable, the period of time during which the creditor is bound by the pre-contractual information.

Pre-contractual information in case of distance contracts

In the case of voice telephony communications, the description of the main characteristics of the financial service to be provided shall include at least the following:

- the total amount of credit and conditions governing the drowning;
- the duration of the credit agreement;
- in case of a credit in the form of deferred payment for a specific good or service or in the case of linked credit agreements, that good or service and its cash price;
- the borrowing rate;
- the conditions governing the application of borrowing rate, calculation method, as well as the periods, conditions and procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the abovementioned information in respect of all the applicable rates;
- the amount, number and frequency of payments to be made by the consumer and, where appropriate, the order in which payments will be allocated to different outstanding balances charged at different borrowing rates for the purposes of reimbursement;
- the annual percentage rate of charge, illustrated by means of representative examples;
- the total amount payable by the consumer.

If the agreement has been concluded at the consumer's request using a means of distance communication which does not enable the information to be provided, the creditor shall immediately after the conclusion of the credit agreement fulfill his obligations by providing the pre-contractual information using the form " "Standard European Consumer Credit Information".

In the case of voice telephony communications and where the consumer requests that the overdraft facility be made available with immediate effect, the description of the main characteristics of the financial service shall include at least the following elements:

- the total amount of credit;
- the borrowing rate;
- the conditions governing the application of that rate, it's calculation method, the charges applicable from the time the credit agreement is concluded and the conditions under which those charges may be changed;
- the annual percentage rate of charge, illustrated by means of representative examples mentioning all the assumptions used in order to calculate that rate;
- for the credit agreements which are granted in the form of an overdraft, an indication that the consumer may be requested to repay the amount of credit in full at any time;
- the interest rate applicable in the case of late payments and the arrangements for its adjustment, and, where applicable, any charges payable for default.

Pre-contractual costs

For mortgage credit agreement, the creditor shall also inform consumer that he has to pay in pre-contractual stage only the following expenses:

- expenditure relating to preparation of loan application;
- the estimated costs related to the mortgage and sureties evaluation.

In all cases, the creditor has the right to perceive a charge for analyzing the file only of the credit was granted.

Evaluation of the file

Besides the pre-contractual information, it is also important for consumers to know the period during which the creditor must evaluate the credit file. According to the national legislation, within 30 days of submission of the credit file, but not more than 60 days after submission of the request for credit, the creditor shall respond in writing to the consumer or the consumer's express request, the other form of consumer choice and accepted by the lender on or not to grant credit.

On credit receipt and other documents required, the financial service provider is obliged to immediately hand the consumer a written, dated, signed and registration numbered paper containing the lender's confirmation that he received all documents required by the granting of the credit.

3. Conclusions

In conclusion, information and knowledge are vital for consumers and, as Benjamin Franklin said "*An investment in knowledge pays the best interest."* Nevertheless, education is the one that empowers consumers to benefit of the various offers of the market.

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GENERAL ASPECTS AND PURPOSE OF THE CONSUMMATION CONTRACT

Alexandru MATEESCU*

Abstract

The current paper mainly tackles the consummation contract and the ways in which it forms, adjusts and helps the citizen, in the general frame of the consumer's rights. The consummation contract is a legal instrument for institutionalizing the commercial operations between a professional and the consumer. This type of instrument has been especially created to help the citizen in being adequately treated both correctly and adequately in all consummation matters. In the 20th century, the need to bring the commercial relations between professionals and citizens under regulation became imperative. Taking into account the socio-humanistic development rhythm, the consummation contact became a way of guaranteeing for the citizens' rights in consummation matters and, at the same time, it confers a legal frame to guide and direct the merchants.

Since 2007, the year when Romania adhered the European Union, the consumers' rights became even more important, as the fact that the European Union focuses on the rights of all its citizens and the way in which they are treated by the merchants from a commercial point of view, was widely recognized. Once Romania adhered to a commercial frame which embeds over 500 million inhabitants, the dimension of the rights and obligations regarding consummation became an ever stronger argument in bringing the legislation under regulation.

Eventually, clarifying the principles that founded the consummation contract will determine the legal frame in which it revolves and will bring to light the utility it has for the citizens, its subsequent employments and all things that should be further added to it in order to ensure an even better protection and settlement, in legal terms, of the commercial relations between a merchant and one or more citizens.

Keywords: *consumer, contract, citizen, professional, European Union.*

1. First words on the consummation contract

It is considered that between a consumer and a professional there is, and there will always be, an uneven forces rapport. In order to make the commercial relations level even for both parties and to offer them a legal frame in which they can both deploy their activities, the consummation contract has emerged.

It all starts with the professional's offer and the consumer's request. The latter expresses the consumer's will to buy the good or the service that is commercialized, while the professional's offer guarantees that the good or service observes all the parameters that have been agreed upon, by means of the contract. Any person endowed with a judicial ability has the right and is free to conclude a consummation contract, which is in full conformity with the effectual laws, and they cannot be detained by any exterior force. The agreement between parties, followed by the observing of the specific terms requested by law, and called "validity terms", convert a simple understanding into an object with a judicial character, and it becomes a consummation contract.

Once concluded, the consummation contract becomes effective and produces rights and obligations, as it represents a judicial rapport between the involved parties, which become contractual parties. [1]

2. Legal determination and presentation of the consummation contract

The consummation contract has many definitions but, formally, it is a judicial instrument. It represents the free will of both the professional and the consumer for establishing a commercial transaction, with and economic finality, in which the professional provides a good or service for commercialization, which the consumer wants to purchase.

The object of the contract must be clearly sated, it has to be determined by and observe the conditions, in order for it to be considered a licit right.

Based on this link between the professional and the consumer, the law clearly decreed the attributions, rights and obligations of the parties, so that they are on a plain level and that the consumer's rights won't be limited or broken. For that matter, if we stop to think what a professional is, we can imagine a merchant with a technical expertise of the product he provides and who knows all the elements of the good or the product he offers for the eventual consumers to purchase. On the other hand, it is probable that a consumer may not benefit from a technical expertise, or from any experience concerning the good or service he is bound to purchase. The consummation contract is, in its essence, conferred by the law to help the consumer to protect his rights, to be treated correctly and to have the possibility to get to know all the aspects of the good or service he is to purchase. [2]

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We cannot say a consummation contract has its own judicial nature, when determining it. It can be regarded as an instrument that helps bringing the commercial rapports between the parties under regulation, and it is adjusted to fit he type and nature of the good or service that is offered for commercialization. Taking all these regulations into account and based in the fact that is does not have its own judicial nature, we can say that it cannot fall under the category of special contracts.

Through its form, the consummation contract represents a civil law contract.

But how can we exactly assert that this type of contract offers protection to the consumer? Firstly, the consummation contract ensures the correct information and the full knowledge regarding the characteristic and essential data on the product or good the former is bound to purchase. The law specifies and carries that the professional should offer the consumer free access to all the information about the good or product, data that should be at the consumer's free disposition. The main information should include the product's characteristics, the means of payment and delivery.

In case the contract does not observe the validity terms, it can be struck as invalid. Thus, it cannot be said that the contract has been concluded.

When referring to the consummation contract, we can also talk about principles. There are principles that represent the basis in concluding such a contract and also, there are principles that stand at the base of the contract itself such as the liberty to conclude a contract, the fraternity between parties the equality of the parties. All these principles are imperative for a good deployment and conclusion of a consummation contract. The contract's conclusion in positive terms is supported by the effectual law, which is specially designed to infer the rights and obligation of each party, in relation with the other, as well as with the national institutions that supervise on these laws being fully observed.

Based on all these regulations and norms we can say that the consummation contract carries out a judicial and economic purpose and, last but not least, a social one. The consummation contract is a consumerist instrument which both merchants and consumers are bound to make use of.

3. The actual form of a consummation contract and its particularities

Through its nature, the consummation contract implies the existence of two parties, the professional and the consumer.

The professional is defined as the economic part, who offers a good or service for commercialization, or as an economic operator. Thus it is either a physical person, or a legally authorized person who can pursue the following activities: transportation, commercialization or storage of a certain type of goods or services.

On the other hand, the consumer can be any physical person who acts outside their economic and commercial purposes.

3.1. The contract's form and the parties roles

As we have previously mentioned, for any sort of agreement between the two parties there has to exist, first and foremost, a willing agreement between the two.

In case the will is displayed by both parties, then the agreement leads to one of the three existent forms of contract. [3]

The first form is that of compulsory contracts, where the terms are essentially the ones regulated by the law, the conditions are clearly delimited and the attributions and responsibilities of both parties are specified. [3]

The second from is that of the negotiated contract. This is a form of contract which is not concluded too often for transactions between professionals and citizens and it represents a classic contract, as it infers all the standard elements of the agreement between two or more parties, for a commercial purpose. [3]

The third from is represented by the liability contract, which is a form that is specific for the majority of commercial contract concluded between a professional and consumer. The general aspect of this form of contract is that more often than not the liability contract will be exclusively written by the merchant and the consumer does nothing more than giving his written consent. [3]

We can even say that the liability contract involves certain unilateral elements that may injure the consumers' rights. In some cases, as the contract is previously drawn up exclusively by the merchant, the consumer might find himself in a situation where he is forced by the circumstances to agree to some terms he would normally not agree to. [3]

In these cases, when the consumer's rights are injured, we can talk about abusive terms which are imposed by the economic operator, which are designed to keep the citizen from benefiting from all the rights the law provides them with. A good example is the right to compensation, in case the product or service that is provided by the merchant does not observe the conformity rules and when the merchant refuses to deliver the product for the consumer to make use of it. In these cases, the terms that are unilaterally imposed by one of the parties can be considered to be completely invalid. The infringement of any right of the citizen to being treated in a correct and balanced manner in a contract is strictly forbidden by the law 240 / 2004 regarding the consumer's protection and by the European directives regarding the citizens' rights in matters of consummation contracts 85 / 375 / CEE and 1999 / 34 / CEE. [4][5][6]

As we have previously stated, the willing agreement is imperative for both parties, so that such a contract should be concluded. At the same time, the legal dispositions work especially for protecting the citizens from any eventual abuse or legal breaches that might be exploited by the professionals in order to fringe the consumers' rights to an equitable and fair treatment and to a good conclusion of the contract that should benefit both parties. [7]

By applying some terms that may seem a little restrictive, equality and balance between the contractual parties is reached, which guarantees the obeying of legal norms by all parties. The consummation contract is considered to be itself an instrument that guarantees the parties equality.

Its utilization represents both a social and a commercial instrument, designed to establish a balance between the technical expertise of a professional and the limited means a consumer has for protecting their own rights.

3.1. The consumer's rights and the contractual provisions

A contract should clearly state all the details and specifications of the product of service that is being commercialized. This information should be expressed in a clear, non-equivocal manner and with no ambiguity, and the levied price should be mentioned.

In case the contract contains any ambiguity or, if the case be, it includes some terms which do not state clearly the rights and obligations of each party, the respective provision will act to the consumer's benefit. [8]

These are the abusive terms. As previously stated and abusive provision is a contractual term that was not open for negotiation to the consumer and it embeds or specifies an infringement of the consumer's right to contract implementation, of their civil rights or to the detriment of his judicial, social or economic interests. This type of provision breaks the good faith principle and that of the contract's balance and it applies the consumers and professional's rights and obligations in an uneven manner.

An abusive provision can be identified as one that has not been negotiated by the consumer and that has a significant influence in the implementation and execution of the contract. [9]

A good example could be a provision which infringes the consumer's right to unilaterally denouncing the contract.

In most cases, the consummation contract can be perceived as a set of rights that the citizen, or the consumer, has:

- the right to clearly knowing the contractual provisions;
- the right to know the exact price they are bound to pay to the professional;
- the right to a technical support in case of any flaws or failures;
- the right to compensation for any prejudice caused by a product that did not observe the conformity terms in the contract;
- for any bank product, the right of being exonerated from paying for the goods or services which have not been included in the contract;
- for any bank product, the right to receiving a written notification, in a term of at least 30 days, in case any change regarding prices and commissions should occur;
- the right to turn to the authorities, when they consider they have not received a fair treatment;
- the right to a fair and equitable treatment, concerning the contract, without being imposed any provision that may be considered unfair or abusive. [9]

All these rights represent a consumer's liberties regarding consummation contracts. At the same time, the infringement of any of these rights can be seen as an abuse or, if the case be and if it has been drawn up as a contractual provision, it can be seen as an abusive provision. In order to fight this type of practices, law 363 / 2007, a law that refers to commercial practices that are unfair towards the consumer, was issued. [10]

4. Legal European climate in the matter and possible development for the future

As far as the general dogma is concerned, nowadays, the European Union applies and also requires the member states a high degree of enactment in the matter. Together with the European directives, the member states are encouraged to apply a law that is comparable to the European law in this matter.

Directive 97 / 7 / CEE of the Parliament and the Council, from 20th May 1997, brings under regulation the European specific conditions for concluding a commercial contract between a consumer and a professional. This directive was issued as a continuation of directive 85 / 55 / CE, the first directive concerning the protection of consumers' rights to be enacted at European level.

Starting from 13th of June 2014 the changes that have been made to the European Law in this matter, through directive 2011 / 83 / CEE, became effective for all the member states. From the beginning of June 2014, the regulations of the European directive became effective for all the member states. The states of the European Union had 2 years, until the end of 2013, to apply the European directive to their national legislations. [11]

Here we can note some changes that have been made in this area in order to harmonize the social economic environments of all the member states. Just like the past provisions, the present directive has a significant impact on national regulations regarding the consummation contract. Taking into account the 21st century and the fact that the economic and social environments are undergoing a continuous change, the European Union approaches the new services and products which are designed for the European consumers.

4.1. The European Union and the consumers' rights regarding consummation contracts

The provisions brought changes to online transactions and hidden costs that may occur to the consumers' prejudice: the consumer's refunding, by the merchant, in case the former returns the product in a term of 14 days from the online purchase of the good or service; the introduction, at European level, of a form designed for consumers who want to retract from a distantly concluded contract.

Another major change is made regarding credit card transactions and the contracts that have been concluded and paid for using credit cards: the removal of any additional costs the consumers were charged by the economic operator. This was seen as an abusive provision that unilaterally forced the consumer to pay for some charges that were unknown to them and that were not agreed upon when concluding the contract; the obligation to include additional information regarding additional costs in case of returning a purchased product.

Once the new changes to the European law became effective, the rights and obligations that sprung from a consummation contract became more and more well-determined and precise. The new regulations also stated that the consummation contracts had to include the geographical address of the selling facility, not only that of the social headquarters, the levied prices, delivery costs and any additional costs that may eventually occur.

The new provisions are mainly designed for distantly concluded contracts and online transactions. The online commerce underwent a great growth in the past years, which made it desirable and, at the same time, necessary a clear regulation that should offer a wide spectrum regarding commercial transactions between the European professionals and consumers. One of the main development directions was the mere growth that has been enlisted in electronic commerce and in the system of electronic payments. Thus the need for optimizing and adjusting the legislation in the matter became imperative as the consummation contract had to maintain its optimal utility and functionality, in the era of digital technology.

The socio-economic climate underwent major changes in the past years, some that have altered the relations between merchants and consumers, as well as the relations among all consumers and the way in which they could manifest and bear their rights and interests, by means of the effective laws and legislation. Together with the recent difficulties that occurred in the European economic environment, which affected the member states, nowadays the main focus is on the citizen and the way in which he has to be fairly, correctly and equitably treated. In what the transactions and contracts are concerned, they have to benefit from both the knowledge and the certainty that the effective legislation will allow them to conclude a contract that will be observed, that will be fairly applied and that will be guaranteed, based on the effective laws and legislation.

4.2. Present and future, internally and at the European level

As we have previously seen, in the case of the effective European legislation, that of the changes that have occurred and that of the national legislation, consumerism is a symbol of both internal and external development. The necessity of helping the socio-economic climate towards a sustainable and balanced development has pushed the Romanian legislator to look at the contract, and especially the consummation contract, as a civil instrument that must have the possibility of being applied efficiently and with great responsibility by any citizen who manifests their will, determination and liberty to conclude such a contract. [12]

Internally we can notice the regulation's effects through a better integration of all legal aspects regarding commercial transactions. The consummation contract is entirely of European inspiration. Its application and perpetual change keep up with the Romanian society. It is a legal instrument that offers direction to all citizens in the free market.

Externally we can note the European legislation vision. The approach here is much wider, as there is a necessity to adjust and harmonize the legislations of the member states, towards a common system, that can be applied to all of them. This necessity occurred because of the main principles of the European Union: the principle of capital, goods and people free circulation. Thus we have a market that embeds more than 500 million citizens, who are as well consumers that need help and guidance towards a fair and efficient behavior in all commercial operations they are involved in.

In the eventuality of future changes, there are some focus areas, regarding the legal provisions, which may occur, as it is mainly underlined by the human development factors in the most important areas where the society has made some progress in the past years.

The administration and online transaction resources are still put to doubt, even after the latest national and European changes. The consumer's possibility of owning the complete control over any contract he concluded in a virtual environment is still highly doubtful. Also, the discrepancies that may occur between the specifications of the commercialized products and the way they are presented are still put to doubt and can have a negative impact on the consumer. The online environment still has some elements that are not clearly perceived by the consumer.

This is where some beaches of their correct information occur, caused by the merchants, and they can eventually manifest through the fact that the consumer is not completely aware of all his rights. In the most critical cases, they can occur due to weak

information and the negative aspects of the contract, like some provisions meant to infringe the consumer's right to dispose some actions, which he is entitled to, in due time, before the contract's expiration or termination.

Also there may occur some supplementary provisions, and they may occur explicitly for many banking services that are offered at European level the common and free economic space makes is possible for any European citizen to benefit from such a service, in every profile institution for any member state. At the same time, the diversity of laws in the matter makes it possible hiding the consumer's rights and some before-hand information they may receive. In this case, we can talk mainly about coordination between the European Union and the member states, concerning the possibility of a common solution, at a communitarian level, which would subsequently be adapted and harmonized with the national laws of the member states.

Another point present of interest is represented by the provision and distribution of electricity, gas and water towards the consumers. Even of the effective regulations include clear approaches regarding the conditions in which a contract can be concluded, these conditions can at most be general, and they are unable to tackle a specific case with a high complexity.

To sum up, we can say that nowadays a consummation contract provides the consumer with the possibility benefits and to act efficiently in any commercial transaction they conclude. The changes that may occur in the future will be determined on some analysis based on the application and utilization of this contract in different cases, from an economical, judicial and temporal point of view. The changes that will be made so that it better serve the citizen's interest are to be determined by the reaction and evolution of the social, politic, economic and judicial climates, internally and at European level.

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THEORETICAL ASPECTS REGARDING THE OBLIGATION AS PROVIDED BY THE ROMANIAN LEGISLATION AND THE DOCTRINE

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Abstract:

Taking into consideration the latest amendments of the Romanian civil legislation performed through the Civil code of 2009, as further amended, I consider useful to provide the lecturers with a theoretical overview over one of the most important institution in our legal environment, i.e. the obligation.

The analyse will start with an introduction comprising the definition of the obligation as provided by the Civil code aand the doctrina, will continue with the structure of the obligation and, further, will offer an overview of its sources, identifying, inter alia, the articles in the Civil code where such sources are regulated (e.g. contract, law).

In the end, the paper will provide a doctrinaire classification of the obligation, outlining the main categories of the obligations.

Keywords: *obligation, agreement, unilateral, civil, Civil code, legislation, bilateral, creditor, debtor*.

I. INTRODUCTION. THE DEFINITION OF THE OBLIGATION. LEGAL REGULATION

As regards the scope of this paper, it is undoubted that, even if the current legislation represents an evolution as regards the obligation, the doctrine and the jurisprudence, especially the ones before the Civil code of 2009, are still actual. Therefore, the scope of this paper is to envisage the general aspects related to the obligation, as such are revealed, mainly, by the legislation and the legal writers.

At the beginning, mentions hould be made that the obligation is an old institution, a definition being provided also by the Institutions of Justinian. Therefore, it was stated that the obligation is "a legal relationship, under which we are compelled to fulfil a duty according to the law of our borough" (lat. – *obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis iura)*[1].

In the current regulation, the obligation is defined under Article 1164 of the Civil code[2] as being that "lawful relationship, whereby the debtor is bound to fulfil a duty towards the creditor, and the latter is entitled to obtain the fulfillmenty of due duty".

Until the current Civil code becomes effective, given that the former regulation (i.e. Romanian Civil code of 1864) did not provide a definition of the obligation, this task was assumed by the legal writers.

Thus, obligation was defined, *lato sensu*, as being "that legal relationship whereby the active subject, called creditor, has the right to request from the passive subject, called debtor – who has the corresponding duty – *to give*, *to do* or *to not do* something, subject to the sanction of state compulsion, unless the action is performed willingly"[3].

Moreover, after the new legislation entered into force, the legal writers offered doctrinaire definition of the obligation, being stated that "the civil obligation is the legal relationship whereby a party, called creditor, has the right to request from the other party, called debtor, to fulfil the duty or duties they have, subject to the sanction of state compulsion"[4].

Based on the above mentioned, we may say that obligation is a private legal relationship involving the existence of two natural or legal persons: the *creditor*, standing for the active component of the obligation (holding a right to claim) and the *debtor* and its duty related to the creditor's right. Such duty of the debtor represents the passive component of the obligation.

Nowadays, it was stated[5] that the term "obligation" has three meanings. Thus, besides the *lato sensu* meaning aforementioned, *stricto sensu*, the "obligation" is considered as being that duty of the passive subject, the debtor. The third meaning of the term "obligation" is that the obligation represents the document itself, incorporating the claim right and the

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[1] Alin-Adrian Moise, *The New Civil Code. Comments per articles. Art. 1-2664*, Coordinators Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C.H. Beck Publishing, 2012, Bucharest, p. 1215;

[2] The Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania No. 505/2011;

[3] C. Stătescu, C. Bîrsan, *Civil Law.General Theory of Obligations*, ninth edition, revised and supplemented, Hamangiu Publishing, 2008, Bucharest, p. 1;

[4] Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Basic Civil Law Treatise. Obligations Pursuant to the New Civil Code*, Universul Juridic Publishing, 2012, Bucharest, p. 12;

[5] Coordinator Marilena Uliescu, *The new Civil code. Studies and comments. IIIrd Volume. Ist Part. Vth Book. About obligations (Art. 1164-1649)*, Universul Juridic Publishing, Bucharest, 2014, p. 15;

related obligation, namely the obligation to pay the said claim.

Taking into consideration the above mentioned, this paper envisaged to offer the reader a concise and clear overview of the institution by analysing the legal provisions of the Civil code, with some references to the existent legal writings.

II. THE STRUCTURE OF THE OBLIGATION

Representing a legal relationship, the obligation has three principal elements in its structure: (i) the subjects, (ii) the content and (iii) the object.

In our doctrine, there are opinions based on which the structure comprises also a forth element, i.e. the sanction, which will be also analysed in this paper.

In its current form, Article 1164 Civil code does not refer to this fourth element and, based on this, some legal writers considered that this was due to the existence of that category of obligations known as *imperfect civil* (or *natural*) *obligations.* This category of obligation is characterized by the fact that the creditor is not able to obtain the performance of its obligation by the means of execution, even if the payment is still due[6].

1. The subjects of the obligation.

Called also the *parties* of the obligational relationship, the subjects may be any natural or legal persons, provided that they act in accordance with the legal provisions, as well as the state when taking part directly in civil legal relationships.

Unlike in the case of bilateral obligations, in case of unilateral obligations, a party is solely a creditor and the other party is solely a debtor. For example, in the case of the donation agreement free of burdens, the granter is the debtor, while the grantee is the creditor.

2. The content of the obligation.

The content of the obligational relationship consists of the claim right of the creditor and the obligation related to this right encumbering to the debtor.

In other words, the creditor's right consists in the right to request from the debtor the fulfillment of a certain duty, which may consist of *giving, doing* or *not doing* something, while the debtor's obligation consists in the duty to execute the action to which is bound (e.g. handing over some property, paying an amount of money, delivering a service, executing some work, etc.).

As regards their patrimony, the creditor's claim right is among its active side of the patrimony, while the debtor's duty is in the passive side of its patrimony, hereby resulting the patrimonial content of the obligation.

3. The object of the obligation.

The object of the obligational relationship consists of the *action* or *inaction* the debtor is obliged to and that the creditor may request.

Therefore, the object of the obligation may consist either of a positive action (*to give* or *to do something)* or of an inaction, a negative action (*not to do something* the debtor would have been entitled to in the absence of the assumed obligation).

Starting from the above mentioned, it is important to make the difference between the three major categories of obligations existing in our legislation: *to give*, *to do* and *not to do something*.

The obligation *to give* means the obligation of create or transfer a real right[7], such as, for example, the seller's obligation to transfer to the buyer the property right.

We may say that the obligations *to do* are those positive actions that may not be considered obligations *to give* (the obligation to deliver a service, the obligation to pay the rent, the obligation to execute a work, the lessor's obligation to make available to the lessee the property that is the object of the lease agreement[8] etc.). Therefore, the differences between the two aforementioned categories revealed the meanings of each of them.

The obligation *not to do* consists of the debtor abstaining from doing something that might have done, unless binding to abstain. We should mention that the obligation *not to do* does not refer to a negative general obligation, such as, for instance, the obligation of the undetermined passive subjects of the property right, who have the obligation not to do anything that might affect the owner's right[9].

Therefore, we may say that there is an obligation *not to do something* when, within an obligation, the debtor undertakes to abstain from exercising a right that, normally, it was entitled to exercise. For example, there is an obligation not to do when the owner of a land undertakes before their neighbor not to erect a construction with a certain use, waiving thus to exercise a power they had in their capacity of owner.

4. The sanction of the obligation.

As previously mentioned, the sanction of the obligation is considered by some authors as the fourth element of the obligation. The sanction arises usually when the debtor does not fulfill willingly its obligation and it consists in the creditor's right to use various legal means for settling its claim, such as:

a) *enforcement procedure commenced against the debtor*, regulated by the Romanian Civil Procedure

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[6] Alin-Adrian Moise, *op. cit.*, p. 1216;

[7] Real rights are listed under Article 551 of the Civil code, and are the following: the property right, the superficies right, the right of usufruct, the usage right, the habitation right, the easement, the administration right, the concession right, the right of use, real security rights, other rights the law considers as being of such nature;

[8] Art. 1786 Civil Code sets forth among the main obligations of the lessor the obligation „*to hand over to the lessee the property leased*";

[9] Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Civil Law Course. Main Real Rights. Second Edition, revised and supplemented*, Hamangiu Publishing, 2013, Bucharest, p. 21;

Code and which may be direct enforcement and indirect enforcement.

b) *legal action*, regulated also by the Romanian Civil Procedure Code, whereby the creditor requests from the Court having jurisdiction to oblige the debtor to perform the due obligation.

c) *default interest*, namely that compensation in money owed by the debtor for remedying the damage caused to the creditor by the failure to fulfill the obligation in due time, which may be cumulated with the fulfillment of the obligation in kind or with compensatory damages[10].

d) *periodic penalties and fines*. These are amounts of money that the debtor is obliged to pay, under a Court judgment, to the creditor, as far as periodic penalties are concerned, or to the state budget, in case of the fines, as a sanction for fulfilling the obligation late.

A major difference between the two is that, as regards periodic penalties, these are subject to reimbursement after the obligation is fulfilled by the debtor, while the fines may not be reimbursed, being considered revenues to the state budget.

If we shortly analysed the methods available for the creditor to obtain the fulfilment of its obligation, it is our view that is important to discuss also about the legal means offered by the legislation to the debtor in order to perform the payment or to defend its rights.

a) *the notification of default of the creditor*. Thus, pursuant to Article 1510 of the Civil code, "the creditor may be notified of default if refusing without grounds the payment duly offered or refusing to perform the preliminary acts without which the debtor is not able to fulfill the obligation".

If the creditor is notified of default, it "take over the risk of impossibility of fulfillment of the obligation, and the debtor is not bound to return the proceeds obtained after the notice of default". Moreover, "the obligor is bound to remedy the damages caused by delay and to cover the expenses on the preservation of the property owed" (Article 1511 of the Civil code).

b) *consignment of the property or its sale at public auction*. A prerogative set forth under Article 1512 of the Civil code, this arises if the obligation of the debtor consists of handing over a property and such obligation may not be fulfilled because of the ungrounded refusal of the creditor. In such case, "the debtor may consign the property at the expense and risk of the creditor, thus being discharged of its obligation". However, "if the nature of the property makes consignment impossible, if the property is perishable or its storage involves maintenance costs or considerable expenses, the debtor may start the public sale of the property and may record the price, notifying in advance the obligor and obtaining the approval of the court of law" [Article 1514 par. (1) Civil code].

Further, „if the property is listed on the stock exchange or on another regulated market, if its current price or value is too low by comparison with the expenses incurred upon public sale, the court may approve the sale of the property without the notification of the creditor" [Article 1514 par. (2) Civil code].

III. THE SOURCES OF THE OBLIGATIONS

The sources of obligations are listed under Article 1165 of the Civil code, which sets forth that "the obligations arise from an agreement, a unilateral act, management of other person's interests, unjust enrichment, undue fulfillment, delict, as well as any other act or fact that the law connects with the creation of an obligation".

a) The agreement is defined under Article 1166 of the Civil code, as "the agreement of will between two or several persons in the intent of creating, changing or terminating a legal relationship".

b) The unilateral civil legal act is the result of the will of one party (art. 1324 – 1339, Civil code).

c) Negotiorum gestio (called also management of other person's interests) is basically the operation whereby a person, called negotiorum gestor, through its intentional and unilateral action, interferes and does material or legal acts in the interest of another person, called principal, without being empowered by the latter[11]. Negotiorum gestio is regulated by the Civil code, art. 1330-1340.

d) Unjust enrichment (art. 1345 – 1348 Civil Code) may be defined as the unlawful act whereby the patrimony of a person increases at the expense of another person, without any legal grounds, the latter being entitled to claim and obtain the restitution.

e) Undue fulfillment (art. 1341 – 1344 Civil code) means the fulfillment by a person - the debtor (*solvens*) for the benefit of another person – the creditor (*accipiens*) of an obligation they were not bound to and that they fulfilled without the intention to fulfill someone else's obligation.

f) The unlawful act as a source of the obligation-based legal relationships is regulated in Chapter IV of the Title V in the Civil code, being also known as „legal liability". Legal liability may be defined as that obligational relationship within which a person has the obligation to remedy the harm caused to another person by its wrongful act or the harm for which it may be held liable according to law.

Civil liability is, pursuant to art. 1349 and 1350 Civil Code, of two kinds: tort and contract.

[10] *Compensatory damages* are the equivalent value of the damage suffered by the obligor due to the failure to fulfill or the partial fulfillment of the obligation and may not be cumulated with the fulfillment of the obligation in kind;

[11] G. Boroi, L. Stănciulescu, *Civil institutions under the new regulation*, Hamangiu Publishing, 2012, Bucharest, p. 169;

g) Besides all these sources, we should mention[12]:

- civil liability for the damages caused by flawed products put in circulation, governed by the Law no. 240/2004 on manufacturer's liability for damages caused by flawed products, republished[13];
- injuries caused by legal errors.

IV. THE CLASIFICATION OF THE OBLIGATIONS

Besides the categories of obligations mentioned above, i.e. obligations to give, obligations to do and obligations not to do, the Romanian legislation knows several types of obligations, classified by taking into consideration different aspects.

Therefore, the obligations are also classified as follows:

a) *positive and negative obligations*. This classification is significant, for instance, as regards the manner in which the notification of default made by the creditor functions, if damages-interests are claimed for the failure to fulfill, the late fulfillment or the improper fulfillment of the obligation.

Thus, pursuant to provisions of Article 1523 par. (2) letter b) of the Civil code, the debtor is notified of default by the effect of the law when defaulting on an obligation not to do. On the other hand, as regards positive obligations, as a rule, the notification of default of the debtor is required, Article 1528 par. (2) of the Civil code provides that "except for the situation when the debtor is lawfully defaulting, the obligor may exercise such a right only if notifying the debtor either when notifying the first of default or subsequent to it".

b) obligations of outcome and obligations of means. Pursuant to Article 1481 par. (1) of the Civil code, "as regards the obligation of outcome, the debtor is bound to obtain the promised result for the creditor". Thus, obligations of outcome are those obligations characterized by the fact that the debtor is obliged, through its conduct, to obtain a certain result for the benefit of the creditor.

The obligations of means, called also obligations of diligence or obligations of prudence and diligence, are defined under Article 1481 par. (2) of the Civil code as being those obligation within which "the debtor is bound to use all the means required for achieving the outcome promised". Thus, we may define the obligations of means as those obligations consisting of the duty of the passive subject to use all the diligence required for achieving a certain outcome, but without being bound to the outcome expected[14].

c) perfect civil obligations and imperfect civil obligations. The perfect civil obligation is the obligation that is sanctioned by the law, namely the creditor may be helped by state coercion for its fulfillment, if the debtor does not willingly fulfill the assumed obligation.

Most obligations fall into the category of perfect civil obligations.

The imperfect civil obligation, called also natural obligation, is that obligation characterized by the fact that its fulfillment may not be achieved by means of enforcement in a Court of law but, if it is fulfilled willingly, the debtor does not have the right to reclaim the performance.

d) common civil obligations, *scriptae in rem* obligations and *propter rem* obligations. The common civil obligation is the obligation that is to be fulfilled between the parties of the obligational relationship, this being incumbent on the debtor for which it was created. Most civil obligations consist of such obligations, common obligations being the rule in our law system.

Scriptae in rem obligation (or the obligations binding also on third parties) is the obligation characterized by the fact that, being in close connection with a good, shall be effective also as regards a third person that acquires subsequently a real right to that thing, even if they did not take part in the creation of the legal relationship that contains that obligation.

Propter rem obligation, called also real obligation, is the duty incumbent on the holder of a real right to a thing and originates in the law or the agreement of the parties. The existence of this category is justified by the need for example to facilitate the existence of some relationships of good neighbors, to protect things of national importance, to use or preserve the qualities of some important things[15].

e) other categories. According to the source of obligations, there are the following categories of obligations: civil obligations arising from unilateral legal acts, civil obligations arising from contracts, civil obligations arising from negotiorum gestio, civil obligations arising from undue fulfillment, civil obligations arising from unjust enrichment, civil obligations arising from unlawful acts causing harms.

At the same time, there are simple obligations and complex obligations. The category of complex obligations includes divisible obligations and indivisible obligations, joint obligations, obligations affected by term and obligations affected by condition, alternative obligations and optional obligations.

As a last classification, we may speak about pecuniary civil obligations, whose object is the obligation to provide an amount of money, and non-pecuniary civil obligations, whose object is any other performance than an amount of money. This last classification may be made depending on the object of

[12] L. Pop, I.-F. Popa, S. I. Vidu, *op. cit.*, p. 48;
[13] The Law No. 240/2004 was republiushed in the Official Gazette of Romania No. 313/2008;
[14] G. Boroi, C. A. Anghelescu, *Civil law course. General Section*, Hamangiu Publishing, 2011, Bucharest, p. 69;
[15] G. Boroi, C. A. Anghelescu, *op. cit.*, p. 71;

obligation, namely whether this may be expressed or not in money.

V. CONCLUSION

The subject choosen for this paper is actual, even if the Romanian legislation is in continuously change. It can be observed that the legislator considered the doctrine when drafted the the new applicable legislation.

Therefore, by approaching this subject, we intended to offer the reader the possibility to make an opinion of the legal provisions applicable to and the interpretation offered by the doctrine (based on the legal provisions) to the institution under analyse.

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- Law no. 287/2009 on the Civil Code;
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- Law. No. 71/2011 regarding the enforcement of the Civil code;
- Romanian Civil code of 1864.

GENERAL ASPECTS ON COMPETITION AND THE FIGHT AGAINST UNFAIR COMPETITION

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Abstract

In its first part, this paper analizes the different aspects regarding the introduction of the first rules in the area of competition, both at European and national level. Further, the paper presents the purpose of competition law which is to prevent and combat certain market participant behavior which in itself distorts competition. There are also highlighted examples of abusive behavior and anti-competitive practices which have as their main object or effect the prevention, restriction or distortion of competition on the Romanian market or a certain part of it. This paper also touches upon the subject of sector inquiries conducted by the Competition Council on certain sectors of the economy and the various categories of agreements in different sectors, with illustrations of measures or penalties that can be disposed / applied. Furthermore, this paper aims to analyze from the perspective of competition, the life insurance sector in Romania, sector included by the Competition Council among the seven economic sectors with particular importance to the national economy.

Keywords: *competition, upgrading, standardization, socio-political implication, sector inquiries, sanctions, life insurance.*

1. Introduction

The business environment and more specifically it's improvement, was one of the key components of economic reform in Romania. In these conditions, the rules regarding the competition field and ensure a uniform level for all companies on the market, has its place increasingly more evident as market mechanisms start functioning under normal parameters.

For a specific perspective, the legislation concerning the competition field could be seen as an affront to free commerce and to contractual freedom, mining the defining elements of the free market. From the other side, is invoked that sometimes the market mechanisms are unable to reach the best result only through their functioning. That would require a moderated intervention. This is the purpose of the competition legislation.

Introducing a set of rules on competition field was always subject to time evolution of such varied factors. The socio-political which took place at the end of XIX century regarding the agreements between railways, oil and banks field, which were growing up, were threatening the stability of the economical and the political system. In various European country, from the beginning of the XX century, the rules concerning competition tried to maintain a balance between the benefits of the economical cooperation of the companies- cartels- and the economical and political risks implied. Such an approach on the competition field, often, was leading to unwanted political results of unfair competition.

In the European Community, the rules regarding competition have been introduced in 1957 by the EEC Treaty, rules that ensured that the restrictions – tariff and non tariff – existing in international trade, that the member States agreed to eliminate them by signing the Treaty, wouldn't be replaced by the creation of cartels between companies in different countries.

Initially, the rules concerning competition in the European Union, complemented the inter-state policies to reduce barriers to international trade and market unification. From that point, the market has become one of the main objectives of competition field by maintaining fair competition.

The legal framework in the competition field in Romania is given by the Law no. 21/1996 on Competition and Law no. 11/1991 on fighting against unfair competition. These regulations aim at the protection, maintenance and stimulation of competition and of a normal and competitive environment, indented to promote the consumers interests.

2. Content

2.1. Purpose of the competition law

The purpose of the competition law is to prevent and combat a particular behavior of the participants in market mechanisms, behavior indented to distort competition.

In this consideration, it was absolutely necessary to modernize and standardize competition law by adopting a legal framework to address the new reality.

Therefore, by the law in force any agreements between companies, shareholders' resolutions of companies and concerted practices which have as object or effect the prevention, restriction or distortion of the competition on the Romanian market or a part thereof shall be prohibited, especially those which are:

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- fixing, directly or indirectly, selling or purchasing prices or any other trading terms;
- limiting or controlling the production, commercializing, technical development or investments;
- sharing markets or supply sources;
- applying, in the relationships with the trade partners, unequal conditions to equivalent services, causing in this way a competitive disadvantage to some of them;
- conditioning the conclusion of contracts by imposing upon partners the acceptance of certain clauses stipulating additional services which, by their nature or by commercial usage, are not related to the object of such contracts;
- participating, in a concerted manner, with rigged bids in actions or any other forms of competitive tendering;
- eliminating other competitors from the market, limiting or preventing access to the market and the free exercise of competition between other companies, as well as agreements not to buy from or to sell to certain parties without reasonable justification.

The exchange of future prices, future sales, future market shares and future territories may result in the prevention, restriction or distortion of the competition.

The exchange of other categories of sensitive trade information:

- Trade and marketing policies and strategies;
- Confidential information and trade secrets;
- Lists of clients, delivery terms;
- Quality, variety, quantity of products;
- Production volume, discounts, production costs, turnover.

On the volatile markets characterized by short-term agreements, the frequent exchanges of information may hardly cause anti-competition effects.

On the very concentrated markets, a single exchange of information may be qualified as an anti-competition agreement.

According to the relevant applicable legislation, any abuse of a dominant position held by one or more companies on the Romanian market or on a substantial part of it is prohibited. Such abusive practices may consist mainly in:

a) imposing, directly or indirectly, inequitable sale or purchase prices or of other inequitable trade terms and the refuse to deal with certain suppliers or clients/beneficiaries;

b) limiting production, commercialization or technological development to the consumers' disadvantage;

c) applying, in the relationships with the trade partners, unequal terms to equivalent services, in this way causing to some of them a competition disadvantages;

d) conditioning the conclusion of contracts by imposing upon partners the acceptance of additional services which, by their nature or in compliance with the commercial usage, are not related to the object of such contracts;

e) charging excessive or predatory prices, on the purpose to eliminate to competitors, or selling to export under the production cost, recovering the differences by imposing increased prices to the domestic consumers;

f) taking advantage of the state of dependence of another company towards such a company or companies and which does not have an alternative solution under equivalent conditions, as well as breaking the contractual relations for the sole reason that the partner is refusing to submit to certain unjustified commercial conditions.

Furthermore, any actions or inactions of the central or local public administrative authorities and institutions and of the entities to which such bodies delegate their powers, that restrict, prevent or distort competition are prohibited, such as:

a) limiting the freedom of trade or the companies' autonomy, exercised with the observance of the legal provisions;

b) setting discriminatory conditions for the companies' business.

Shall be presumed, until is proven otherwise, that one or more companies are in a dominant position, in case that the share or aggregated shares on the relevant market, recorded during the period subject to analysis, exceed 40%.

General Recommendations:

- No not exchange, directly or by means of third parties, classified information that is rated as sensitive information from the competition point of view;
- Make sure that at the professional associations' meetings shall be discussed legal and permitted subjects.
- The exchange of public information does not represent an anti competition agreement.

2.2. Methods to exchange information:

- Bilateral exchanges:

Both parties exchange information actively by: e-mails, telephone calls, Romanian postal services, attending to meetings.

- Unilateral exchanges:

A party discloses actively sensitive trade information to a passive party.

The simple presence to a meeting where are disclosed sensitive trade information may be construed an involvement in an information exchange.

2.3. Sector inquiries

Are inquiries conducted by the Competition Council on certain areas of the economy and on various categories of agreements in various sectors.

Role of the sector inquiries are to prevent, to sanction and to monitor the market proactively.

Goal of the sector inquiries:

- To obtain information relating to the operating manner of certain markets;

- To analyze and understand various markets and economic sectors;
- To identify the malfunctions related to anti competition.

The unannounced inspections are intended to collect evidences on the alleged breaches of the competition law.

Prerogatives of the Competition Council in the framework of the sector inquiry:

- the legal right to request from the economic operators any information and documents deemed necessary;
- the inspectors shall indicate the legal ground, the object, the information providing term and the sanctions for the failure to respond to the requests;
- the legal right to inform other competent authorities;
- the right to obtain declarations from any person that consents in this respect.
- The competition inspectors shall be allowed to:
- enter the premises, lands or means of transportation belonging to the companies or the residences of head executives, managers, directors and of other employees;
- examine and/or to pick up and/or to copy any documents, registers, accounting, financial and commercial documents and other records related to the company's activity, regardless of the location in which they are stored and the physical or electronic media on which they are;
- request explanations to a representative or to a member of the company's personnel on the facts or documents related to the object and to the purpose of the inspection and to record or the register their answers;
- seal any premise assigned to the company's activities and any documents, registers, accounting, financial and commercial documents and other records related to the company's activity during the inspection and to the extent necessary for the inspection.

How we should behave in case of a sector inquiry?

- Ask politely the competition inspectors to wait in a room, for a short period of time, until you organize yourselves at the internal level of the company;
- Warn the personnel to avoid showing a hostile behavior, obstructing the investigation, destroying documents and communicating to anyone outside the company on the performance of the unannounced inquiry;
- Do not provide voluntarily information or documents that are not requested;
- The answers to the inspectors' questions shall be precise and at the point;
- In case that the questions asked by the inspectors are not clear, request additional clarifications - do not speculate and do not extend the answer more than necessary;
- Make sure that no one is breaking the seals applied by the inspectors – fines;
- Make visible signs indicating that the door or the box may not be opened;
- Provide the requested documents or information on due time.

2.4. Sanctions

For providing inexact, incomplete or misleading information, as well as for incomplete documents or for the failure to provide the requested information and documents, shall be applied the sanction with fine, from 0.1% to 1% out of the turnover corresponding to the financial year previous to the sanctioning. The sanctions shall be individualized by taking into consideration the seriousness and duration of the act.

The companies have the obligation to act in observance of the fair usances, in compliance with the general principle of good faith and with the legal provisions. In case of failure to observe the above, shall be entailed the civil, contravention or penal liability.

Fighting against unfair competition is regulated by Law no. 11/1991, with the subsequent amendments and additions, and aims to secure the fair competition, with due observance of the fair usances and of the general principle of good faith, in the interest of the involved parties, including the observance of the consumers' interests. This regulatory document shall apply to natural or legal persons, Romanian or foreign, that conduct practices of unfair competition.

The trade practices of a company that violate the fair usances and to the general principle of good faith and that cause or may cause damages to any market participant constitutes unfair competition.

Practices of unfair competition shall be prohibited, regarding:

- denigration of a competitor or denigration of its products/ services, made by communication or spreading by a company or by its representative/employee of information that do not correspond to reality regarding the activity of a competitor or regarding his products, likely to injure his interests;
- deviation of a company's clientage by a former or current employee/representative or by any other person by using trade secrets, for which such company has taken reasonable measures to ensure their protection and their disclosure may damage the interests of such company;
- any other trade practices that conflict with the fair usances and with the general principle of good faith and that cause or may cause damages to any market participant.

The unfair competition means the situation of market rivality, in which every company tries to obtain simultaneously sales, profit and/or market share, offering the best business-like combination of prices, quality and connected services, with due observance of the fair usances and of the general principle of good faith.

Within the meaning of the law, "fair usances" mean the generally known set of the practices or rules that apply in the trade relations between companies, with a view to prevent the violation of their legal rights.

Competition Council, as autonomous administrative authority in the competition field, ensures the companies' protection against the practices of unfair competition within the limits of the powers granted under law.

The Competition Council may decide, as the case may be:

- the cessation of the practices of unfair competition, during a claim settlement;
- forbidding the practices of unfair competition;
- applying the civil/contravention fines, if the unfair competition was construed as contravention.

The evidences that may be produced in order to prove that certain facts are practices of unfair competition may consist in experts' reports, documents, correspondence, that vary depending on the particularities of each case.

As an example, in case of a clientage diversion, I consider that the evidences should result both from the clientage deviation, as a factual situation, and from the causality relation between the clientage deviation and the use in this respect of certain trade secrets by the actor of such practice, for which have been taken protection measures and their disclosure may damage the interests of the company at issue.

2.5. Life insurance in Romania as seen from the perspective of market competition

Recently, life insurances in Romania were the subject of a study made by the Competition Council, on which the analysis focused on the period between January 2011 and June 2014.

Through it the life insurance market was seen in the light of two structures that describe the market characteristics, i.e. monopolistic competition (it resembles the perfect competition market in terms of the large number of active firms and ease of entry; products offered for sale in this market are differentiated) and oligopoly (it involves a small number of sellers, protected from other competitors entering the market; active companies in this market offer for sell similar products.).

In terms of market entry barriers, it is considered to have several different types. Firstly, we are talking about regulatory and capital barriers imposed by the Authority of Financial Supervision, such barriers are absolutely justified, due to the sensitive character of the contracts existing in the life insurance market. In short, regulatory barriers are dependent on to the way society itself is organized, including its name, and on certain opinions which it is required to obtain and certain taxes incurred, and the conditions imposed to significant shareholders of the or founders company. In addition, the Authority of Financial Supervision requires the life insurance companies for a minimum paid-up capital. Competition Council considers that the recent trend of tighter market access conditions for life insurance market generates concern.

In terms of the number of firms active on the market, it is considered that there is a trend in which the life insurance market Romania is relatively concentrated, tendency especially highlighted in recent years. Even if the current number of active insurance market is moderate, it is considered that it is still relatively small compared to other countries in the region.

Regarding the homogeneity of the product offered by insurers in the report made by the Competition Council, it is considered that there is a significant difference between the life insurance contracts offered by various market participants, both in terms of basic risks covered and the additional risk that may be incurred by the same insurance.

Concluding on the 3 aspects shown above, it is considered that the life insurance market in Romania borrows both oligopolistic market structure characteristics (entry barriers and a relatively small number of competitors) and those of the monopolistic market competition (likely product differentiation). Competition Council's concerns on this market are the result of concentration trend observed in recent years, a trend that seems to be complemented by an apparent tightening of barriers to entry. Therefore, one of the concerns of the competition authority refers to the relative proximity of the life insurance market oligopoly model, with all the risks that this approach posed for consumers.

3. Conclusions

As a corollary of the entire thesis, I understand to highlight the guidelines of the fair competition, representing the same principles that may be found in the other fields of the law and, in a general manner, in the essence of the legal practice itself as an art of good and equity or "Law is the science of what is good and just" (*jus est ars bonu et aequi*).

For modernization and consistency in the application of competition policy to be successful, it is necessary that the law should apply to a much greater rigor and competition to become the dominant culture.

In the current context of improving the states economic situations as a result of reduced effects of economic crisis, we believe that competition policy should use this momentum. In Romania, the concern for the implementation of pro-competitive reforms is currently high, strongly anchored in implementing Community standards. As a consequence, in the interest of improving the institutional framework and enforcement, we note a number of actions taken by the Competition Council related to the modification of the analysis and legal framework (laws, secondary legislation, procedures etc.).

For example, the modification of Law no. 11/1991 regarding unfair competition by Government

Ordinance no. 12/2014 which had its main purpose to as to modernize the law and strengthen the role of the Competition Council in combating unfair competition. Through the same ordinance, there were introduced a number of changes to the Competition Law no. 21/1996, which aimed to improve the processes, procedures and human resource of the competition authority.

All these efforts are aimed at ensuring consistency of competition policy. This is the key to achieving a competitive fair environment for all businesses. Such an environment makes the companies to strengthen their effectiveness and therefore be better prepared to compete in domestic and international markets. A dynamic business environment that ensures competition induces the necessary motivation to innovate and to promote increase productivity. It also creates a competitive benefit for consumers and society[**].

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INTEGRATING UNMANNED AIRCRAFT VEHICLES IN THE ROMANIAN NATIONAL AIRSPACE

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Abstract

The use of unmanned aerial vehicles in the Romanian civil airspace brings us back to the 1920's, when the first aircraft started to fly over the Romanian sky. Little did the legislators at that time know how to create the proper legal framework for the use of such machines so that all aspects related to their use be covered, as well as identify all potential risks and effects. Nowadays, UAVs are the new aircraft and it is a challenge for the legislators to properly identify the legal framework so that the safety and security of civil aviation are not affected. The paper will address the challenges the regulator faces in the integration of the UAVs in the Romanian civil airspace, developments and issues raised by the current regulation, as well as aspects related to the national regulations expected to enter into force at the end of 2015, beginning of 2016.

Keywords: *UAV, RPAS, unamanned, vehicles, integration.*

1. Short history of the Unmanned Aircraft Systems

The necessary technology for remote control of vehicles has been used since the nineteenth century, when the concept was first applied to torpedoes. Thus, since 1870 torpedoes began to be controlled remotely using various methods invented by John Ericsson (control of the vehicle by using pneumatic systems), John Louis Lay and Victor von Scheliha (control of the vehicle by using electrical systems).

The first technical developments towards radio control or wireless routing, as known today, have been made since 1898 when Nikola Tesla presented to the public his invention in the hope that it will be purchased by the US Army: radio-controlled torpedo.

Government representatives took in derision Tesla's project, considering it another project with no future.

However, on the other side of the Atlantic studies on the possible military applications of radio-guided systems were taken seriously. Thus, the work conducted by the pioneer in the field, Archibald Low, with regard to radio guided missiles, torpedoes and planes during the First World War pioneering work of in radio, brought him the title of "father of the radio-guided systems".

Starting with 1934, Reginald Denny, a former pilot of the Royal Air Force in World War I, opens his first store for radio controlled aircraft produced under Reginald Denny Industries (RDI). In 1940 RDI wins a contract for providing US military with target aircraft.

Returning to the fronts of the First World War, we must remember that the war of attrition that followed the German offensive of 1914-1915 was the perfect stage for the launch of "radio controlled military equipment". Some of them quite notable and very ingenious for their time: guided trolleys to target with light beams and small aircraft equipped with barometer / altimeter, and gyro mechanical counter designed to collapse on predetermine targets. These devices were designed to "deliver" cargo in the enemy trenches. Although there were many brilliant ideas at that time, Germany was the only country that succeeded in using a controlled radio device in its military actions: in 1917 the boat FL 7 was used successfully against British ships which were bombing Oostende and Zeebrugge German bases.

Again, in World War II, Germany was the only country to produce and use military equipment controlled by cable or radio controlled, as follows:

- **Goliath**: a tracked military vehicle capable of carrying a load of 50kg of explosives under enemy tanks. For the movement of the vehicle, two electric motors were initially used, replaced later by an internal combustion engine. These vehicles were used on the Eastern Front, on the beaches of Normandy and in the fight for the suppression of the uprising Warsaw ghetto. Their effectiveness was limited by low clearance, reduced speed and vulnerability to small arms;

- **V1 flying bomb**: the first operational jet missile of the German army. It could carry a 850-pound bomb and had a flight range of around 200 kilometers. The launch could be done with the aid of fixed ground bombers or directly from the bomber aircraft. Although there was a standalone version designed for kamikaze type attacks, it has not been activated again. About 10,000 flying bombs V1 type were manufactured at that time. Around 9521 bombs

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were launched over Great British, of which 2419 have reached London. Antwerp was hit by 2448 bombs V1, during October 1944 and March 1945;

- **Cruise missile V2**: first operational ballistic missile in military arsenals of states was guided by advanced gyroscopic system and powered with a diluted mixture of alcohol and liquid oxygen. To obtain liquid oxygen, two auxiliary fuels were used: hydrogen peroxide and a mixture of sodium permanganate and water. The missile had a range of 362 kilometers an explosive load of 975 kilograms and reached the target at a speed of about 4,000 km / h, that made it almost impossible to be detected by radar surveillance. Over 900 V2 type missiles were launched at the end of 1944 to targets located in Belgium (Antwerp), United Kingdom (Ipswich, Norwich), France, the Netherlands and at the end of the war, even in Germany.

- Anti ship missile FX 1400 "Fritz": flying bomb having a maximum mass of 1400 kg payload 700 kg, 4 small wings, control surfaces and radio controlled rocket motor. They were transported to the target attached by Dornier Do 217 bombers. During the war, about 2000 units were built.

Design, construction, testing and development of remotely controlled or autonomous equipment entered into obscurity after the end of World War II. However, the only one who have campaigned for further research, especially aircraft design and testing of autonomous / remote controlled systems, was the US Air Force. The ultimate goal of its research was to develop military systems, complementary to the manned military aircraft.

In this context, in 1962 the aircraft Model 147 "Lightning Bug" appeared, produced by Ryan Aeronautical products. Between 1962-1975 these aircraft were used in the airspace of countries in Southeast Asia for flying missions at low and medium altitude for activities such as: aerial photography, aircraft targeting, launch of antiradar ribbons, radar jamming, launch of propaganda materials.

Given that the use of such equipment were exclusively for military purposes, the information resulting from the completion of the various research programs in the field of autonomous and remotely controlled systems, was classified or less accessible to the public.

The first information on the use of radio controlled aerial systems for the management and adjustment of artillery shooting became public in 1982 after the end of the military conflict between Israel and Lebanon. Israel conflict sought solutions to neutralize their priority, before planning any air offensive, that being possible also given the experience of Yom Kippur (1973) when antiaircraft systems provided by the former USSR Arab allies (Egypt and Syria) have caused significant damage to the Jew military aviation,. The use of unmanned aircraft to locate the positions of Egypt and Syria's air defense systems and their subsequent destruction by conventional means (artillery attacks, air strikes, the use of special forces etc.) resulted in decrease of aircraft destroyed by soil-aircraft missiles.

Following the completion of the "Cold War" Conflicts and the use of increasingly wider "Global Positioning System", autonomous military and remote control systems were brought to the public's attention. The first use of the above mentioned equipment occurred during the first Gulf War (War of 1991 which opposed the military forces of Iraq and the US-led multinational coalition) and had the "star" subsonic cruise missiles BGM-109 Tomahawk.

Subsequently, new systems were designed and developed, some of which we mention: General Atomics RQ-1 Predator and Northrop Grumman RQ-4 Global Hawk, used in the NATO air operations in Serbia. On this occasion the two air systems have been successfully used to collect real-time information on the movements of Serb forces, air defense systems, refugee flows etc.

The beginning of the new century has seen a technological leap, new autonomous or remotely controlled systems with a smaller design-manufacturing cycle are easier to purchase and use. The terrorist attacks of September 11 and the invasion of Iraq and Afghanistan by the US military and its allies led to an explosion of robotic systems used in both civil and military activities.

Autonomous or remotely controlled systems and the importance attached to them is illustrated by the fact that, for example, the US military inventory currently includes about 12,000 robotic systems that can be used in land missions and 7,000 unmanned aircraft that can be used in armed conflicts. In addition to the US military interest in developing new military systems based on new technologies, other 44 countries are engaged in the design, testing, production and use of military unmanned aerial systems on board.

2. International and regional context

The evolution of technology is more rapid than the ability of the rule-maker. Always ahead with at least one step, technology does not cease to amaze us and to challenge our minds so that ways and means are identified so that activities undertaken are conducted in a safe manner.

UAVs today are one of the most intriguing challenges aviation deals with currently, especially from the legal perspective. We are living history by creating the legal framework for the proper integration of remotely piloted aircraft systems into civil airspace. Even though the year is 2015, we are back at the beginning of the 1900 when the aviation legal framework was barely developing and legislators little did they know about all potential risks and situations that needed to be covered from

the rulemaking point of view so that activities were conducted in a safe and secure manner.

The use of UAVs in the civil airspace definitely brings a wide series of benefits. From photogrammetry to search and rescue activities, UAVs are useful systems that assure rapid and efficient solutions for various necessities.

However, their interference is not lacking risks and the civil society is exposed to accidents and violent actions. There were several incidents reported to date, most of them resulted in little or no harm: BBC 2011 in the UK; Mortimer 2012 in New Zealand, LL 2013 in Australia etc.). Some of them on the other hand resulted in death such as the crash-landing of a drone in Congo in 2006[1] and another death from an accident caused by a pilot error and loss of GPS data-feed in Korea in 2012[2].

According to Brownsword, it is of extreme importance to analyze the regulatory connection when it comes to developing a legal framework in a certain context while accommodating new forms of activities.[3] This means that the current legal framework needs to be constantly reconnected to the evolution of technology. In the process of achieving such balance, the analysis of some elements could benefit the course of development:

- new rules to deal with the new situation;
- dealing with the uncertainty of how to handle new activities and how to regulate them;
- identification of potential hazards;
- in which category does the new activity fit, how should it be defined; make sure there is no conflict of laws;
- is it cost-effective;
- does it allow for the activity to develop in a safe and secure manner for civil aviation.

After thorough consideration over these aspects, the characteristics of a solid legal framework should be: oversight (monitoring activities of the regulated acts), enforceability (regulated activities are subject to enforcement), enforcement (the agency with enforcement powers has appropriate resources and uses them), review (constantly reviewed so that it corresponds with the envisaged aims).

On all three layers of regulatory systems, international, regional and national, legislators are in the process of analyzing the elements that lead to a strong legal system that will permit the accommodation of UAVs in the civil airspace.

2.1. Legal framework and future perspectives at international level – ICAO

The International Civil Aviation Organization (ICAO) is a UN specialized agency having its headquarters in Montreal, Canada. ICAO is the organization that sets out the context for regulation[4] in its Member States. Through the publication of standards and recommended practices (SARPs), ICAO seeks the harmonization of aviation legal regimes around the world by promoting the safe and orderly development of international civil aviation.[5] Member States, according to the Chicago Convention[6], may apply different rules from the ones established by SARPs, but doing so, they are required to notify ICAO with regard to such rules that are different from the standards. Failing to notify ICAO, it is presumed that the Member States complies with the SARPs. Thus being said, unless otherwise, States are obliged to comply with the standards and recommended practices developed and adopted by ICAO.

Until now, the organization has been mainly preoccupied with regulating activities in which piloted civilian aircraft are involved. Generally, it covered issues related to aircraft of a given size and operating above a given height and in sectors adjacent to airports. The attention was concentrated on flights that would cross borders and on issues of safety and security raised by such flights.

The scenario more or less involves the following elements:

a. Control – exercised through air navigation service providers, controllers (one or a team) that have responsibility for the design of airspace, have authority over pilots within determined airspace, have a system of communication with the pilot and benefit of sufficient capacity to properly accommodate all aircraft that are present at the same time in that given airspace and last but not least, that have a significant contribution to the conduct of flight activities in a safe manner.

b. Pilot – is on board the aircraft and has ultimate responsibility for the safety and security of the airplane, is in contact with the controller and follows its instructions, is able to analyze the situations and decide accordingly.

On the other hand, the use of UAVs represents a challenge from both pilot and controller perspective, as well as national authorities. First of all, the pilot is not on board aircraft but operates the UAV remotely from a station. This situation decreases the pilots appreciation of the aircrafts surroundings and also weakens the communication

[1] La Franchi P. (2006) "Kinshasa UAV accident highlights need for standards development", Flight Global, 9 October 2009.
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[6] Convention on International Civil Aviation, signed at Chicago on 7 December 1944, art. 38.

channel with the controller and has an impact on the way the aircraft behaves. UAVs are smaller than regular aircrafts thus increasing the potential of not identifying properly or timely. Hence, the potential of a collision between a UAV and an aircraft is increased, as well as the possibility of a technical congestion threatening data quality and risk information[7] in the air navigation services field.

According to the Chicago Convention, the regulation of UAVs is left to national laws.[8] It was not until recently that words such as pilotless aircrafts, UAVs, unmanned aircraft started to be used in the ICAO terminology and SARPs. The absence of specific UAV related rules at international level is most probably due to the activities limited to civilian aircraft with a pilot on board.

In 2007, ICAO established the Unmanned Aircraft System Study Group (UASSC) which brought together experts from Member States, stakeholder groups and industry. The Group developed the Unmanned Aircraft System (UAS) Circular 328, published in 2011 which provided an initial step toward the elaboration of an international regulatory framework for RPAS. The Circular is superseded by the Manual on Remotely Piloted Aircraft Systems produced by the study group, now replaced by the ICAO RPAS Panel.

The Manual shows how the existing regulatory framework that was developed for aircraft with pilots on board applies to unmanned aircraft. It gives insight into the changes that will take place in the RPAS domain. It also offers an outline of the ICAO SARPs to be developed on the subject. The Manual is a useful tool for states, industry, service providers and other stakeholders on what the regulatory framework dedicated to UAVs should comprise.[9]

It is expected that standards and recommended practices for air traffic management to be developed by 2020. The process of developing standards and guidance material in the field is only at its beginning and it is expected to continue for 10+ years.

Apart from the development of new SARPs, ICAO has amended 3 of its 19 Annexes to the Chicago Convention in order to accommodate RPAS. Annexes 2 – Rules of the Air, Annex 7 – Aircraft Nationality and Registration Marks and Annex 13 – Aircraft Accident and Incident Investigation have been revised. Throughout the novelties of these amendments we mention:

a. A remotely piloted aircraft system (RPAS) engaged in international air navigation shall not be operated without appropriate authorization from the State from which the take-off of the remotely piloted aircraft (RPA) is made.

b. RPAS shall meet the performance and equipment carriage requirements for the specific airspace in which the flight is to operate.

c. An RPAS shall be approved.

d. An operator shall have an RPAS operator certificate.

e. Remote pilot shall be licensed.

As it can be observed, the international legal framework for UAVs is currently incomplete and immature. Throughout the sections of this paper, regional regime will be analyzed as well as national regulations on order to establish the current modalities and conditions a=in which UAVs can be used.

2.2. Legal framework and future perspectives at regional level

At European level, UAVs utilization is subject to national laws of the States. For these reasons, the European Commission desires a basic regulatory framework in the field by the end of 2015.

Taking a look at the current legal regimes, it can be observed for example that in France, flights over Paris without approval from aviation authorities are illegal and there were incidents reported where UAVs flown over objectives such as the Eiffel Tower or the US Embassy in Paris triggered alarms. In Germany, UAVs must weight no more than 25 kg, while in UK, UAVs above 20 kg are subject to the same regulations as manned aircraft.

For these reasons, the European Commission underlines the necessity of having a harmonized legal framework in the field of unmanned aircraft systems. In this sense, the European Aviation Safety Agency (EASA), the responsible institution for the civil aviation safety in EU, is to develop the specific regulations for UAVs and in particular for RPAS when used in civil application and with an operating mass of 150 kg or more.[10]

Agency is supporting the European Commission to progress the „roadmap" presented by the European RPAS Steering Group (ERSG) on 20 June 2013 and covering the development and integration into non-segregated airspace of civil RPAS in the next 15 years. The roadmap is articulated in three pillars: research and development; safety regulation and technical standardisation; and complementary measures including privacy and data protection, insurance and liability.[11]

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[7] Roger&Moses pag. 280.

[8] Chicago Convention, art. 8 – "No aircraft capable of being flown without a pilot 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 such authorization. Each contracting State undertakes 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."

[9] Leslie Cary, ICAO RPAS programme manager, RPAS Panel Secretary, declaration on the release of the Manual on Remotely Piloted Aircraft Systems.

[10] EASA website – www.easa.europa.eu/unmanned-aircrfat -systems-uas-and-remotely-piloted-aircraft-systems-rpas

[11] Idem.

EASA is also a member of the Joint Authorities for Rulemaking on Unmanned Systems (JARUS), a group open for civil national aviation authorities and regional organisations active in the field of aviation safety regulation. The group is not limited to European countries an organisations. The focus of EASA in this group is on developing recommended requirements for:

- Licensing of remote pilots;
- RPAS operations in Visual Line-of-Sight (VLOS) and beyond (BVLOS);
- Civil RPAS operators and Approved Training Organisations for remote pilots (JARUS-ORG);
- Certification specifications for light unmanned rotorcraft (CS-LURS) and aeroplanes (CS-LURS) below 600 Kg;
- Performance requirements for 'detect and avoid' to maintain the risk of mid-aid collision below a tolerable level of safety (TLS) and taking into account all actors in the total aviation system;
- Performance requirements for command and control data link, whether in direct radio line-of-sight (RLOS) or beyond (BRLOS) and in the latter case supported by a Communication Service Provider (COM SP);
- Safety objectives for airworthiness of RPAS ('1309') to minimize the risk of injuries to people on the ground; and
- Processes for airworthiness.

Recently, EASA released its proposal for a UAV regulation. EASA envisages the creation of three categories of civil drones in order to proper regulate unamnned aerial vehicles used nowadays in activities such as filming, farming, parcel deliveries etc. The aim of the regulation is to promote technological development and at the same time to protect people and goods.[12]

Under the rules suggested by EASA, the lower risk category would cover cover low-energy aircrfat, including model planes and would not require any license. These type of UAVs shall be flown line of sight and away from corwded ares, airports or nature reserves.

In the case where operations of UAVs presume more contact with people or share airspace with other aircrafts, then it would be required that a risk assessment and mitigation to be carried out before the use of the UAV and that permission for use is granted by the competent authority.

The last of three categories envisaged by EASA would make the object of the current regulations for manned aircraft, requiering certain certifications to be obtained before the begining of operations.

There are still certain aspects that such a legal framework will not cover and that pose a serious threat towards private life especially. The use of UAVs raises concerns with regard to intrusion of drones in the private life of persons and in collecting data. They present a threat from the perspective of the illegal use of such aircraft for unlawful interference acts. Another issue raised by the use of UAVs is the liability regime. These aspects are to be dealt by states at national level.

The first draft of the regulation is expected to be presented by December 2015.

3. Legal requirements for UAV operation in Romania

The Romanian legal framework in the field of unmanned aircraft systems is yet to be developed. Until the finalization of the regulation dedicated to remotely piloted aircraft systems, the general legal framework applies, that is the Civil Air Code, Government Decision no. 912/2010 for the approval of the procedure to authorize flights within the national airspace and of the conditions in which takeoff and landing procedures can be undertaken of surfaces of land or water, other than certified aerodromes and Order of the Ministry of Transport no. 8/2014 establishing the condition under which UAVs can be operated in the national airspace.

3.1. The Civil Air Code

Amended at the end of 2014 so that it can properly accommodate UAVs and determine the general conditions under which drones can be operated, the Civil Air Code still has a long way to go, being under a new process of revision.

The recent changes of the Code envisage aspects related to the definition of the drones, the establishment of conditions to be fulfilled by the personnel operating such aircraft and specific sanctions for lack of fulfillment of the enshrined obligations.

Resuming the changes brought to the Civil Air Code it can be observed that art. 3, point 3.8 defines "state aircraft" as those aircraft belonging to state institutions and used for activities in fields such as defense, public order, national security and customs. Article 3 is completed by the definition of "unmanned aircraft", in point 3.8^1 as those aircraft piloted by an automated pilot on board the aircraft, by remote from a remote station on the ground or by another aircraft with a human aircrew on board. The definition is quite broad, trying to cover all possible situations in which an UAV can be activated. However, the definition will have to be adjusted accordingly or removed from the Code once the European Regulation in the specific field enters into force.

Furthermore, the code identifies an obligation for the person in command of the unmanned aircraft to have along the registration certificate for the entire period of the operation of the aircraft. The pilot of an unmanned aircraft is considered to be

[12] Reuters News – EASA Sets Out Drone Proposal for Europe -http://news.airwise.com/story/view/1426206846.html

aircrew and is subject to proper training and licensing.

By analogy with the powers of the captain in command for manned aircraft, the pilot of an unmanned aircraft has full command and responsibility for the aircraft during its operation and is obliged to take all necessary measures to assure that the operation is conducted in a safe manner for both the aircraft and flight.

In terms of applicable sanctions, in case the pilot in command of the unmanned aircraft refuses to present to the empowered persons, the requested documents, especially those which are mandatory to have when operating such an aircraft, are subject to fines.

It can be observed that the Civil Air Code establishes the general principles for the operation of UAVs. However, there are no specific provision related to the illegal use of drones, applicable sanctions as well as means and methods to identify persons using drones in activities without having fulfilled the requested obligations, that is to say, a proper instrument to control abuse. There need to be stringent, clear and easily accessible guidelines about how and when drones can be deployed.

In developing such regulation, there are several principles that need to be followed in order to have fruitful provisions. These principles are a must when it comes to achieving public safety. First, a proper Evaluation of the context, situation and implication needs to be conducted. After the evaluation has taken place, the second step is to develop the draft regulation and submit it for Consultation with the interested stakeholders. The process needs to be Transparent so that its main objectives are achieved. Justification for the form and content of the provision is also needed in order to allow the user to properly understand the intentions of the legislator. Last but not least, oversight is required for the users of the regulation to establish the level of implementation, necessary measures to be taken if the obligations are not fulfilled accordingly, as well as a good source of information for improvement of the regulation.

In the specific context of UAVs, three principles need to be applied to the design of drones as well, which are proportionality, mitigation and controls. The application of such a framework, combined with risk assessment techniques, is likely to identify various segments of national airspace in which congestion occurs and the conclusion might lead to the necessity of some form of air traffic control and that rules need to be developed for three dimensional space rather than two.[13]

3.2. Government Decision no. 912/2010

Government Decision no. 912/2010 establishes the conditions and related procedures for authorization of flights in the national airspace, as well as the conditions to be fulfilled for taking off or landing from a surface (land/water), other than certified airports.

According to the above mentioned decision, flights over Bucharest at a height of less than 3.000 meters can only performed if there is an overflight authorization form the Ministry of Defense. Thus, it can be observed that, in the absence of such an authorization, flight over Bucharest is forbidden. Furthermore, UAVs may take off or land from surfaces other than certified aerodromes if the surface is located outside the city/village and the operator obtained the authorization of the mayor of that city/village for such an operation. If the surface is considered to be public domain, than, the operator needs to have an authorization from the owner of the land. In any situation, the land needs to have the proper characteristics to be used for taking off and landing activities.

The Decision forbids the operation of lights over crowded areas of the flight is conducted at a level lower than 300 meters.

Another restriction imposed by the Decision is related to the type of activities undertaken by the operator, photography been strictly restricted and in certain cases forbidden by law.

The Decision, useful and appropriate for activities in which manned aircraft are involved, but less friendly for the unmanned systems. UAVs are used for activities such as photography and their flight autonomy is quite restricted, meaning that for most of the drones used in such type of activity is near impossible to take off from a surface outside the city. The Decision is in the process of being amended, however, the process is slowed down by negotiations with the Ministry of Defense, trying to adjust the requirements in order to bring any prejudice to national security and public safety.

3.3. Order of the Ministry of Transport no. 8/2014

Order no. 8/2014 is the only regulation in the national legislation dedicated to the use of unmanned aircraft systems.

The above mentioned order allows the operation of UAVs only in temporary segregated areas, established according to the specific national regulation. By temporary segregated area it can be understood - a defined volume of airspace normally under the jurisdiction of one aviation authority and temporarily segregated, by common agreement, for the exclusive use by another aviation authority and

[13] Roger&Moses pag. 285.

through which other traffic will not be allowed to transit.[14]

In the circumstances of the above definition of temporary segregated area, UAVs can only be used by authorities in airspaces under the jurisdiction of another authority. That being said, private owners of UAVs are not allowed to conduct any kind of activities. For these reasons it is proposed that the wording of the Order to be changed, in the sense that temporary segregated are to be replaced with "restricted area"- defined as - airspace of defined dimensions, above the land areas or territorial waters of a State, within which the flight of aircraft is restricted in accordance with certain specified conditions, which better serves the objectives of the Order.

Order no. 8/2014 sets a limit for its applicability to UAVs with a maximum take off mass of no more than 150 kg. It is also proposed the analysis of the amendment of the maximum take off in order to better cover a larger scale of drone models.

It is also essential for Order no. 8 to make a specific distinction between drones and toys with characteristics similar to UAVs.

The Order is currently in the process of being amended.

4. Integrating UAVs in the Romanian national airspace

A sustainable development of unmanned aircraft domain is subject to the fulfillment of the following conditions:

1. **public acceptance**: changing the current perception created after the intense "advertisment" of the success missions in Yemen, Afghanistan and Iraq, after which drones have come to be regarded by most people as "killing machines";

2. **integration in controlled airspace**: as was the case for the " classic aviation ",the use of these aircraft will be economically efficient only when they will be operated in the airspace in its entirety, without the need to allocate special areas.

For the first condition to be fulfilled, organizations and civil aviation bodies, as well as manufacturers make efforts in order to raise societies awareness of the benefits of new technologies. Filming and aerial photography, monitoring of critical infrastructure elements, monitoring of forests and agricultural crops, search and rescue activities (for people that were involved in accidents for example, or for missing persons), assessing the damage caused by natural disasters or appropriate treatments against pests in orchards and vineyards are just some of the activities successfully conducted with the new type of aircraft.

In order to fulfill the second condition, integration of UAVs in controlled airspace, constitutes the real challenge. For the purpose of illustration of the multitude of legislative and technical problems that need to be solved, we mention here two of them which pose the highest level of risk:

i. ensuring a level of security comparable to that of activities involving "classic" aircraft;

ii. identifing technical solutions enabling operators on ground to keep the aircraft on its intended and indentified flight path and to timely determin the possible "route conflicts" with other aircraft.

Addressing both problems mentioned above will have a major impact on the current legal framework requiering review and massive update. By terms of comparison, it can be affirmed that UAVs have generated a revolution in human society similar to that generated by the emergence and proliferation of the Internet at global level.

In terms of the amendments we consider necessary, we apreciate in firts instance that it s essential to establish requirements for the issuance and maintenance of pilot licenses. Given that the pilot can no longer experience danger himself and that the actual piloting of UAVs can be compared to a video game, initial and recurrent psychological testing of pilots is a crucial stage of the licensing process. Another legislative issue regards the management and security of personal data. Considering the technical possibilities (flight duration of tens of hours, maximum flight range of hundreds or thousands of miles, possibility to access prohibited areas or restricted areas due to its small size) personal privacy issues are the most difficult to manage.

From a technical standpoint, liaising radio and maintining the integrity of the connection, writing and updating the lines of code related to the software installed on the on-board computers and the establishment and verification of autonomous flight procedures, are other critical elements of the integration of UAVs in the restricted airspace.

For civil aviation bodies and organs these aspects are of serious concern,not only because of the rapid development of technology and the urgent need for intergration, but also because there is a huge amount of pressure from the various players: producers, users, civil society etc.

It is importnat that we mention here the Declaration of the Conference organized in Riga by the European Commission in partnership with the Ministry of Transportation of Latvia on 5-6 March 2015 in order to have a complete picture of how humanity has treated and continues to approach various stages of its development: the emergence and development of the rail (remember that members of the British Academy of Sciences stressed that

[14] EUROCONTROL (2010) EUROCONTROL Guidelines, The ASM Handbook, Airspace Management Handbook for Application of the Concept of the Flexible Use of Airspace, Ed. 3.0

speeding 40km / h will result in sufocating passengers in cars) or the emergence and development of air transport (same members of the British Academy mocked the studies regarding the design and construction of aircraft heavier than air). We find ourselves today in the same specific situation, where technology runs faster than law, where some activties are hard to be perceived and understood by international society and where we need to adapt and learn how to fruitfully use the resources to our benefit. As in many other situations, new technologies invented and developed by mankind, in this specific context, the UAVs, have a dual use: civil and military. It is our choice as an individual and human race how we perceive these technologies and put them in use to our benefit. T We must be aware that the future is here and can no longer be ignored.

The situation of design, manufacture and use of UAVs in the national airspace is no different from what is happening globally. If until January 2014 the UAVs were virtually unknown to civil aviation bodies in Romania, some aspects regarding the security of state officials and flights safety generated the revision of the national legislation and the neccessity to develop a new regulation dedicated to the use of UAVs with a maximum mass of 20 kg. According to the new law, which was approvedin 2014, national aviation authorities have the obligation to develop and approve a legislative package dedicated to UAVs that will contain the following aspects:

- Conditions for approval of air operators using UAVs in aerial work activities and general aviation;
- Requirements for the licensing of UAV operators;
- Requirements for registration / identification of UAVs;
- Requirements for the issuence of airworthiness documents (national flight permit or airworthiness certificate).

It is planned that by July 2015, the new legislative package to be posted on the website of the Ministry of Transport for public consultation.

The purpose of developing and promoting this new legislative package is to allow the safe operation of UAVs in the national airspace, to ensure the safety and security of all airspace users as well as a smooth transition to future European legislative framework, expected to be applicable for the UAV operation in controlled airspace starting with 2028.

5. Conclusions

Under the current national, regional and international regulatory frameworks, drones are subject to a limited regime which is neither effective, from both the point of view of the user as well as the authorities, nor is it enforced. The aims of the regulatory process and expected outcomes seems not to have been cearly expressed. The discussions and attempts conducted up to this point do not present the required level of transparency , hence, there is clear doubt that emerging regulations will properly reflect the interests and needs of stakeholders.

So far, the eductaional process is poor and for these reasons, manufacturers, retailers and commercial users are not aware of the implications and of their obligation to conduct risk assessment, devise and implement appropriate safeguards and establish certain arrangements, including liability insurance.[15]

The analysis presented in this paper give rise to certain concerns and concluds that the framework is not strong and clear enough for fully autonomous aircarft operations as long as the development of regulations is left to the national regimes.

It is of great importance that international and regioanl organizations reach a conclusion sooner and establish a harmonized procedure and requierements for UAV operation. Until then, it is obvious that a considerable risk exists of harm arising from UAV usage.

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[15] Rogers&Moore pag. 285.

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THE STIPULATION FOR ANOTHER IN THE ROMANIAN CIVIL CODE

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Abstract

The article focuses on the stipulation for another in the context of the Romanian Civil code. Its purpose is to answer a few questions, such as: is the stipulation for another still a true exception from the relativity effect of the contract; what are the circomstances that render a stipulation for another void. Also, a comparative approach of this institution is to be made taking into account, on one hand, the old and the actual civil code, and on the other hand, the romanian approach of the stipulation for another in opposition with other european (and not only) legislations. At last, the article will try to express a point of view regarding the effects of the stipulation for another, as the Romanian doctrine has not yet expressed a firm opinion on this matter.

Keywords: *civil code, stipulation for another, effects of the contract, inter partes effects.*

1. Introduction

The issue of stipulation for another problem was and continues to be, by the fact that it is, according to some authors, the only real exception to the principle of relativity of the effects of the contract, a rather sensitive issue, especially in the context of Romanian Civil Code[1] in force from October 1, 2011.

Thus, if the legal regime of the stipulation for another was under the influence of the Romanian Civil Code of 1864, an eminently doctrinal creation, the Civil Code in force has changed this situation, offering to the institution of the stipulation for another a comprehensive settlement, but raising also a number of issues that have not yet received answers.

Therefore, compared to the place occupied by the articles devoted to the stipulation for another in the context of the Romanian Civil Code, we note that they are situated in subsection 2 of section 6 of the book V, dedicated to the effects of contracts, and more specifically, to the effects that the contract produces to third parties.

Thus, the contract validly concluded does not give rise but to rights and obligations in favor, respectively on the parties, without being able to take advantage or harm, in principle, third parties. Regarding the latter, the contract gives rise to a new factual situation that didn't exist until the conclusion of the act, which must be followed by those who did not participate in the conclusion of the contract and that are totally foreign to it. This is the principle of enforceability, the true effect that a contract produces to third parties.

In these circumstances, we can say that the Romanian legislator understood to share the doctrine and jurisprudence previous to the entry into force of the new Civil Code and to continue to look at the stipulation for another as to an exception to the principle of relativity of the effects of the contract, meaning that a third party could acquire rights, but not obligations under a contract in which it did not take part. However, from the analysis of the rules governing nowadays the institution, we may ask ourselves if it is to constitute an exception to the relativity of the effects of the contract, given the crucial role played by the will of the third-party beneficiary in the effectiveness of the stipulation for another.

Another controversial issue in this area, in which this article aims to provide a solution, is that of the effect that death of the beneficiary of the effect has on the effectiveness of the stipulation, death that occurs prior to the acceptance by him of the right stipulated in the contract concluded between the promisor and the stipulator.

Finally, we propose that we pay also attention to the action that the third-party beneficiary has against the promisor, if it does not perform the obligation in its task, particularly on the classification of this action as a direct action, in the conception given by law and doctrine to this notion, or is a self-contained action, specific only to the stipulation for another.

2. Stipulation for another. Concept and applications

Stipulation for another may be defined as that contract by which one party, called the promisor commits to another, called stipulator, to give, to do or not to do something in favor of a third party, called third-party beneficiary.

The stipulation source is the contract concluded between the promisor and the stipulator, by which the first one commits to the second that it will directly provide a proprietary benefit to a third party, called

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[1] Law no.287/2009 on the Civil Code, republished in the Official Gazzette of Romania, Part I, no. 409 of 10.06.2011.

beneficiary. So, the stipulation is a legal operation of bilateral and trilateral efficiency[2].

Although there is no controversy regarding the definition of this institution, the Romanian legislature of 2009 did not understand to define by itsself this legal operation, but chose to show that anyone can stipulate on its own behalf, but in the benefit of a third party (art. 1284 civ. code).

From this point of view, one cannot say that has been adopted a less courageous solution than that adopted in the legislation of other states. For example, the Civil Code of Quebec, art. 1444, paragraph 1 states that "In a contract, it may stipulate in favor of a third party" so that the second paragraph recognize the right of the third-party beneficiary to ask for the performance of the obligation directly from the promisor[3]. Neither the French Civil Code does provide a definition of this operation, confining itself to rule in art. 1121 that "It may provide in favor of a third party when this is the condition of a stipulation that we do for ourselves or of a donation that we make to another one. The one who stated it, cannot revoke it if the third party declared it wanted "to take advantage" [4].

However, a more direct approach is found in the Civil Code of the Republic of Moldova, which, under the name *Contract on behalf of a third party*, shows that „*The parties to a contract may agree that the debtor (promisor) make the benefit not to the creditor (stipulator), but to the third party (beneficiary), shown or not shown in the contract, who directly obtains the right to claim the benefit in its own interest."* Far from being a real definition, however, the approach of art. 721 of the Civil Code of the Republic of Moldova seems to us a more direct one, which establishes even from the beginning what the difference is in this operation, what its effects are and what legal relations result thereunder.

We can find applications of the stipulation in the matter of the specific purpose donation agreement in favor of a third party in the matter of the contract of carriage of goods, where their recipient is someone other than the sender, in the matter of the insurance contract, in the matter of the annuity and maintenance contract etc.

Conditions for the validity of the stipulation for another

Stipulation for another may take the form of a genuine agreement, but most often, it is nothing more than a clause inserted in an agreement. Whatever the aspect in which it is found, being an agreement of wills between two parties – the stipulator and the promisor - it shall comply with the general validity of any civil legal act: the ability of the parties, the expressed valid consent, moral and lawful object and the valid cause.

In terms of form, stipulation for another is not an exception to the rules established in this matter. As a rule, being an accessory clause of a contract, the stipulation will have to take the form required for the validity of that contract.

Thus, if is concluded a specific purpose donation agreement in favor of a third party, the clause by which was established the obligation of the gratuity receiver should take the same form, authentic, ad validitatem, as the donation agreement itself, according to the formal requirement imposed by art 1011 para.1 of Civil Code. However, if it is desired to introduce in an insurance contract a clause by which the sum insured be paid to a relative, the agreement is concluded according to the formal requirements of art. 2200 Civil Code, in writing, but not *ad validitatem*, *but ad probationem*, despite the fact that this clause is nothing but a donation[5].

An express provision we have in the matter of the annuity contract, in the sense that, according to art. 2243 paragraph 2 of the Civil Code "When life annuity is stipulated in favor of a third party, even if it receives free of charge, the contract is not subject to the form provided for donation".

Nevertheless, as regards the maintenance contract, a mention shall be made. Under Article 2255 of the Civil Code, the maintenance contract shall be concluded in authentic form, under the penalty of nullity. Thus, this contract falls always in the category of solemn acts for which valid conclusion is necessary to fulfill certain formalities, namely that of the authetnic form. According to art. 2256 Civil Code, the rules established for the annuity contract matters, relating, inter alia, to the form of the contract when the annuity is established in favor of a third party (art. 2243 paragraph 2 of the Civil Code.) shall apply accordingly to the maintenance contract, also.

However, we consider that in this situation, related to the imperative and public order nature of the policy on the *ad validitatem* authentic form of the maintenance contract, the provisions of art. 2243 paragraph 2 of the Civil Code are not applicable. In other words, the maintenance contract shall always take the authentic form, even when by its means is stipulated in favor of a third party.

We emphasize at this point that if the stipulator raises the question of revocation by the extent permitted by law, the unilateral revocation deed shall have to take the form required by law for the validity of the stipulation itself for another. This condition is not expressly provided, however, it derives from the general principles governing the form of civil legal

[2] P. Vasilescu, *Drept civil. Obligaţii* (Editura Hamangiu, Bucureşti, 2012), 476.

[3] Art. 1444 Civil Code Quebec has the following content*: „(1) A person may, in a contract, stipulate for the benefit of a third person.(2) The stipulation gives the third person beneficiary the right to exact performance of the promised obligation directly from the promisor."*

[4] *On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre. Celui qui a fait cette stipulation ne peut plus la révoquer si le tiers a déclaré vouloir en profiter.*

[5] C. Firică, *Excepţii de la principiul relativităţii efectelor contractului* (Editura C.H.Beck, Bucureşti, 2013), 166.

deed, having as a starting point the principle of symmetry of form.

In addition to the general conditions of substance and form shown above, the stipulation for another must meet a number of special conditions of validity.

On this aspect, already in the doctrine in our country have been expressed several points of view.

Thus, according to an opinion[6], the special conditions of validity of the stipulation for another are: *a) the third party beneficiary be determined or at least determinable when at the time of conclusion of the contract; b) the third party beneficiary of the stipulation exist at the date on which the promisor must perform its benefit and c) the stipulation be beyond doubt.*

In a second opinion[7], it is stated that, along with these two conditions, is also necessary the acceptance *by the third party beneficiary of stipulation*, the Civil Code recognizing a much greater importance for the consent of the beneficiary, its rejection having repercussions regarding the raising of the right in its heritage.

In our case, we understand to adhere to the first opinion expressed, including to the condition according to which stipulation must be express as this legal operation, as an exception to the rule, the intenstion to stipulate in favor of a third party must undoubtedly emerge from the content of the instrument by which it was established.

In terms of acceptance by the third party beneficiary of stipulation, we believe that this is not a true condition of validity of the contract for the benefit of another person, but a condition of effectiveness, a real condition subsequent, as we shall show further in our study.

In what follows, we make a brief analysis of the special conditions of validity, focusing on issues that we believe require a more rigorous interpretation of the text.

A. The first condition concerns the third party beneficiary who, according to art. 1285 para. 1 sentence I *must be determined or at least determinable* at the date of conclusion of the stipulation. The fulfillment of this condition requires either that the third party beneficiary be determined even from the time of conclusion of the document between the stipulator and the promisor, or that exist all those elements enough so that at the time of the execution of the benefit, can be identified the person in whose favor it will be executed.

With regard to this condition, in the French literature it was stated also that the determination of the thrid party may be left event to the discretion of a stranger on the relation between the promisor and the stipulator, as long as in the contract in favor of a third party were given all the necessary directives to be followed by the person designated to determine the beneficiary[8]. Moreover, it is considered that this condition is fulfilled even when the third party is determined on the day the obligation must be performed, not being important the fact that by that point its identity could not be known[9].

To conclude on this condition, we can say that the third party, the beneficiary of the stipulation must be known at the time of conclusion of the contract between the promisor and the stipulator, or, at least, be known by inserting in that agreement elements that make possible its identification at the time the promisor's obligation shall be executed.

B. The second condition required by the Romanian legislator in art. 1285, second sentence, still concerns the third party beneficiary, *and refers to its existence at the time the benefit will be executed by the promisor.* From this, we can conclude on the validity of the stipulation regarding future persons, ie those persons that did not exist at the time of the arising of the legal relationship derived from the stipulation. The third party beneficiary shall not have capacity of use, and therefore, capacity of execution, at the time of conclusion of the agreement of wills between the stipulator and the promisor. It must, however, have the capacity of use at the time the benefit shall be executed by the promisor. We believe that when it comes to rights and not to obligations, full capacity of execution is not required to the third-party at the time of the benefit execution, nor at the time of acceptance of the stipulation that, at least theoretically, as time precedes the time of execution. So in this case of the lack of full capacity of the beneficiary at the time of acceptance of the stipulation, there is no need for legal representation or that the minor custodian approve this deed.

C. Finally, the last special condition of validity of the stipulation for another *is that stipulation be unambiguous.* No matter if it is expressly provided or is apparent undoubtedly from the interpretation of the contractual terms, what is relevant is that the intention to stipulate in favor of a third party be beyond any doubt. In this respect, we recall the decision of the Supreme Court of Justice, still current, which held that, in the judgment of an application for the granting of moral damages, the defendant cannot be compelled to execution to a third party beneficiary of compensations due to the claimant, as it would mean to establish the effects of a stipulation for another, without there being any agreement of wills between the stipulator claimant and the promisor-defendant[10].

The willingness to stipulate to another is a question of fact, which, unless expressly stated in the

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[6] L. Pop, I.F.Popa, I.S.Vidu, *Obligații,* 209-210.

[7] C. Zamşa, în F.A. Baias, E. Chelaru, I. Macovei, R. Constantinovici (coord.), *Noul Cod civil. Comentariu pe articole,* ediţia I (Editura C.H.Beck, Bucureşti, 2012), 1346-1347.

[8] P.Malaurie, L.Aynes, P.Stoffel-Munck, *Les Obligations* (Edition Defrenois, Paris, 2007), 429.

[9] Code Civil francais (Edition Dalloz, 2008, Paris), 1168.

[10] C.S.J., secţia civilă, dec. nr. 613/26.01.2001, in C. Stătescu, C. Bîrsan, *Obligații*, 72, footnote no. 1.

contract, will be proven by any means permitted by law[11].

D. Although we do not consider it a genuine condition for the existence of the contract in favor of a third party[12], we believe that this is the place, in this study, to investigate the role fulfilled, in the stipulation mechanism, by the will of the third-party beneficiary[13]

Thus, according to art. 1286 para. 1 Civil Code, *if the third-party beneficiary does not accept the stipulation, its right is deemed to have never existed.*

With regard to this provision, the doctrine has shown that the acceptance by the beneficiary works as a condition of effectiveness of the stipulation, and not as one of validity. This means that the arising of the subjective civil right, directly and permanently, in the heritage of the third-party beneficiary is subject to its acceptance by the latter, having the character of a condition subsequent[14]. For this reason, we argue that the acceptance of the third party is a unilateral act, which produces declaratory effects, *ex tunc*, which makes its right, arisen of the agreement of wills between the promisor and the stipulator reinforce for the future.

If we refer to the classification of unilateral legal acts provided by art. 1326 Civil Code, we believe that the acceptance of the third party is an act subject to communication and that takes effect when the communication reaches the addressee (stipulator or promisor).

Acceptance may be tacit or express, but necessarily it must be beyond doubt. It can be made either prior to or concurrently with the time at which the third party requests to execute the obligation in its task. We believe that a simple request for summons by which the third party, as claimant seeks the obligation of the promisor-defendant to the execution of its obligation constitutes an unequivocal acceptance.

Regarding the form that should take theacceptance, we believe that, if the contract out of which has arisen the stipulation is a solemn act, which must meet a certain shape for its validity, the same should also be the acceptance form.

Finally, one last issue requires special attention in this matter, namely that the time to which the acceptance of the acceptance of the beneficiary may intervene.

In light of previous civil code, the doctrine stated that although the third-party beneficiary is not a party to the contract, it acquires directly and immediately the right created for its own benefit and that regardless of any acceptance on its part (s.n. – T.V.R)[15]. This means, among other things, that despite the fact that the third-party beneficiary died before being accepted the right provided for in the contract concluded between the stipulator and the promisor, both the right and the accompanying actions shall be trasmitted to its own successors, so as will be transmitted the other property elements belongint to it at the time of its death[16].

This view appears to be shared in the current context, following the entry into force of the 2009 Civil Code[17].

However, as noted above, it cannot be argued anymore, based on the provisions of art. 1286 paragraph 1 of the Civil Code that the right shall enter the heritage of the beneficiary, irrespective of any acceptance on its part. As shown with other occasion[18] too, we believe that the acceptance cannot be done only by the third-party beneficiary, in person or via a representative, so while it is alive, the possibility to accept not being transmissible to successors. This solution is inferred from the interpretation *per a contrario* of the second paragraph of article 1286 of the Civil Code, which provides expressly that the acceptance can occur even after *death of the stipulator or promisor*, thereby being excluded the acceptance after the death of the third-party beneficiary. Moreover, the same effect has Article 1285 of the Civil Code, which, speaking of the conditions relating to the third-party beneficiary, establishes that it must exist (s.n. – T.V.R) at the time the debtor must perform its obligation; so, all the more, it must **exist when it accepts**, acceptance that is previous, at the most concomitant to the execution.

Finally, after analyzing the conditions of validity of the stipulation for another, arises the issue of the sanctions itervening in case of their non-compliance.

In a first case, we speak of the nullity, penalty, absolute or relative, if are not complied with the general conditions of validity of civil legal act: capacity, consent, object, cause.

But if what is not complied with is a special condition, the situation is not the same[19] anymore.

Thus according to art. 1285 Civil Code, final sentence, if not complied with the requirements relating to the third-party beneficiary (it is determined or at least determinable, namely to exist at the time of execution of the obligation by the promisor), "*the stipulation will benefit the stipulator, but without*

[11] For the view according to which, this is not a true conditions of validity of the stipulation for another, see C. Firică, *Excepții,* 171.

[12] Despite a previous opinion expressed by us in the work C.S.Ricu (ș.a.), *Noul Cod civil. Comentarii, doctrină și jurisprudență*, (Editura Hamangiu , București, 2012), 617, pct. 5.

[13] In the sense that acceptance is not a condition for the validity of the stipulation for another can be also found in the French case law; See in this respect *Cass., s. civ., dec. din 19 dec. 2000*, in Code civil, Ed. Dalloz, 2008, p. 1168.

[14] G. Boroi, C. A. Anghelescu, *Drept civil*, 229.

[15] C. Stătescu, C. Bîrsan, *Obligații*, 73.

[16] C. Stătescu, C. Bîrsan, *Obligații*, 73-74.

[17] See in this regard C.Firică, *Excepții,* 178, L.Pop, I.F.Popa, S.I. Vidu, *Obligații,* 213.

[18] T.V. Rădulescu, in C.S.Ricu (ș.a.), *Noul Cod civil. Comentarii, doctrină și jurisprudență* (Editura Hamangiu , București, 2012), 617, pts. 2 and 3.

[19] For the opinions expressed before the entry into force of the 2009 Civil Code on applicable penalties, see C. Firică, *Excepții.,* p. 172; A.Circa, *Relativitatea efectelor convențiilor (*Editura Universul Juridic, București, 2009), 206.

aggravating the task of the promisor". Nevertheless, this provision of the Code is not applicable *de plano* in all situations, but it must be circumstantiated to the contract containing the stipulation. Thus, for a contract of carriage of goods, in which the consignee is other than the sender, for a specific purpose consisting in the provision of an annuity to a third party (where there is no interest for the donor to be the recipient of the stipulation), the provision of Article 1285 Civil Code, final sentence cannot be applied[20].

An exception to the rule of art. 1285 Civil Code, final sentence, we find in the field of personal insurance contract, in which, according to art. 2230 Civil Code, "*in case of the death of the insured, if was not designated a beneficiary* (s.n. – T.V.R.) the *insurance indemnity shall enter into the succession, belinging to the heirs of the insured*".

Finally, if not complied with the condition for the existence of an unequivocal intent on the stipulation in favor of a third person, the penalty will be absolute nullity, lacking the intention itself to contract.

Effects of the stipulation for another

Similarly to the the previous legislation, under the conditions of the current Civil Code, it can be stated that the effects of the stipulation for another can be analyzed in terms of three distinct legal relations: i. the relation between the promisor and the stipulator; ii. the relation between the promisor and the third-party beneficiary and iii. the relation between the stipulator and the third-party beneficiary.

i. between promisor and stipulator are produced the effects of the contract by which was introduced the stipulationin favor of a third party. In addition, by the unequivocal agreement on the stipulation, the promisor is bound to the stipulator to execute accurately and timely its obligation to the third-party beneficiary. Given that this obligation incumbent to the promisor arises out a contract, which most often is sinalagmatic, the debtor of the obligation may refuse its fulfillment, under the conditions of the exception of non-performance of the contract (Art. 1556 Civil Code) if, without any justification, the stipulator does not execute its obligation arising from the same contract and that is interdependent with that of the promisor. At the same time, the promisor can also obtain the rescission or, where appropriate, the termination of the contract in which is inserted stipulation for another, if are fulfilled the conditions required by law to implement this measure. Finally, in all cases, the promisor may require the stipulator to pay damages for failure to perform its obligations arising from the contract concluded.

Then, the stipulator the only one[21] entitled to revoke the stipulation made as long as the acceptance of the beneficiary has not reached the stipulator or the promisor (art. 1286, para. 2 of the Civil Code, first sentence) and only with the consent of the promisor if the latter has an interest in executing the obligation (Art. 1287 Civil Code, para. 1, final sentence).

Therefore, revocation of the stipulation may be unilateral (when the promisor has no interest in carrying out the stipulation) and bilateral (mutual).

Regarding the time by which stipulation may be revoked, it appears that it may lay even after the beneficiary has accepted the stipulation, as long as the acceptance has not reached one of the persons indicated in the legal text. Thus, we can say that the right of the third-party beneficiary is fully consolidated only after the time its acceptance has reached the promisor or the stipulator and only if there hasn't taken place the revocation (unilateral or bilateral, as appropriate) of the stipulation.

Revocation of the stipulation, which takes effect when it reached the promisor will benefit the stipulator or its heirs, if hasn't been designated another beneficiary.

ii. Stipulation for another gives rise to a direct and immediate right in the heritage of the third-party beneficiary, which, if accepted, will also provide a right of action against the promisor in order to satisfy this right[22]. Nevertheless, as a third party to the contract between promisor and stipulator, it will not have the right or the interest to ask for the recission of termination of the deed concluded between the two.

Direct action[23] that the third-party beneficiary has against the promisor is most often an action derived from a contract, personal and prescriptive in general limitation period of three years, term that shall run from the time the acceptance of the beneficiary reached the promisor. However, we cannot exclude de plano also the possibility that the third party has to bring an action for recovery, imprescripitibile, invoking its right of ownership of the property that is the subject of the promisor's obligation, acquired from the very moment of the conclusion of the stipulation.

In its defense, the promisor may oppose the beneficiary only the defenses based on the contract including the stipulation - art. 1288 of the Civil Code. So, the promisor may invoke any exception that is entitled to oppose to the stipulator too, such as: nullity of the contract, non-compliance of the standstill period of execution, exception of inexecution of the

[20] P. Vasilescu, *Obligații.,* p. 477.

[21] According to art. 1287 paragraph 1 of the Civil Code, heirs of the stipulator cannot revoke the stipulation, or its creditors, in an actio Pauliana.

[22] I.C.C.J., s.com., dec. no. 1396/31.03.2011, on www.scj.ro.

[23] Do not confuse direct action that the third-party beneficiary has available against the promisor with direct action, recognized for certain categories of creditors, considering the special situation in which they are (direct action of workers in matters of contracts for work, art. 1856 Civil Code, direct action of the lessor against the sub-tenants, art. 1807 of the Civil Code, the principal action against sub-agent, art. 2026 paragraph 6 of the Civil Code).

obligations undertaken by the stipulator to the promisor, etc[24].

iii. Finally, stipulation for another may also raise the question of certain relations between stipulator and third-party beneficiary. But these are not the essence of the stipulation, them showing interest when, through this legal operation, the stipulator tends to extinguish certain legal relations existing between it and the third- party beneficiary. Thus, if the stipulator is debtor to the third-party beneficiary, the performance of the stipulator by the promisor, will have the value of a payment that extinguishes two obligations: the obligation of the stipulator and the obligation of the promisor to the third-party beneficiary, obligations with different sources[25]. If between the stipulator and the third-party beneficiary there are no previous legal relationships on which stipulation for another may cause direct or indirect consequences, we find, most often in the presence of indirect donations, whose advantage is that it will be subject neither to any relation or excessive liberalities nor to restriction[26].

Conclusions

Far from being an exhaustive article, this paper has tried to express a range of views on the controversial issues that have already appeared in the literature after the entry into force of the 2009 Civil Code.

A final aspect that may be subject to our analysis is that regarding the place of the stipulation for another in the assembly of the effects of the contract, namely what is the relation of this operation with the relativity of the effects of the contract.

Until the entry into force of the Civil Code, on October 1, 2011, the literature of our country had been unanimous in finding that the stipulation for another represented the only real exception to the principle of relativity of the effects of the contract.

Nowadays, the doctrine, or at least part of it, seems to have departed from this view, questioning the inclusion of the stipulation for another into the category of genuine exceptions to the principle of relativity. This opinion is supported by the argument that if a real exception to the principle of relativity can exist only by the will of the parties then the stipulation for another is not such an exception, as it needs the acceptance of the third-party beneficiary, otherwise its right being considered to have not ever existed[27].

Without excluding from the beginning the correctness of this view, however, we must remember that the right of the third-party beneficiary arises directly and immediately from the agreement concluded between the stipulator and the promisor. Its greement acts, as mentioned above, only to strengthen its right, its absence having the effect of a condition subsequent. But still, there is no need for the manifestation of its will at the conclusion of the deed between the promisor and the stipulator. The contract for the benefit of a third person is, in our view, still an exception to the principle of relativity of the effects of contracts. What remains to be discussed, but will not be the subject of the present analysis, is, on the one hand, to what extent continues to exist under the conditions of the Romanian Civil Code in force, the discussion regarding the classification of exceptions to the principle of relativity as apparent and true and more importantly, if, stipulation for another continues to be the only real exception hereto.

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[24] L. Pop, I.F.Popa, S.I.Vidu, *Obligaţii,* 214.
[25] *Ibidem.*
[26] C. Firică, *Excepţii*, 193.
[27] C. T. Ungureanu, *Drept civil*, 191.

CONSIDERATIONS REGARDING THE ON-GOING CONTRACTS AFTER THE INSOLVENCY PROCEDURE HAS BEEN INSTITUTED

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Abstract

The main purpose of the article is to highlight new aspects regarding contracts that a legal person had perfected before the insolvency procedure is opened. Once the syndic judge rules in favour of opening the procedure the judicial administrator, named in that case, has a special power, a right to opt, to either permit the contract to run its course or to denounce it thus ending its effects. Sometimes, due to the special nature of some contracts, the right of option is conditioned and certain procedures must be enforced. Also, due to an obvious possibility that the respective contract might create an unbalance to the debtors' accounts and other sectors, the judicial administrator must take special consideration and can also modify the articles of the contract, rendering new significance or substituting the content of the provisions. Nonetheless, a combination of these possibilities may be preferable to the judicial administrator, partially changing the contracts or keeping in effect only what is in the debtors favour.

Keywords: *insolvency, contracts, right to opt, judicial administrator, debtor*.

I. Introduction

Since last year we have a new Insolvency Law[1], which has only entered into force this year. Its official title refers to the procedures regarding the prevention of insolvency and of the insolvency, but in quickly got a special nickname The Insolvency Code.

The new Insolvency Law has changed some of the old provisions that the old law regulated. Among the most important aspects that this law has introduced are the new prevention procedures, to which the debtor can resort should it desire to avoid the standard insolvency procedure. Also, it has set new rules and new conditions for the possibility of the interested parties to find out, expose and obtain compensation from the people that were responsible for the debtor's insolvency. Finally, new criminal offences were regulated and some of the old ones were rewritten in order to adapt to the realities that could have been observed during the implementation of the old law.

Separately, as to the insolvency procedure in particular, the new law tries to bring balance between the interests of the debtor and those of the creditors. It tries to reconcile some of the aspects that proved difficult in the past. Some aspects like the easy access of the debtor to a reorganization plan or the low powers of the creditors are now stipulated differently so that any attempts of manipulating the procedure are forfeited.

The new law puts an end to the former practice that who among the creditors or the debtor is first to obtain the opening of the procedure has almost limitless powers as to appoint a judicial administrator or to have his debts written in the order of payments more easily.

A clear signal came also from the European Union that encourages the second chance to restructuring the business of the debtor from an early stage of the procedure and continuingly during the restructuring plan, in balance with the interests of the creditors.

New ideas were introduces by the Insolvency Code, most of them protecting the investments that were injected into the debtors that are in insolvency, also debts that are contracted during the insolvency procedure can be paid directly and not have to wait for the end of the restructuring and the opening of the bankruptcy stage. None the less, the protection of the secured debts, like the ones we will refer later in this paper and the regulation of the special delivery agreements which are vital for the debtors activity (electricity, water, gas etc.) that now can be paid by the judicial administrator during the procedure.

II. The focus of the present paper regards the on-going contracts that the debtor has contracted during its normal activity but which now will have a special situation because of the insolvency procedure. The topic revolves around three aspects that govern this situation. Firstly, there are the special effects that come with the opening of the insolvency procedure, that influence the on-going contracts. Secondly, there is the special right to opt of the judicial administrator by which he can choose either to keep the on-going contracts, thus he will have to pay them from the debtors patrimony, or to terminate then, giving way to the signing of a debt at the debtors table. Finally, some of the contracts have special provisions that regulate their effects in either of the judicial administrator's choice.

1. As regarding the special effects that come with the opening of the insolvency procedure, Law no. 85/2014 (Insolvency Code) only partially affects the

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[1] Law no. 85/2014 published in the Official Journal no. 466 from 25 June 2014.

on-going contracts. Nonetheless the importance of some of these effects must be pointed out.

1.1. Normally the first effect after the insolvency procedure has been opened will be that the debtor can no longer govern its own business. This means that the judicial administrator will decide every aspect regarding the activity of the debtor. Should the debtor opt for reorganisation he might be allowed to continue his activity and retain the decisions regarding his business. This effect has little impact regarding on-going contracts because the right to opt between keeping their effects or terminating them will be of the judicial administrator. However, should some contracts not be terminated and the debtor retain its decisions right, then these contracts will go on as normal and will be the concern of the debtor who will be verified by the judicial administrator.

1.2. The second effect upon opening of the insolvency procedure is that all judicial actions and all litigations will cease and any third parties or persons that have a claim regarding the debtor must come and submit a request to affiliate at the debtor table. The main point is that should any contracting party have any claim from the debtor it must join the debtor table and wait his turn, but also will have to see if the whole contract will be terminated by the judicial administrator, leaving only the option to sign his entire prejudice at the debtor table.

1.3. Other effects of the opening of the insolvency procedure regard the freezing of any penalties, interests or any other sums from non-payment, also suspension from public trading should the legal person have that status. This impacts the on-going contracts because should there be a clause regarding any penalties or other non-payment sanctions they will be suspended from the moment that the insolvency procedure has been instituted.

2. The insolvency procedure is usually instituted because before different juridical acts or contracts have been poorly implemented and business was conducted in an improper way. Thus the judicial administrator has the right to identify all acts and deeds of the debtor or of the persons that are in charge and annul them. Should some contracts be in the interest of the debtor he might keep them into effect.

2.1. The on-going contracts are those contracts that their effect unfold on a certain amount of time, or their effects could not be realised because the insolvency procedure has been instituted and the suspension effect that we mentioned before have been implemented.

Any types of contract qualify for an on-going contract, even if the effects are executed one time or several or multiple times. They may refer to any activity as long as it is legitimate. An exception was regulated by the Insolvency Code, regarding the utilities contracts that have their own special regime. On these lines the utility supplier cannot terminate the contract or cease delivering that utility to the debtor after the insolvency procedure has been instituted nor can the judicial administrator terminate the contracts because it will result in leaving the debtor without vital means to continue its activities.

2.2. As a general principal, all on-going contracts must be continued after the insolvency procedure has been instituted. This special rule can be found in art. 123 par. 1 of the Insolvency Code.

It represents an exception from the general rule found in the Civil Code, art. 1417, that regulates the decadence from all benefits of a term upon the implementation of the insolvency procedure. Surely, the debtor must find itself in either the situation of insolvency or when he reduced the warranties of the creditors or refuses to give any.

This is in line with the main idea of the insolvency procedure that does not have the purpose of terminating any contracts but to continue them in the hope of restructuring the debtor activity.

2.3. A special rule instituted by art. 123 par. 1 of the Insolvency Code regards the annulment of all contractual clauses that specify the termination of the contract due to the implementation of the insolvency procedure, or specify the decadence from the benefits of the term or declare an anticipated maturity of any contract due to insolvency. The only exceptions from this rule are regarding the financial contracts and compensation (netting) contracts. This means that the excepted contracts can have a clause for termination should the insolvency procedure be instituted.

The practical effects of this rule reside in the fact that no creditor should be put above the other. The insolvency procedure is a collective procedure where all creditors come at the same debt table and their ranks are given only in accordance with the special provisions of the Insolvency Code.

2.4. The same article regulates the judicial administrator **right to opt** as one of the major rights of given to him by law. The right to opt has two different implementation options, differing on who is the first person to ask what should happen to an on-going contract.

a) The first possibility has as main decision maker the judicial administrator that in 3 month, after the insolvency procedure has been implement, must decide whether to keep or terminate the on-going contracts. This possibility has certain conditions in order to be implemented.

One of the conditions regards the time frame in which the judicial administrator must reach a decision. He has 3 months calculated from the official implementation of the insolvency procedure. According to art. 45 par. 1 letter d), the syndic judge that presides over the procedure must appoint in its opening sentence upon the person that will assume the judicial administrators obligations. From this moment the 3 month term begins.

The other condition regards whether the contracts that are in debate have been executed. The Insolvency Code regulates that should the contract be entirely executed or substantially executed the judicial

administrator may not terminate them. This extends also to the execution of the main obligations should any accessorial obligations remain. Due to the general principal that all that is accessory follows the main obligation, implementing what is left of the contract is the only solution permitted for the judicial administrator.

b) The second possibility will arise from the notification of the contracting party that contains the question regarding the decision of the judicial administrator as to terminate his contract or contracts. In respect, the contracting party addresses a notification, that mustn't have a specific form or content, but must contain the question wheatear the judicial administrator will terminate the contract.

The notification containing this request must be submitted by the contracting party in 3 months from the opening of the insolvency procedure. According to art. 99 of the Insolvency Code, upon being appointed as judicial administrator he must send a notification to all known creditors communicating them of the implementation of the procedure and inviting them to sign up their claims at the debt table. Now, although the contracting party has 3 month calculated from the opening of the insolvency procedure, in our opinion, it should include also the period necessary for the notification of the opening of the insolvency procedure to that party.

Upon receiving the notification asking about the termination of the contract, the judicial administrator has 30 days to answer it. The answer is not mandatory. Consequently, different effects will result, depending on the judicial administrator's actions:

i) The contract will be considered denounced and terminated upon the ending of the last day of the 30 days period should the judicial administrator give no answer to the notification asking about the termination of the contract;

ii) If the judicial administrator opts for continuing the contracts effect, he must report every trimester wheatear the debtor has funds to on-go the contract. This option implies that the judicial administrator give a written answer to the contracting party specifically saying that the contract will continue its effects;

iii) A special effect arises from the termination of the contract, either by express notice or from not answering the contracting party notification, and refers to damages. The contracting party may claim damages against the debtor, but the payment will be substituted to the order of payment specific to the insolvency procedure and regulated in art. 161 par. 4 of the Insolvency Code.

2.5. The judicial administrator right to opt cannot be implemented or finds no applicability should one of the following situation apply:

a) The contracting party, within 3 month from the opening of the insolvency procedure, denounces the contract or declares an anticipated maturity of the contract and communicates either of them to the judicial administrator.

This situation implies that the contracting party considers the contract terminated without first sending a notification to the judicial administrator asking about the termination of the contract. Also, this possibility does not come in conflict with the interdiction of terminating the contract due to the implementation of the insolvency procedure, mentioned by us in the above paragraphs, because it is a unilateral decision taken after the implementation of the procedure and justified on the general right of the contracting party to denounce the contract should the other party fails to fulfill its obligations.

b) In the special conditions of a sale contract with the retention of the title. Since the sale was conditioned by the seller who will keep the property title until payment, the sale is cannot be completed without the title, should the insolvency procedure be instituted before payment of the contract the seller can retain the title and renounce the payment.

c) In the special conditions of a financial lease contract, the financing party must express its express consent regarding the continuation of the contract, within 3 months calculated from the opening of the procedure. Should the financing party not express its option at all the contracts will be by law considered terminated without any other persons intervention.

2.6. Separately from the right to opt, art. 123 par. 5 of the Insolvency Code regulates that the judicial administrator may **modify the terms of the contracts** negotiated or settled by the debtor. This separate right of the judicial administrator gives way to two different possibilities.

Firstly, the judicial administrator can modify the contracts that the debtor settles after the insolvency procedure has been implemented. Consequently, if the debtor does not lose its right to govern its own business he may enter into negotiations and sign contracts on his own. The judicial administrator only may stand watch for any law breaching and, should it consider that the terms of the contracts settled by the debtor are against its interests may decide to unilaterally modify those terms or exclude them without necessarily terminating the entire contract.

The other possibility is that the judicial administrator may not opt for the termination or keeping the on-going contracts of the debtor, which implies a decision regarding the entire contract, but may decide to rule out some terms from those contracts and keep the other effects. This possibility is subject to the contracting party right to denounce the contract should the other party fails to fulfill its obligations.

2.7. Finally, the last right of the judicial administrator regarding the on-going contracts is to **surrender the contracts** to paying third parties in order to maximize the debtor's fortune.

This solution may be taken into consideration by the judicial administrator should any third parties be interested in buying those on-going contracts from the

debtor. He may set any price for the contracts, as long as it is not in contradiction with the debtor's interests. The content of the surrender contract and its form are governed by the general rules regulated by art. 1566-1586 of the Civil Code.

3. Not all on-going contracts were left to the judicial administrator appreciation, because the law, due to their particularities, considered that special provisions must regulate their effects depending on the option made. Hence, the last part of the article is dedicated to the special contracts that were regulated by the Insolvency Code and that in the light of the right to opt of the judicial administrator will generate different effects by which the participants at the insolvency procedure are bound.

3.1. Regarding the sale contract with the retention of the title, art. 123 par. 6 of the Insolvency Code regulates that if the seller holds property title until payment in full, the sale will be considered fulfilled for the seller and, should he entered his rights at the cadastral register makes the sale opposable to the judicial administrator or the liquidator. The good will be part of the debtors belongings and the seller will benefit from a preference clause which is assimilated to a mortgage according to art. 2347 Civil Code.

3.2. Regarding the bilateral promise to sell that has a certain date, art. 131 par. 1 of the Insolvency Code regulates that the promising-buyer may ask for execution from the promising-seller which is now an insolvent debtor, should the formalities required by the law are met, the contract has a certain date and the following conditions are met: i) the price of the contract was paid in full and the good is in the possession of the promising-buyer; ii) the price is not below the market price; iii) the good is not crucial for the success of a restructuring plan.

Perfecting this contract can be done by the judicial administrator based on his right to sign on behalf of the debtor, perfecting a free of privileges or preference clauses contract. But due to the fact that the bilateral promise was perfected before the opening of the insolvency procedure and some other creditors might have already instituted preferences or privileges over the good the judicial administrator should he perfect the promise to a contract must recognise and note in the debt table the special rights of these creditors.

3.3. Regarding the labour contract art. 123 par. 7 and 8 of the Insolvency Code regulates that when the debtor is the employer the judicial administrator in exercising his right to opt must take into consideration the legal terms for notice given to the employees.

Hence, the termination of the individual labour contracts must be made on an urgent basis and with the notice in advance as they are both defined by the Labour Code. The termination of a collective labour contract must also respect half of the normal notice periode.

Separately, the Insolvency Code regulates the same rule of respecting the notice period, when termination of the contract is decided by the judicial administrator, for the rental contracts.

3.4. Regarding the contracts that imply successive executions art. 123 par. 9 of the Insolvency Code regulates that the judicial administrator may keep their effect if it benefits the debtor but will pay only those executions or deliveries that come after the insolvency procedure has been implemented. All other obligations, prior to the opening of the procedure must be petition to be included in the debt table by the contracting party.

3.5. Regarding the credit loan contracts art. 123 par. 5 of the Insolvency Code regulates that with the consent of the contracting party the judicial administrator may change the terms of the contract should it benefit the debtors fortune.

3.6. Regarding the lease contract art. 123 par. 11 of the Insolvency Code regulates that if the financing party opts for the termination of the contract in the event of the user becoming an insolvent debtor he only may choose from two options:

- either he gives the good to the user and obtains in return a legal mortgage over it and the register of the value of that good in the debt table including all accessory sums calculated until the opening of the insolvency procedure;
- either taking back the good and registering other due sums in the debt table.

As mentioned in the previous paragraphs, this rule represents a special one, because a right to opt belongs to the financing party separately from the one of the judicial administrator and the option must be made by the financing party before 3 month from the opening of the insolvency procedure. After that period he loses his right and the contract is considered terminated by effect of the law.

Should the financing party chose to continue the contract, whit the express approval of the judicial administrator, then the effect may be as written in the contract or as modified by the consent of both.

3.7. Regarding the sale contract of movable goods that are in transit art. 124 of the Insolvency Code regulates that should the insolvency procedure be instituted while the movable goods are in transit from the seller to the buyer who is now an insolvent debtor one of this solution may apply:

i) The seller may take back the good and return all expenses. This solution may happen only if the price has not been paid and the good has not been delivered to the buyer.

ii) should the seller admit the goods to be delivered to the buyer, he will recuperate the price by claiming it from at the debt table.

iii) if the judicial administrator demand the delivery off the good he must pay the full price from the fortune of the debtor immediately.

3.8. Regarding the commission contract art. 124 of the Insolvency Code regulates that if the agent holds goods or titles regarding assets that belong to the client and the agent becomes insolvent the client may

recuperate the entire assets from the agent because he works on behalf of the client.

3.9. Regarding the consignment contract art. 127 of the Insolvency Code regulates that the owner can recuperate the full of his goods but for the case that the agent might have claim or retention right over them. This principal applies to all cases were the debtor is precariously holding goods that belong to another.

If after the opening of the insolvency procedure the goods are no longer in the possession of the agent and cannot be recuperated then the owner can enter his claim in the debt table, at the value it had at the moment of the procedure opening. Should the goods be in the possession of the agent at the opening of the insolvency procedure and be los afterwards the owner can claim in the debt table the full value of the goods.

3.10. Regarding the rental of immovable goods contract art. 128 of the Insolvency Code regulates that when the debtor is the landlord the contract will stay into force should the rent be at market value. Still, the judicial administrator may terminate the contract or refuse to pay any debt or fulfil any obligation to the renter. In this last case the renter has the choice either to claim its loss at the debt table or to reduce the sum from the rent paid.

3.11. Regarding specialises personal services contract art. 129 of the Insolvency Code regulates that if the debtor is obliged to carry out specialised personal service to another contracting party the judicial administrator may terminate these contracts at any time leaving the other party, should he desire, to claim damages at the debtor table.

III. In conclusion, the on-going contracts are in general submitted to the will of the judicial administrator or liquidator. The Insolvency Code has kept most of the old law provisions but improved those were practice and jurisprudence proved that a change was needed. This continuation or the termination of the contracts, at such an early stage of the insolvency procedure may prove vital to the success of the debtors restructuring so it must be carefully thought through.

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THE COMPLAINT ABOUT THE PROTRACTION OF PROCEEDINGS

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Abstract

The complaint about the protraction of proceedings ("contestația privind tergiversarea judecății") has the role of sanctioning the passivity of the court of law which does not use the means necessary for correcting irregular conduct, or even worse, it disregards the legal provisions requiring a certain conduct from the court itself. The complaint about the protraction of proceedings should not be seen as a possibility to sanction the judge empowered to solve the case. This appeal is actually a remedy provided by law, intended to correct those situations in which the court of law is causing undue delay to the cases, or even more, it doesn`t take the necessary measures for protecting the right to a fair trial within a reasonable and foreseeable time.

Keywords: *The complaint about the protraction of proceedings, fair trial within a reasonable and foreseeable time.*

1. The Right to a Fair Trial within a Reasonable and Foreseeable Time

Having a strong set of principles aiding the civil trial is vital to the strength of the legal system. According to J. Pope`s vision, if we want to highlight the importance of the principles of law, we should imagine the justice system as an "intuitive model of an ancient temple"[1]. The roof of the temple shall remain balanced as long as the foundation is solid and the pillars are uniformly built. Just like this, the Romanian legal system will be balanced only if we all respect the principles of law while judging according to a specific rule of law value system. The stability of the entire legal system depends on all of its elements: "the solidity of its foundation (value system) and the harmony of its structure (the balanced development of all its pillars)"[2]. Moreover, having a strong and harmonious legal system requires "to identify in a systematic manner the weaknesses and the ways to strengthen and integrate the pillars into a coherent whole"[3].

In our current Civil Procedure Code (abbreviated as "CPC"), the legislator regulated these fundamental principles that underlie the civil trial. Before our Civil Procedure Code came into force, these principles were derived from the interpretation of the old Civil Procedure Code articles in relation to the Constitution and of course, by means of jurisprudence. Thus, the doctrine had an important part in successfully shaping "the pillars" of the entire judicial systems, which were even more reinforced by a coherent jurisprudence.

These legal principles are means of understanding the civil procedural rules and are mainly used in solving procedural issues without express regulation. These legal principles are included in the Articles 5-23 CPC.

The Article 6 of the Civil Procedure Code, guarantees everyone`s right to a fair trial within a reasonable and foreseeable time. The trial is to be ruled in a promptly manner by an independent, impartial and legal court of law. The promptness of the act of justice is guaranteed by the court of law that has to take all the legal measures to assure this.

The phrase "in an optimal and predictable period of time" has a particular importance, because according to the Civil Procedure Code, the judge has the obligation to set short hearing dates to assure the promptness of the act of justice.

A hearing date may be considered optimal when it`s short enough so as the parties does not lose sight of their purpose when they started the lawsuit. Under the provisions of art. 238 CPC, the judge is obliged to estimate the period of time in which the trial will be solved by consulting the parties at the first hearing. According to the complexity of the case and the facts that are to be judged, the court of law must set hearing dates that are both optimal and predictable. Thus, the hearing dates should be not only reasonable but also useful to the trial and adapted to the needs of the parties.

On the other hand, given the fact that a hearing date is by nature essentially relative and also that the judge can reconsider the date of the trial with no sanction whatsoever, the provisions of art. 238 CPC have a preventive role in a psychological way at most.

According to the European Court of Human Rights (ECHR) jurisprudence, the condition of setting hearing dates of a reasonable length, aims on the one hand "to create an effective judicial system that does not allow administrative or procedural delays" and on the other hand must provide "effective remedies for the situation of exceeding the length of judicial

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[1] Jeremy Pope, "Scoala – un sistem de integritate", *Transparency International*, 2007, 2, http://www.transparency.org.ro/publicatii/ghiduri/GhidScoalaSistemIntegritate.pdf.

[2] Idem 2.

[3] Idem 2.

proceedings"[4]. In order to support the idea of having predictable hearing dates the legislator has regulated a number of new rules likely to prevent delay in trial cases and encourage the rule of trials with greater rapidity. Whether we are talking about the Complaint about the protraction of proceedings or the regulations of having maximum limits for setting hearing dates, the aim of the legislator was to facilitate the act of justice, to make it faster and more transparent.

To what extent this has been achieved by regulating the Complaint about the protraction of proceedings, we shall discover from analyzing the regulations, both in terms of its impact on civil trials and its effectiveness compared to the practice developed over the years in the Romanian courts of law.

2. The Premises of Regulating the Complaint about the Protraction of Proceedings

This procedure has emerged as a consequence of the jurisprudence of the Strasbourg court that has ruled on the need of internal procedures that allow interested parties to contest the period of time in which their trials are being solved. Thus, the Complaint about the protraction of proceedings appears as a mean to achieve the ruling of the European Court of Human Rights.

The European Court of Justice pointed out on numerous occasions the need for such procedures, obligating the states to regulate a procedure for those cases that are solved in a long period of time. In this case, before the regulation of this new procedure, Romania was sanctioned on the one hand for not finalizing trials in a short period of time and on the other hand, for the lack of legal procedures in order to the correct the irregularities of long lasting trials. After the Civil Procedure Code came into force, and regulated these procedures, the European Court of Justice can only penalize Romania for disregarding the principle of finalizing trials within an optimal and predictable period of time.

In full accordance with the decisions of the ECHR, which sanctioned the absence of legal means to act in cases of exceeding the reasonable time in which a case should be solved, this new procedure enables the party, that believes that its right enshrined in Art. 6 CPC is violated, to ask the court to take action in order to correct that situation.

3. The Reasons for the Regulation of Trial Delay Appeal

The main objective of this procedure is the administration of justice in a firm and fast way. Thus, the Art. 6 in the Civil Procedure Code establishes the right of everyone to have its cases solved in an optimal and predictable period of time, by an independent, impartial and legal court of law. This is why, the court of law is obliged to take all necessary legal measures to conduct a fast trial case.

One of the solutions provided by the legislator to solve this cases in an optimal and predictable period of time is the procedure of Trial delay appeal.

This procedure is designed in such way that, when the judge does not respect the deadlines, and does not take legal measures to correct the situation, the interested party can file the complaint about the protraction of proceedings. This procedure can be used even when the deadline to fulfill a particular procedural act was not respected by the party itself or even the prosecutor or judge.

As noted by the High Court of Cassation and Justice in Decision no. 5313/2013, the complaint about the protraction of proceedings has the purpose of sanctioning the passivity of the court that, even though it has the legal measures to correct the reasons why the trial takes too long to be solved, the judge does not use them.

Furthermore, the Complaint about the protraction of proceedings must not be seen as an opportunity to punish the judge hearing the case. This procedure is in fact a remedy provided by the rules of procedure, "applicable in situations which cause undue delay or even the court`s lacks of measures to ensure the trial completion in a reasonable period of time"[5].

4. Effects and Consequences

The Complaint about the protraction of proceedings has the following effects: it prevents the trials to be finalized in a long period of time and it sanctions those responsible for the delay.

Specifically, the court seized with this procedure will set a new hearing date for the procedure to be completed. The question that we may ask is what will happen if not even during this new hearing date, the situation is not corrected. Will the party be able to seize the court with a new Trial delay appeal? Regardless of the answer, if it does not correct the situation even during the second hearing date, the procedure`s efficiency is questionable.

With no penalty expressly provided for this, one can conclude that the role of this procedure is purely psychological. This procedure will certainly produce effects for those who already respect the court of law, the procedures and the promptness of the act of justice. For the other category of recipients, because of the lack of coercive means and penalties, this procedure will not be able to change their attitude.

Furthermore, if the judge targeted by such a procedure could be disciplined for failing to take the

[4] Gabriel Boroi, O. Spineanu-Matei, et al., *The New Civil Procedure Code* (Bucharest: Ed. Hamangiu, 2003), 1015

[5] Decision no. 5313/17.05.2013 of the High Court of Cassation and Justice having as object the Complaint about the protraction of proceedings

legal measures to ensure the promptness of trial (either by court`s internal regulations or by a new law coming into force), the measure would not be equitable having regard to the many situations in which, the trial is delayed by the parties (sometimes even intentionally).

However, there are situations in which the delay of trial is a direct effect of the case is administrated by the court. Thus, in the matter of evidence, after the expiry of the date provided for this situation, you need to administer new evidence that emerged from the debates, this situation will become increasingly rare given the possibility that the judge may be penalized for exceeding the optimal and predictable length of trial, set at the first hearing date. As a result, the reluctance of judges to approve the proposed evidence in such cases will lead to a rapid resolution of the case, thus respecting the principle of promptness, but at the expense of a fair solution.

5. Regulations

This special procedure of Complaint about the protraction of proceedings, is a non-contentious and incidentally appeal and is regulated by art. 522-526 CPC. The Complaint about the protraction of proceedings is intended to ensure that the principle of trial promptness is respected and guarantees the right to trial ruled within an optimal and predictable period of time.

5.1. The Parties and Causes of Action

According to the provisions of Art. 522 para. 1 CPC, every party to a civil trial, as well as the public prosecutor taking part in the proceedings, is entitled to bring a complaint whereby they allege a violation of the right to a trial within a reasonable and foreseeable time and consequently request that adequate measures be taken to efficiently deal with the alleged violation. In the second paragraph of the same article are listed the cases in which the Complaint about the protraction of proceedings may be filed:

a. where a statutory deadline for the finalization of a case, the delivery of a judgment or the drafting of a statement of reasons is reached without any of the requisite action having been taken;

b. where a party to the proceedings fails to comply with a court order urging it to carry out a specific procedural act by a deadline and the court does not take statutory measures against that party;

c. where an authority or other third party to the proceedings fails to observe a time-limit set by the court to submit to it a document, data or any other information deemed essential to the case, and the court does not take statutory measures against the defaulting authority or third party;

d. where the court defaults in its duty to dispose of the case within a reasonable and foreseeable time by not taking the required statutory measures or by not carrying out a procedural act, as imposed by law, even though it could have done so in the time that had lapsed from its last procedural act.

To file such a complaint, is necessary to have a law suit in front of a court of law. Although this is not expressly provided, it follows logically from art. 522 CPC.

The first case under consideration by the legislator regards the situation when judges does not comply with the procedures required by law. Since this complaint will be judged by a panel of judges that are invested with the proceedings on the merits, it is hard to believe that such a complaint could be accepted, given the reason that such a delay would exist mainly because of the volume of activity due to the high number of trials in Romania.

Of course, in cases of gross negligence or bad faith on the part of the judge, such an approach would be justified but these cases are limited in number in relation to the situation described above. The main effect will be contrary to the objective of the new Civil Procedure Code, generating even more lawsuits.

Another reason which would excessively lengthen proceedings could be the judge`s poor time management, which of course can be improved but not by such a measure.

In this first case, the Complaint about the protraction of proceedings, can be considered as a "reminder" for the judge. The same result would have been achieved by a simple request during the hearings.

In the other two cases provided for by art. 522 para. 2.2 and para. 2.3 CPP, it is clear that the complaint holders will issue guidance on resolving the situation, and even considering the opportunity of certain procedural acts. In this situation, the risk for the parties to replace the court`s ruling is quite clear.

Furthermore, just like it shown before, the parties could "remind" the judge by means of a written or verbal request, and the court could oblige the ones that delay the procedures to act accordingly under penalty of warning or fine.

Such a use of the complaints will delay the trial even more, given that in addition to the numerous cases a judge has to rule upon, they will have to analyze and decide upon these new ones. Moreover, these complaints can be and most likely will be attacked separately, and thus resulting in an even greater number of cases that have to be ruled upon.

Regarding the fourth case referred to in art. 522 para. 2.4 CPP, it gives the party the possibility to file a complaint when the court does not take legal actions or does not fulfills certain procedural acts, which is contrary to the principle of judge`s independence. Thus, the party is able to replace the court`s ruling indicating which procedural acts should be met. Even if the judge does not meet the procedural act willingly, this may be due to its appreciation in terms of opportunity and on the basis of the active role of the judge.

5.2. Withdrawal of the Complaint. Formal Requirements

According to the provisions of Art. 523 CPC, the Complaint about the protraction of proceedings may be withdrawn at any time up until a decision has been rendered. Once withdrawn, the complaint cannot be repeated.

Although it is not expressly provided this, in the situation of new reasons, distinct from the one that already was the subject of the first complaint, a new complaint is possible.

These rules also apply to the appeal ("plângere") provided by art. 524 CPP for the following reasons: the legislator did not distinguish in art. 523 CPP between the two kinds of complaints and the possibility of withdrawal the complaint is regulated prior to the appeal of the complaint.

Regarding the formal requirements, according to the provisions of art. 524 CPP the complaint shall be filed in writing or made orally within the court dealing with the case in respect of which allegations of undue delays have been raised. If the complaint is made orally, in this case, it will be taken note of it, together with its legal grounds, in the interlocutory judgment.

An important aspect to remember is that filing of such a complaint does not halt the course of the legal process, and thus cannot be used as an abuse of rights in order to delay the proceedings. A contrary approach would have been contrary to the very purpose for which this special procedure was created

5.3. Examination and Determination of the Complaint

The Complaint about the protraction of proceedings is examined without delay, and at the latest within five days from its submission, by the panel of judges sitting in the main proceedings and no party shall be summoned.

The interlocutory judgment that is delivered if the complaint is well-founded cannot be subject to appeal. Moreover, the judges will order the adequate measures to remove the situation that had led to the protraction of the proceedings to be taken forthwith. The concerned party shall be immediately notified.

If the complaint is unfounded, it is reject it by an interlocutory judgment as well, but in this case, it can be appealed ("plângere") against by the interested party, within three days from the date on which service of process has been effected.

The appeal ("plângerea") is filed through the court that rejected the complaint, which submits it immediately to the higher court together with a certified copy of the case file. In the special situation of the case being heard before the High Court of Cassation and Justice, the appeal will be examined by a different panel within the same court.

The appeal against the decision to reject the complaint is examined and determined within ten days from the receipt of the case file by a panel composed of three judges and no parties are summoned. This decision is final.

If the appeal is well-founded, the panel will admit it and the decision will indicate what action is to be taken and also, if needed it will also set a deadline for it to be implemented.

Please note that the court that ruled upon the appeal cannot, by its own ruling, give guidance or express its opinion on the facts or points of law that may anticipate the judgment on the merits or otherwise infringe upon the freedom of the judge to decide on the ruling to be adopted. In this way, "the independence of the judge hearing the main proceedings will not be affected, having full discretion on the facts subject to judgment"[6], and so, the higher court will only address the reasons regarding the delay of the trial.[7]

Even with such express regulations it`s difficult to say to what extent the judge`s ruling independence will be respected, considering the instructions given by the higher court. Although the goal of this complaint is to report any irregularities likely to delay the trials, through this special procedure are created the premises to exercise possible pressure from higher courts.

Another problem that may arise regarding this complaint is the sanction applied to not respecting the guidelines given by the higher court; to be more exact what kind of sanctions? Such procedures could be used for disturbing the judges, leading eventually to an even higher number of trials, which would definitely counter the purpose for which this procedure was created.

5.4. Sanctions for a Complaint Filed in Bad Faith

In the situation that the complaint and appeal are likely to become themselves a way to delay the trial, the legislator regulated in art. 526 CPP the possibility of sanctioning those that file this procedure in bad faith. Thus, the filing of a complaint or an appeal in bad faith is sanctioned by a fine of between Lei 500 and 2,000. Moreover, the interested party, can also order request an additional payment of compensation for damages caused by the abusive filing of a complaint or appeal. This sanction is applicable to any of the subjects of the complaint or appeal, including the prosecutor, since the legislator did not make any distinction between the subjects.

Given the difficulty of proving bad faith, the legislator provided in the second paragraph of the same article how it can be determined: "Bad faith shall be discerned from the manifestly ill-founded nature of the complaint or appeal, as well as from any other circumstances that make it reasonable to assume that the right was exercised abusively or served a different purpose than that allowed for by the law".

[6] Idem 5.

[7] Legislative Information Bulletin no. 4/2009

It is worth mentioning that filing appeals on complaints is also sanctioned in the same way.

6. The Conclusion

In conclusion, it is necessary that to guarantee any person both the right to a fair trial within a reasonable and foreseeable time and the right to file claims and to report irregularities regarding the trials. However, this can also be achieved by filing written claims or orally request them, without regulating the special procedure of Complaint about the protraction of proceedings, that can also be used as an element of disturbing the judge and even delay the trials furthermore.

The Complaint about the protraction of proceedings will be an effective tool for those who don`t master a good management of time, those who lack interest or are poorly trained, those who hurry and thus make mistakes or even for those who delay trials with bad faith.

This procedure would prove successful given a situation in which all the holders would act in good faith, would be concerned of having a fair trial, and also where the truth and honor would triumph. Because all of this is unlikely to happen in the near future, having such a procedure is more than welcomed, given the degradation of people`s good spirit and understanding one another.

Given the current context of a high number of trials and the "legislative instability that generates periodic waves of lawsuits"[8], the filing of such complaints needs to analyzed accordingly to its opportunity, and thus, avoid arising the already high number of lawsuits and high work load of judges.

However, assuming that the holders file these complaints only in good faith, this procedure would be used only exceptionally and would definitely conduct to shorter trials and better ruling. Otherwise, a large number of such complaints and appeals will weaken and suffocate the legal system, delaying even more the trials.

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[8] Gabriel Boroi, O. Spineanu-Matei, et al., *The New Civil Procedure Code* (Bucharest: Ed. Hamangiu, 2003), 1016.

THE CONFLICT BETWEEN THE LEGAL INTERESTS OF THE ORIGINAL OWNER AND THE GOOD FAITH ACQUIRER OF MOVABLES – A COMPARATIVE OVERVIEW OF THE SOLUTIONS

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Abstract:

The present article compares the legal rules on the good faith acquisition of movables in various national legislations of both Member states and countries outside the EU, in order to analyze the differences of the three major types of legal approach towards this means of original acquisition of ownership over movables. It is underlined that the existing diversity in the regulation can cause serious difficulties when multiple jurisdictions are concerned. One of the solutions to this issue is the unification of these rules at the EU level. The provisions of Book VIII, art.3:101 of the Draft Common Frame of Reference provide a solid foundation for this unification and may help to solve cross-border cases in a more efficient and just manner.

Keywords : *'nemo plus iuris' principle; good faith acquisition; original owner; bona fide acquirer; transfer of movables; comparative legal research; Draft Common Frame of Reference.*

Introduction:

Due to its great importance for the security of transactions, there is hardly a major legal system that doesn't contain any rules on the good faith acquisition of movables as well as the protection of the rights of the deprived original owner. The legislations of the particular Member states, as well as other countries outside the European Union are not coherent and they differ in the solution of the arisen legal conflict, taking a different approach to the Roman principle '*nemo plus iuris ad alium transferre potest quam ipse habet*'. Either the deprived owner or the bona fide acquirer (or sometimes even both sides) must bear the risk of losing their rights. The interests of commercial transactions and the liberalization of the market normally favor the bona fide acquirer, while even the basic notion of justice is offended by the idea that the owner of a movable could be deprived of it, sometimes even against his will, simply because someone has disposed with it. Of course, if the acquirer knows or under the specific circumstances of the case should have known that he is dealing with a non-owner or a person not being entitled to transfer the movable, every major legal system unambiguously protects the deprived owner, thus preventing the loss of his rights *in rem*. Much more complicated to solve are those situations where the acquirer is in good faith and the transferor, who has disposed of the movable, is holding it with the consent of its owner.

It is possible to divide the major contemporary national legislations into three broad groups as far as protection of the good faith acquirer is concerned. It will be inaccurate to say that every particular country has an absolutely identical set of rules with the other countries, included in the same group. What is important to stress out is that those legislations share a common legal principle that has defined their legal approach on resolving the conflict between the rights of the dispossessed owner and of the bona fide acquirer. Two extreme and one balanced legal approach can be distinguished. Using the comparative method of legal research the present article aims at studying these three main types of legal approach in cases where the law has to take side in the conflict of legal interests of the deprived owner, on one hand, and a good faith acquirer, on the other.

I. The Original Owner Rule

At the first extreme the original owner's legal interests are being meticulously protected irrespective of the means in which he was deprived of his property. The owner is granted the right to claim back his property, wherever he finds it, even if it has passed in the hands of a good faith acquirer.

The roots of the *original owner rule* can be traced back to Roman private law. In the early period (about 450 BC) private law was codified by Lex Duodecim Decorum (The Twelve Tables) and original acquisition of ownership was recognized by acquisitive prescription only – the so called *usucapio*. This principle intended to protect the owner of the movable from being deprived of his property, on one hand, and the party in possession who could acquire the movable after a certain period of time. A means for the owner of the movable was provided to claim back his property if the prescriptive period had not run.

By the Classical period of Roman law, extending from 1 AD to the end of the third century

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AD the rules on acquisitive prescription evolved immensely. The major principle, applicable both to immovables and movables, was formulated by Ulpianus – "*One cannot acquire ownership from a person who is not himself the owner*"[1]. Together with another tenet, formulated by Paulus "*What belongs us cannot be transferred to another without our consent*"[2], they formed a concept of the consistent protection of the original owner.

During this period, the basic action available to an owner out of possession to recover his property, both movable and immovable was the *rei vindicatio*, or revandicatory action. Initially the period for this action was limited to one year. The possessor could repel the claim if proving the fact that his possession had lasted longer than one year, without having to prove anything else. This circumstance was seriously obstructing the interests of the original owner.

That's why at the end of the Republican era the prerequisites for the usucapio were set to five elements: *res habilis* (a movable or immovable thing that is not *extra commercium*), *possessio*, *iustus titulus* (a just title, capable of transferring ownership by nature), *bona fides* (good faith) and *tempus* (an elapsed period of time).

Furthermore, at the time of Justinian and his Corpus Iuris Civilis, enacted in the middle of the 6th century, the prescriptive period was increased to three years. If the prerequisites were not met (for example, if the *iustus titulus* was not present because of the circumstance that the goods were lost or stolen, or the possessor was lacking good faith) the period of possession necessary to acquire the thing was set to thirty years. In addition, the Justinian legislation strengthened the *rei vindicatio* so that the owner could pursue his property during the whole prescriptive period.

As a conclusion, Roman law established and developed an approach that meticulously protected the dispossessed owner. This approach has been enacted by a series of national legislations.

English common law takes as a starting point the *nemo plus iuris* principle. As a consequence if someone has disposed of a property not belonging to him, in the conflict between the original owner and a third acquirer the former has the stronger position. This is expressed in art. 21 (1) of the English Sale of Goods Act of 1979 (SGA)[3].

The major difference between English and civil law in respect of good faith acquisition is that the first one lacks a gerenal exception to the *nemo plus iuris* rule to benefit the good faith acquirer. Rather, the SGA of 1979 provides several statutory exceptions to this principle.

The emergence of these exceptions is to an extent influenced by a statement by Lord Denning:

"In the development of our law two principles have striven for mastery. The first is for the protection of property: nobody can give a better title than he himself possesses. The second one is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title."[4]

The first exception concerns *apparent authority* (also known as the doctrine of estoppel), which is actually provided in the second part of art. 21 (1) SGA'1979 "… unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell". This doctrine means that if the owner has assured the buyer that the seller has an actual right to transfer the title of the goods, the buyer can acquire the title despite the fact the seller was not the owner[5].

The second statutory exception to the *nemo plus iuris* principle is referred to as *sale under voidable title* (art. 23 of the SGA) - "When the seller of goods has a voidable title to them, but this title has not been voided at the time of the sale, the buyer acquires a good title, provided he buys them in good faith and without notice of the seller's defect of title". It offers protection to the buyer of a movable if he purchased it in good faith and did not know that his seller has a defect of title (cases of fraud, duress, misrepresentation etc).

The SGA contained the market overt rule as well, but the provision was abolished in 1995[6].

Other statutory exceptions can be found in the Factors Act of 1889, concerning cases of mercantile agency[7] and seller in possession after sale[8].

The provisions of the English Sale of Goods Act have influenced a number of common law

[1] "Nemo plus iuris ad alium transferre potest quam ipse habet"- D.50, 17, 54.

[2] "Id, quod nostrum est, sine facto nostro ad alium transferri non potest – D. 50, 17, 11.

[3] Art. 21 (1) SGA : "Subject to this Act where goods are sold by a person who is not their owner and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

[4] See *Bishopsgate Motor Finance Corporation Ltd. v Transport Brakes Ltd* [1949] 1 KB 332 at 336-337.

[5] The estoppel is actually a rule of evidence preventing a person from denying the truth of a statement he has made previously or the existence of facts in which he has lead another to believe. See Laszlo Pók, op. cit., 7.

[6] The market overt rule was codified in art. 22 (1) SGA'1979 : Where goods are sold oin market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect of title on the part of the seller".

[7] Art. 2 of the Factors Act provides: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale … made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same."

[8] Art. 8 of the Factors Act provides that if the owner of a good sells it two times the second buyer can acquire the title if he acts with good faith and has no knowledge about the first sale.

national legislations, like Scotland and Northern Ireland (as part of the United Kingdom), Cyprus[9], India[10], Canada[11] etc.

Among the countries whose national legislations belong to the Continental legal system Portugal is the only country whose Civil Code has fully adopted the *nemo plus iuris* principle. Portuguese civil law does not recognize good faith acquisition. There are no rules comparable to the "possession is equal to a title" principle, embodied in the French law, or even to the provisions of §929-932 BGB allowing the good faith purchase despite the enhanced protection of the original owner.

This circumstance results in the legal construction that a sales contract, by which the seller is neither the owner, nor legally entitled to dispose of the goods, is considered void, as art. 892 of the Portuguese Civil Code explicitly provides. If, however, such a contract is concluded and the purchaser acting in good faith, paid a consideration, the Portuguese legislator provides a restitution claim for the price because of unjustified enrichment of the transferor (art. 894 of the Portuguese Civil Code). The dispossessed owner can always claim back his movable, no matter how much time has elapsed.

II. The Bona Fide Acquirer Rule

At the second extreme, an acquirer who gained possession over a movable through a valid title, becomes the rightful owner, even if the movable has originally been lost or stolen from its original owner. The former owner loses his rights over the movable, but can always claim compensation for unjustified enrichment against the transferor of the goods. The policy of a comprehensive protection of the good faith transferee, known as the bona fide acquirer rule, has been adopted by the new Italian Civil Code of 1942. Pursuant to art.1153 of the Italian Civil Code, as far as movables are concerned, the possession is equal to a title. This principle is based on the need to increase certainty in the circulation of movables, since it is nearly impossible for a person to undertake a thorough investigation if every transferor of the goods was in fact their owner. Another argument in support of adopting this principle is the speed with which transactions occur, not allowing the transferee to keep a complete record of the transfers. It is being stressed out that the possession of a movable creates a legitimizing appearance of ownership, so that every person exercising power over a movable has a right to dispose with it, as far as other people unaware who the actual owner is are concerned. Pursuant to art. 1153 et seq. Italian Civil Code, the former owner cannot bring a rei vindicatio action against the good faith acquirer under any circumstances, not even if the goods were lost or have been stolen from him. Thus, the Italian Civil Code of 1942 has eliminated the distinction between involuntary and voluntary loss of ownership and enhanced the protection of the bona fide transferee in either cases. Furthermore, there are no additional requirements concerning the title except its validity, which means that both onerous and gratuitous acquisition will lead to extinguishing the original owner's right and the good faith acquirer shall become the new owner.

Throughout the Member states, there is no other legal system implementing the *bona fide acquirer rule* to such an extreme extent. The other national legislations are being somewhat influenced either by the balanced approach or by the *original owner rule* that consistently protects the right of the dispossessed owner. Particularly interesting is the policy towards good faith acquisition adopted in the Czech and Slovakian legislation. Both countries have very similar civil and commerce codes and thus share the same principles. Their civil codes do not provide any rules on good faith acquisition. Is it not possible to acquire ownership from a transferor who lacks the right to dispose regarding the transferred property. The absence of a right of disposition of the property always results in an absolute nullity of such a contract[12]. It is clear that Czech and Slovak civil law have adopted the *nemo plus iuris* principle. Surprisingly, on the other hand, the Czech and Slovak Commercial Codes have codified a set of very liberal rules on good faith acquisition, applicable to merchants only (see § 446 of the Slovak Commercial Code and § 446 of the Czech Commercial code). The main purpose was to promote the security of commercial transactions. § 409 of the Slovak Commercial code explicitly provides an exception of the *nemo plus iuris* principle if the good faith acquisition is based on a business relationship. Since there is no rule excluding lost or stolen goods, scholars[13] believe that they can be acquired in an original manner from the good faith transferee.

Another example of a national legislation that adopted the bona fide acquirer rule, but sustained some influence from the balanced approach is Austria.

Art. 367 of the Austrian Civil Code provides that it is possible to acquire ownership over movables from a non-owner in three particular

[9] Cyprus's Sale of Goods Act of 1994 and its articles 27-30 mirror the provisions on good faith acquisition of English Sale of Goods Act of 1979.

[10] See art.26-30 of India's Sale of Goods Act.

[11] See § 22-24 of Canada's Sale of Goods Act.

[12] Ivan Petkov, National Report on the Transfer of Movables in Slovakia, in vol. 6 of *National Report on the Transfer of Movables in Europe* (Munich: Sellier European Law Publishers, 2011), 421.

[13] Ivan Petkov, op.cit., p. 421

situations: at a public auction; if it is purchased from a person in the course of the latter's commercial activity of selling goods of this kind; and if the owner has voluntarily entrusted the movable into the seller's possession. Moreover, the acquisition must be for value and the acquirer must have obtained possession over the movables in good faith.The rules on good faith acquisition in the Austrian civil code do not provide an exception on lost or stolen goods. This circumstance has lead scholars to assume that it is possible for the good faith transferee of these goods to gain ownership over them in an original manner[14]. This effect can occur only if the other prerequisites of the good faith acquisition are present. Despite these limitations, the Austrian Civil Code provides an enhanced protection of the legal interest of the good faith transferee, allowing him to acquire ownership even over lost or stolen goods. Scholars tend to categorize Austrian law as one of the most protective jurisdictions towards good faith purchasers[15].

The liberal Austrian provisions that can be ranked as the second most favorable to the bona fide acquirer (after the Italian ones), have been fully adopted by the art. 64 et seq. of the Slovenian Ownership Code as well.

III. The Balanced Approach

1. The Consensual System

Just like the bona fide acquirer rule, the balanced approach recognizes good faith acquisition as a separate, original manner of acquiring ownership over a movable from a person acting in good faith.

The basic rule that has become the founding stone in a number of national legislations when it comes to good faith acquisition is that "with reference to movables, possession is considered equivalent to title"[16], meaning that possession and ownership of movables go hand in hand. The first national legislation to adopt this principle with the intention to protect good faith acquirers and the interests of commerce, was the French Civil Code of 1804 and its article 2279 (a recent reform changed the numeration to art. 2276). The drafters of the Code placed this provision in a section called "On some special prescriptions". Thus, good faith acquisition was looked upon as a special, instantaneous acquisitive prescription rule. This explanation is rejected by Marcel Planiol[17], however, being in contradiction in terms since "acquisition by prescription presupposes a certain period of time has actually elapsed". A more recent theory explains the legal nature of the provision on good faith acquisition as an irreputtable presumption of ownership in favor of the possessor[18]. The prevailing view, supported by the case law of the French Cassation Court is that the good faith acquisition is a separate, independent method to acquire ownership over a movable in an original manner. The main effect of the principle "as far as movables are concerned, possession is equivalent to title" is that it overrides the rules in the law of obligations regarding abuse of trust by a transferor holding a limited title or even nullity of a contract. The result therefore is that the good faith acquirer a non domino neither receives the ownership right on a derivative basis, nor takes title by instantaneous prescription, but acquires a clear title by statutory provisions[19].

In order to fully comprehend the good faith acquisition in French law one must keep in mind that according to art. 711 of the French Civil Code, ownership is acquired and transmitted by succession, by gift (both inter vivos and mortis causa) and by the mere effect of a obligation.This provision brings us to the conclusion that the French transfer system is consensual, which can be derived from a closer look on article 1138 as well : *An obligation of delivering a thing is complete by the sole consent of the contracting parties. It makes the creditor an owner.*

Thus, the provision of art. 2276 (1) serves a double function. In the first place, it provides a rule of proof – possession establishes a legal presumption that whoever is exercising the factual power over a movable is deemed to be its owner, unless proven otherwise. In the second place, it contains a material rule – the act of possessing a movable renders its possessor as the owner in case the movable is being transferred to him by someone not entitled to dispose with it.

The French Civil Code does not specify further requirements that the possessor has to meet before he is entitled to invoke the *possession vaut titre* rule. That's why case law helped the institute to evolve. Nowadays, it is unambiguous that the transferee of a movable that was transferred to him by a non-owner can acquire ownership if he received actual ("real") possession and he doesn't know or should not have known that his transferor lacks ownership over the movable. Transition of ownership is not caused by

[14] Helmut Koziol and Rudolf Welser, *Bürgerliches Recht*, Band 1 (Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2006), 335.

[15] Ernst Karner, Gutgläubiger Mobiliarerwerb, (Wien : Springer, 2006), 18.

[16] "*En fait des meubles, la possession vaut titre*". This principle was formulated in the first half of the XVIII century by the famous French civil law scientist Francois Bourjon in his work Le commun droit de la France et la Coutume de Paris reduits en principles. (Paris, 1770) p. 1094., see Arthur Salomons, "The Purpose and Coherence of the Rules on Good Faith Acquisition and Acquisitive Prescription in the European Draft Common Frame of Reference. A Tale of Two Gatekeepers." *European Review of Private Law* vol. 3 (2013): 843.

[17] M.Planiol, Traite elementaire de Droit Civil. Droit les biens, translated by Tihomir Naslednikov (Sofia, 1928, Staykov Printing Office), 214.

[18] P. Michael Hebert, "Sale of Another's Movables", *Louisiana Law Review*, vol. 29 (1969): 335.

[19] Colin, A., Capitant, H., Traite elementaire de Droit Civil, Tome 1, Livre II – Droit les biens, translated by Galab Galabov, (Sofia, 1926, Royal Court Printing Office), 326.

the effect of an obligation, but instead, by mere possession. This possession creates a new title on behalf of the good faith transferee, independent and not deriving from the original title.There is no requirement for the transaction to be onerous – any valid legal act capable of transferring rights over movables is sufficient[20].

The major difference between the balanced approach and the bona fide acquirer rule can be found in the attitude towards lost or stolen goods. Unlike the quite liberal approach in Italy that allows the good faith transferee to acquire ownership even over lost or stolen goods, the provisions of the French Civil Code exclude them from the material protection of the good faith acquisition. The reason for this exception can be found in the circumstance that loss and theft lead to involuntary loss of possession. If the property was lost or got stolen, the original owner can reclaim it back from whoever holds it, even from the good faith transferee. Because of its somewhat radical nature, the French legislator has limited the time-span for such a claim to be made to three years – not from the date of the bona fide acquisition, but from the moment the movable got lost or was stolen (see art. 2276 (2) French Civil Code).

The good faith transferee of a lost or stolen movable is not left completely empty-handed. Pursuant to art. 2277 French Civil Code, *when the present possessor of a thing lost or stolen has bought it at a fair or market, or at a public sale, or from a merchant selling similar things, the original owner may have it returned to him only by reimbursing the possessor for the price which it has cost him.*

This remarkable provision of medieval origin is called the "market overt" rule. It serves a primary function – to create a counter-exception in favor of the transferee who acquired in good faith lost or stolen movables under normal, unsuspicious circumstances[21]. On the other hand, it protects him against a possible insolvency and/or untraceability of his transferor. If the dispossessed owner reclaims back his goods, the good faith buyer can spare the difficulties of trying to find the seller and refund the purchase price. The French Civil Code has adopted a much more fast and practical solution that strikes the best possible compromise in the conflict of legal interests between the original owner and the bona fide acquirer – the owner is obliged to reimburse him with the price paid for the lost or stolen goods. Until he has received this payment, the possessor is entitled even to exercise a retention right over the movables.

This balanced approach, resulting in a compromise in the conflict of legal interests between the dispossessed owner and the bona fide acquirer was adopted by the revoked Italian Civil Code of 1865 (art. 707). One of the most significant merits of art.707 Italian Civil Code'1865 was expanding the protection of good faith acquisition institute over bearer instrument and money as well. The old Italian Civil Code had a great impact on a huge number of national legislations that belong to the Romanistic legal family, including the Bulgarian one.

In Bulgaria, the first rule on good faith acquisition was enacted in 1904 in the revoked Law on Property, Ownership and Servitudes. This act implemented the provisions on ownership and other real rights from the revoked Italian Civil Code and closely followed both the consensual system of transferring ownership and the balanced approach in terms of good faith acquisition. Its article 323, identical to art. 707 of the old Italian Civil Code, contained the rule "With reference to movables and bearer instruments, possession is considered equivalent to a title". The possibility for the original owner to reclaim his lost or stolen movables for a period of three years, as well as the market overt rule in favor of the good faith acquirer who bought lost or stolen goods at a fair, market or at a public sale, were present as well (art. 324 and 325 of the Bulgarian Law on Property, Ownership and Servitudes).

After the deep socio-economic changes in the Bulgarian society after World War II, in 1951 a new Ownership Act came into force and remains until today the primary source of rules on ownership and other real rights. The policy on good faith acquisition sustained only minor changes. Pursuant to art. 78 (1) of the Bulgarian Ownership Act, the good faith purchaser of movables or bearer instruments, who acquired them on a valid onerous title is their new owner if he didn't know that the transferor did not own them. If the goods were lost or stolen, art. 78, (2), first sentence provides the familiar three year period for an ownership claim to be made by the dispossessed owner.

The first change concerns the requirement for value of the legal act that transfers ownership. If it is gratuitous, the interests of the dispossessed owner will prevail, because it is not justified to protect the person who has enriched himself, without sacrificing a counter-performance. As mentioned above, modern Bulgarian civil law has continuously adopted the balanced approach and a general policy of enhanced protection of the bona fide acquirer has never been customary.

The second change is tightly connected with the socio-economic changes in Bulgaria. After 1950, commercial law was abolished and private enterprises were nationalized. They were all transformed into State-owned socialistic enterprises

[20] Eleanor Kashin Ritaine, National Report on the Transfer of Movables in France, in National Report on the Transfer of Movables in Europe, (Munich: Sellier. European Law Publishers, 2011), 119-128.

[21] Arthur Salomons, "Good Faith acquisition of movables", in *Towards an European Civil Code, 4th revised and expanded edition*, ed. M. Hesselink et al. (Wolters Kluver Law International, 2011), 1065-1082.

who were the only major participant in Bulgaria's economic life until 1989. That circumstance made the counter-exception concerning lost or stolen movables bought at a fair, market or at a public sale pointless and incompatible with the socialistic state regime, since it presumed the presence of private commercial relationships. This rule was substituted with another provision that suited the new regime better, yet expressed the same ideas. Pursuant to art. 78, (2) second sentence, if a person bought lost or stolen goods from a State or cooperative enterprise, he acquires ownership in an original manner and the former owner cannot claim the goods back under any circumstance. No possibility for reimbursement of the price was provided as well. The legislator's aim was to affirm the dominant position of State and cooperative enterprises as the substitute of all previous private companies and partnerships and to increase citizens' trust in the new legal subjects who were designed to achieve the primary economic goals of the ruling party. Still, it must be pointed out that the good faith transferee enjoyed such a favorable position only if he acquired the lost or stolen movable from a State or cooperative enterprise. If the goods were transferred by anyone else, the original owner's interests prevailed and a claim could be successively carried out even without having to reimburse the good faith acquirer with the price paid.

After the transition to free market economy in the late 80's and in the beginning of the 90's, the State and cooperative enterprises are no longer the only and the biggest participant in the economic life of Bulgaria. The majority of them were reorganized in the process of privatization and nowadays they have a negligible role. This circumstance significantly reduces the applicability of the provision of art. 78, (2), second sentence and causes a debate on enacting a new rule on the protection of the good faith transferee who acquired lost or stolen goods from a transferor acting in the ordinary course of business.

Apart from Bulgaria, the consensual system of transferring ownership as well as the balanced approach on good faith acquisition was adopted with some changes by many other national legislations within the European Union, as well as other, Non-member States. The Belgian Civil Code has adopted an identical set of rules and stands the closest to its primary source – the French Civil Code. The provisions of art. 2279 and 2280 of the Belgian civil Code follow art. 2276 of the French Civil Code to the letter. Out of the EU, art. 1161 and 1162 of the Ethiopian Civil Code have fully adopted the French approach on good faith acquisition as well. The only difference is that the rules on good faith acquisition in the Ethiopian Civil Code are not placed next to the provisions about prescription, but among the other separate methods of acquiring ownership by original manner.

Modern national legislations have adopted the consensual transfer system as well, but have provided some additional requirements or other prerequisites as far as good faith acquisition is concerned. The most typical one is that the acquisition must be onerous. Only when the good faith transferee has given or promised a counter-performance his legal interest is worthy of protection. A number of national legislations broaden the scope of the "good faith" requirement as well. In contrast to the French Civil Code where case law defined good faith as the lack of knowledge that the transferor is not the owner of the movable[22], modern civil codes tend to perceive the good faith requirement as a lack of knowledge that the transferor is not entitled to dispose of the goods. The transferee may know that he is dealing with a non-owner and this circumstance will not vitiate the acquisition a non domino. The main reason for this concept is protecting the dynamic commercial relationships in cases when the transferor established factual power over the movable on a lease, pledge or rent contract, but the acquirer believes that his transferor holds the goods on a consignation contract, for example and is entitled to transfer them.

A number of national legislations combine the classical French approach and a modern, reformed policy on the good faith acquisition. Such rules can be found in art. 933 of the Swiss Civil Code[23], art. 464 of the Spanish Civil Code[24] art. 4.96 of the Lithuanian Civil Code[25], art. 95, (1) of the Estonian

[22] Cass. 1re civ., 23 mars 1965: Bull. civ. I, n° 206: « *En matière d'application de l'article 2279 du Code civil, la bonne foi … s'entend de la croyance pleine et entière où s'est trouvé le possesseur au moment de son acquisition des droits de son auteur, à la propriété des biens qu'il lui a transmis; le doute sur ce point est exclusif de la bonne foi*. »

[23] Article 933 of the Swiss Civil Code states that "If someone has acquired ownership or other real rights over a movable in good faith is worthy of protection in case his transferor was not entrusted with the movable as well". Article 934 (1) provides a 5-year period of time for the original owner to claim back his stolen or lost goods after he reimburses the good faith acquirer with the price the latter paid for the movables. For additional information see Arnold F. Rusch, Gutgläubiger Fahrniserwerb als Anwendungsfall der Rechtsscheinlehre, in:

Jusletter 28. January 2008, p. 12-13; Tuor/Dreyer/Schmid, Das Schweizerische Zivilgesetzbuch (Zürich: Schulthess Polygraphischer Verlag, 1996), 618-619.

[24] "As far as movables are concerned, possession is equivalent to title". For additional information see José Manuel de Torres Perea, "Acquisition from a non domino in Spanish civil law" (paper presented at the International Scientific Congress on Spanish-Philippine Private Law, University of Malaga, April 16-17, 2015).

[25] "If a person in good faith acquires property for value and without notice that the transfer doesn't have authority to dispose, the legitimate owner may bring an action for rei vindicatio of the goods against the good faith transferee, provided that the owner lost the goods or was dispossessed without consent or that the goods were stolen." Apart from this exception, the good faith acquirer can always rely on a title to

Property and Ownership Act[26], art. 5:39 of the New Hungarian Civil Code (in force since 2014)[27], art. 3:86 of the Dutch Civil Code[28], the Swedish Good Faith Acquisition of Personal Property Act and § 1 of the Norwegian Good Faith Acquisition Act. Outside the EU, the balanced approach on good faith acquisition has been implemented in art. 1197, 1204 and 1268 of the Brazilian Civil code[29], § 34 of the Sale Law of Israel, art. 798 and 799 of the Mexican Civil Code, art. 194 of the Japanese Civil Code, art. 1713 and 1714 of the Civil Code of Quebec and art.1157 of the Iraqi Civil Code[30].

2. The Abstract (Traditio) Transfer System

Among those national legislations included in the balanced approach group, the rules on good faith acquisition enacted in § 932 of the German Civil Code (Bürgerliches Gesetzbuch) deserve special attention. The starting point of the German transfer system is that a legal consequence can either follow directly from a statutory provision or from a party's legal act. In contrast to the French Civil Code, German private law does not grant translatory effect to the contractual agreement, but has developed its own method, known as the "Trennungs- und Abstraktionsprinzip". The transfer of title must find its basis in a real agreement distinct from the obligation created prior by the parties. The basis of the transfer therefore is held to be the agreement on the transfer of title, this real agreement being an agreement in rem. Furthermore, pursuant to § 929 BGB the real agreement must be made public by the abstract act of *traditio*, that is the transfer of possession and both contracting parties must have agreed upon the passing of ownership. As far as these requirements are fulfilled, all powers embraced in the right of ownership pass to the transferee. In other words, ownership doesn't pass until the transferor has actually delivered the movable to the transferee. The transfer of title is a consequence of the real agreement, not of the underlying agreement creating just a mere obligation to transfer[31].

Apart from this major difference, with regard to the acquisition a non domino, German private law resembles the French provisions, yet imposes a much more consistent legal protection of the original owner in comparison to art. 2277 of the French Civil Code.

The basic rule is given in § 932 (1) BGB: *The transferee becomes the owner occurring under paragraph 929 even if the movable doesn't belong to the transferor, unless he did not act in good faith at the time at which he would acquire ownership under these provisions.* The transferee is worthy of protection only if he acts in good faith at the moment of delivery. Section 932, (2) BGB sets out that "*the purchaser is not in good faith if he is aware or due to gross negligence is unaware that the movable doesn't belong to the seller*".

Paragraph 932 BGB does not provide a requirement for value and this might create the false impression that both onerous and gratuitous transfers can lead to a good faith acquisition. However, § 816 BGB provides that the person who acquires a movable without a counter-performance, may be under a duty to return it to the owner under the rules of unjustified enrichment. This means that good faith acquisition under the rules of the German Civil Code can occur only if it is for value.

Despite being positioned in the balanced approach group, German private law is somewhat influenced by the *original owner rule* and this can easily be seen when it comes to the scope of protection of the dispossessed owner. Similarly to French law, §935 BGB starts off by manifesting that the movable must have been voluntarily entrusted to the transferor, thus excluding lost or stolen goods, but continues by referring explicitly to goods of which the owner had otherwise involuntarily lost possession. This provision extends the number of occasions when the dispossessed owner can reclaim back his movable and since there is no requirement for him to reimburse the price the good faith acquirer had paid[32], we can conclude that the rules on good

ownership. Art. 4:96 of the Lithuanian Civil code provides that lost or stolen goods can be vindicated within three years from the moment of dispossession.

[26] "A person who has acquired a good by transfer in good faith is the owner of the good from the moment of gaining possession over the thing even if the transferor was not entitled to transfer ownership." The Estonian civil law doesn't explicitly provide a requirement "for value" of the acquisition. However, if the acquisition was gratuitous, the acquirer must re-transfer the thing to the entitled person even if the disposition was otherwise valid. This provision is derived from the rule of art. § 1040 Law of Obligations Act: "An acquirer in good faith who is no longer enriched in the extent of the (gratuitous) transfer by the time he learns or should have learned about the filing of a claim against him, is relieved of the duty to re-transfer the thing". For more detailed information about the Estonian national legislation in terms of the good faith acquisition see : Priit Kama, Evaluation of the Constitutionality of Good-Faith Acquisition, *Juridica International*, XIX (2012), accessed May 08, 2015, doi:10.12697/1406-1082.

[27] Section 5:39 (1) provides that "A bona fide acquirer acquires ownership of a good, which has been sold in the course of the transferor's commercial activity, even if the merchant was not the owner of the goods". Section 5:39, (2) and (3) create the exception concerning lost and stolen goods and the counter-exception, when these goods are obtained at public auctions. See Laszlo Pók, An old topic in a modern world, *European Review of Law and Economics*, vol. 2 (2012), 7.

[28] "Although an alienator lacks the right to dispose of the property, a transfer pursuant to articles 90, 91 or 93 of a movable thing, unregistered property, or a right payable to bearer or order is valid, if the transfer is not by gratuitous title and if the acquirer is in good faith."

[29] See Eduardo Filho, Good Faith in the Brazilian Civil code : Ten Years Later, *Teisé*, 88 (2013), 211-221.

[30] Dan Stigall, A closer look on Iraqi Property and Tort Law, *Louisiana Law Review*, 68 (2008), 780.

[31] Manfred Wolf, *Sachenrecht* (München: Verlag C.H.Beck, 2006), 198-200.

[32] W. Brehm/C. Berger, *Sachenrecht* (Tübingen: Mohr Siebeck, 2000), 412; H. J. Wieling, *Sachenrecht* I, (Berlin: Springer, 2001), 385-395.

faith acquisition in the German Civil Code, despite sharing common principles with the French provisions, stand much closer to the *original owner* rule than most of the other national legislations from the *balanced approach* group.

The German approach has influenced a number of national legislations, for example the Greek Civil Code. Its provisions on the abstract method of transfer of movables, as well as on good faith acquisition (art.1034-1038 Greek Civil Code) follow in general § 929-932 of the German Civil Code. However, the Greek legislator has adopted the "French" market overt rule on lost or stolen goods, bought at a public auction, or at a fair or on the market, providing a better protection of the legal interests of the bona fide acquirer in comparison to the German Civil Code[33].

Other national legislations that adopted the German Civil Code, can be pointed out as well – the provisions of art. 22 of the Law on Property and other real rights of Kosovo[34] and art.187 et seq. of the Georgian Civil Code[35].

IV. The need for coherence and the Draft Common Frame of Reference as a role model

As this short comparative overview has shown, there is a considerable diversity on the rules of good faith acquisition. The majority of national legislations strive to find a balance between the interests of both the original owner and the good faith transferee, especially when it comes to lost or stolen goods. Yet, within Europe Italian and Portuguese law represent the two contemporary extremes and throughout the national legislations there are differences beyond trifle. This circumstance is able to cause serious difficulties in legal enforcement if multiple jurisdictions are concerned, not to mention the unfair treatment of either parties if the applicable law is less susceptible and provides a considerably lower level of legal protection towards one of them in comparison to their national legislation, for example.

In my opinion, the existing diversity of rules could be overcome on the way of a unification of the provisions on good faith acquisition through a mandatory act, enacted at EU level. For this purpose the rules of the Draft Common Frame of Reference (DCFR) may serve as a role model. The Draft Common Frame of Reference is prepared by the Study Group on a European Civil Code that consists of legal scholars from several jurisdictions in the EU. It is a soft law codification[36] which can serve as a common denominator in the approximation of laws within the Member States[37].

Because of its great importance for promoting security of transactions and commerce, the Study Group has provided a set of rules regarding good faith acquisition of movables in Book VIII, art. 3:101 of the DCFR[38].

The provision of art. 3:101, (1) DCFR sets out that when a movable is acquired for value from an unauthorized transferor, the transfer is valid, provided all other transfer requirements are met and the transferee neither knew nor could reasonably be expected to know that the transferor was not entitled to transfer. The article contains a rule on burden of proof as well: "The facts from which it follows that the transferee could not reasonably be expected to know of the transferor's lack of right or authority have to be proved by the transferee".

Art.3:101, (2) DCFR provides that good faith acquisition does not take place with regard to stolen goods, unless the transferee acquired them from a transferor acting in the ordinary course of business.

As one can see, the Study Group has tried to strike a compromise between the provisions on good faith acquisition in the majority of national legislations. The requirement for value, the strict standard on good faith and the exclusion of lost or stolen goods from its scope of application are aimed at granting a better protection of the dispossessed original owner, whereas the market overt rule and the wider content of good faith (especially compared to the provisions of the French Civil Code) put the transferee in a favorable position.

The choice of the Study Group to place the burden of proof on the good faith transferee has been regarded as "highly unusual" and criticized for causing a detrimental effect to commercial transactions, as well as urging costly and time-consuming lawsuits that the rules on good faith

[33] See art. 1039 Greek Civil Code : "If the lost or stolen things are ... things, sold at a public auction, or at a fair or on the market, the buyer does acquire ownership of them if he is acting in good faith". See P.Agallopoulou, *Basic Concepts of Greek Civil Law* (Athens, 2005), 394.

[34] Haxhi Gashi, Acquisition and Loss of Ownership under the Law on Property and Other Real Rights (LPORR): The influence of the BGB in Kosovo Law, *Hanse Law Review*, 9 (2013), 41-61

[35] Eugenia Kursynsky-Singer and Tamar Zarandia, Rezeption des deutschen Sachenrechts in Georgien, *Max Planck Private Law Research Paper*, 14 (2010), 108-137.

[36] See Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitons and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law* (Munich: Sellier European Law Publishers), 2009, 431-432.

[37] http://www.sgecc.net/pages/en/introduction/100.aims.html (accessed on 09.05.2015)

[38] The Study Group agreed upon the need of drafting rules on good faith acquisition. This would balance the interest not only of the concrete parties at an individual level, but also of all participants in the commercial relationships intending to acquire goods. The scholars state that it would be too burdensome, costly and insecure if every particular acquirer was forced to undertake a detailed investigation of his transferors' rights. Not having a good faith acquisition rule would ruin legal certainty and increase investigation costs immensely. See Eric Clive, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Full Edition*, vol. 5 (Munich: Sellier European Law Publishers), 2010, p. 4827.

acquisition are evocated to prevent[39]. Perhaps the reason for this criticism is that in the majority of national legislations a presumption of good faith is provided in favor of the transferee. The only two countries in the EU whose rules on good faith acquisition provide a requirement for the transferee to prove that he did not know or couldn't have known that he was dealing with a non owner or a person, not entitled to transfer ownership, are Sweden and the Netherlands.

On the other hand, one can find solid arguments in support of this policy. Placing the burden of proof on the transferee can be regarded as a form of balancing the interests. The good faith acquisition leads to depriving the original owner of his rights *in rem* and should be seen as an exceptional opportunity for the transferee to acquire ownership.

Another justification for this decision can be found in the general principles of the law of evidence. The transferee, as one of the contracting parties, is much closer to the act of acquisition than the original owner and it would be much easier for him to provide evidence of his good faith. The original owner will have immense difficulties to investigate the circumstances of the transfer that might have occurred on a different place or after a considerable period of time has elapsed. Moreover, there is a general principle that a person who wants to benefit from a specific provision has to provide facts and evidence that support his statement.

Conclusion:

The comparative overview of the major national legislations made above reveals that the existing diversity of the solution to the conflict between the legal interests of the original owner of a movable and its good faith acquirer can cause serious difficulties when multiple jurisdictions are concerned. The importance of this issue is even bigger under the conditions of the EU-Internal market and its primary feature - the free movement of goods. In spite of being a mere soft law codification, the DCFR can provide a solid basis for legal harmonization among national jurisdictions. Adopting a set of harmonized rules may help to solve cross-border cases on good faith acquisition in a more efficient, consistent and equitable manner.

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PECULIARITIES OF INTERNAL MANAGEMENT BELONGING TO THE COMPANY ADMINISTRATOR GOVERNED BY LAW NO. 31/1990

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Abstract

The management (power) responsibility (internal management) involves committing physical operations of implementing the social will embodied in the General Assembly decisions as well as verifying their execution. In this way, the administrator is authorized by the General Assembly to execute its decisions. Furthermore, these decisions implementation implies concluding legal deeds (of conservation, management and disposal) requested by the activity of the company, and thus, achieve its core business. However, as have emphasized, certain legal deeds of disposition of particular importance to the assets of the company, may be concluded only with the approval of the general meeting of shareholders. In this context, as well as a lacunar regulation on the applicable sanction it is necessary to analyze the effects such the lack of authorization, as well as the administrator liability in relation to the management of the company. These powers (authorities) of the administrator concern the internal management of the company (management),that is the relationships of the manager with the company and shareholders, which requires delineation of the power they represent.

Keywords: *internal management, legal representative, approval of the general meeting, the delegation of powers.*

1. Introduction

The management of the company involves the exercise of two responsibilities: internal management task and the task of representing the company in relationships with the third parties. Having in view the fact that the management of the company implies the completion of legal deeds with the third parties, the present study aims at conducting a comparative analysis of the two functions (powers) of their manager - internal management and legal representation, but with special focus on internal management. The study[1] reveals peculiarities of the internal management: How is the task performed within the collective management bodies, what implies the task itself – does it limit to completion of legal deeds, in the meaning of art. 70 of the Law, or does it imply the conclusion of legal deeds, divided into categories according to the type of company? What is the penalty of breaching the general meeting approval required to complete certain transactions and the consequences on the civil liability of the administrator. As we shall show, contrary to the doctrine, we consider that the obligation of concluding legal deeds of a certain value to the company only with the approval on behalf of the general meeting, is expressly established by law, the liability to the company for non-compliance can only be a tortious one. Moreover, in this case, in the assumption of the administrative bodies, the liability lies with collective bodies and not individually to the administrator.

The analysis of this task is a first phase in developing a comprehensive study on the power of representation and the dual quality of the administrator not only as a trustee but also as a legal representative, more precisely as organ of the company. Basically, the question arises as to know if either we can speak only of a trustee administrator of the company, according to the opinion of doctrine that governed the literature until now, or to adopt the organicist theory. We believe that the administrator exercises internal management as a trustee of the company. Thus, the quality of the company's trustee manager does not exclude the one of an body of the company. This results from the provisions of art. 209 paragraph 3 of the Civil Code *"relationships between the legal person and those who make up its management bodies are subject, by analogy, to the rules of the mandate, unless otherwise provided by law, regulation or statute."*

In general, the theme approached was analyzed in two categories of specialty papers: on the one hand by the treaties or university courses with a broader research object, and on the other hand, in the articles regarding certain problems, reaching only adjacently the power of management, the peculiarities and liability for failure in exercising congruently.

2. Legal framework of managing the company task

Achieving the core business and the purpose for which the company was set up it becomes possible only by performing deeds of administration and management.

As a legal operation, the company's management involves the exercise of possession, enjoyment and disposition of the stock-in-trade and other elements of

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patrimony as well as concluding deeds of preservation, management or disposition in relation to these goods. In this context, the management is a form of exercising the business ownership, in order to meet the statutory objectives.

Administration of the company is carried out by a distinct body of permanent management, represented by the sole administrator or board of directors (specific to the unitary management system) respectively by the directorship and the supervisory board (in the dual system of administration in stock companies). It performs operations required for the achievement of the core business, giving concrete expression to the will of the company, reflected in the decisions of the General Assembly (*internal management task*). Furthermore, the administrator represents the company in the relationships with the third parties, engaging its legal liability for deeds such as agreements (*representation task*). Generally, the internal management task is performed by the administrator under the control and in collaboration with the Assembly/shareholders, whereas the task of representation is the exclusive attribute of the administrator, as the body (legal representative) of the company.

Law no. 31/1990 regulates generic administrator powers through two "key" texts, namely art. 70 paragraph 1 according to which, "*managers of the company can perform all the operations required for the fulfillment of the core business* ..." (internal power management), and art. 701 of the Law which provides that "*deeds of disposition regarding the goods of a company are concluded by the legal representatives of the company, pursuant to the powers conferred, as appropriate, by law, articles of association or bylaw not being necessary a special and authentic proxy for this purpose.*" (power of representation).

The law also contains provisions on the powers of the administrator differentiated on types of companies. Thus, in terms of partnerships and limited liability companies, art. 7 letter e) of the Companies Law no. 31/1990 establishes that the articles of association of these companies must contain clauses regarding the "*associates representing and managing the company or unassociated administrators ... the powers that were granted to them and if they are to exercise them together or separately.*" Regarding the stock companies and partnership limited by shares, art. 8 letter g^2 has the same effect (as amended by Law no. 88/2009) stipulating that, in the articles of association there must be references to "*the powers of managers, directors and, if applicable, the members of the directorship and if they are to exercise them together or separately.* "

From the Companies Law provisions it results that the powers of the administrator are very broad, he can perform all operations of management and representation required to achieve the purpose of the company. In other words, the administrator is able freely to pursue all those activities necessary to fulfill the general duty to manage the company.

From the provisions of art. 7 letter e) and art. 8 letter g^1 of Law no. 31/1990 it results the clear distinction that the law makes between the power of management (internal management, rough administration) and the one of representation. It should be noted that the right of representation is a special right, distinct from the general right of administration, limited to the internal management of the company. Thus, the internal power of management regards the relationships of the manager with the company and associates, and it belongs to any administrator appointed under the law. Instead, the power of representation belongs only to the administrator who was granted with this prerogative and it commits the company towards the third parties. Hence, the administrator powers may be limited to the internal management of the company (ordinary administrator) or may include powers of representation, situation in which the administrator is authorized to engage the company in relationships with the third parties. Regarding the sole administrator, it shall benefit from the fullness of management power (the power of internal management and representation). However, in cases of multiple administrators, the powers granted to some of them may be limited to the internal management of the company, while the others or one of the administrators are granted powers of representation. Thus, if the hypothesis of a plurality of administrators, the power of representation shall belong only to those administrators to whom it has been expressly conferred.[3].

3. The task of management (internal management) of the company

The management of the company primarily involves the fulfillment of internal management operations, which means deeds required by normal course of the company's business and the purpose for which it was founded. In this sense, art. 70 par. 1 generically stipulates for all types of company governed by Law no. 31/1990, "*administrators can carry out all the operations required for the*

[2] On approval Emergency Ordinance no. 82/2007 amending and supplementing Law no. 31/1990 and other incidental acts. Prior to this legislative change, the two legal provisions were distinguished (letter g^1) "*powers entrusted to managers and directors and if they are to exercise them together or separately*" and (letter i^1) *the representation powers conferred to administrators and, where appropriate, to directors, members of the directorate, and if they are to exercise them together or separately.*" By amending the provision contained in letter g^1) and the repeal of the one stipulated in i^1), at present, the text takes into account the strength of internal management (administration) and the one of representation.

[3] In all cases, the act of vesting the administrator must contain an express statement regarding the right to social signature, that is the power to represent the company

performance of the company's object, apart from the restrictions referred to in the articles of association."

1. The legal disposition is re-engaged with reference to the collective management bodies of the joint stock company. Thus, in the unitary system of administration of the joint stock company, the board carries out the internal management of the company. According to art. 142 par. 1 "*The Board shall be responsible for carrying out all the necessary and appropriate deeds in order to achieve the core business of the company, except those reserved by law for the general meeting of shareholders*." Therefore, the internal management task is a collective one, it devolves on the entire council as a body. In its turn, the Board, in the exercise of the company's management must respect the powers expressly recognized by law to the general meeting. In the dual management system of the stock company, the company's internal management task devolves on the Executive Board as a collective body. Thus, according to art. 153^1 par.1 the directorship "*fulfills the necessary and appropriate deeds in order to achieve the core business of the company, except those reserved by law for the supervisory board and the general meeting of shareholders.*"

From the aforementioned, it results that the administrator/member of the Board has full decision-making authority for all management operations, except those assigned by law to other bodies of society or prohibited by the articles of association.

However, certain legal deeds of disposition, of a particular importance for the assets of the company, may be concluded only with the approval of the general meeting of shareholders.

Thus, *in joint stock companies*, according to art. 150 of Law no. 31/1990, paragraphs 1 and 2 "*if through of articles of association it is not provided otherwise ... under the nullity, the administrator shall be able to own, dispose of or acquire goods to or from the company having a value over 10% of the net assets value of the company only after obtaining approval of the extraordinary general meeting of shareholders. The provisions of par.(1) also apply to renting or leasing operations.*" The text applies adequately to the directorate members or members of the supervisory board in the dual management system, as reflected in the art. 153^2 par.6/art. 153^8 par.3 based on art. 150. Furthermore, the prohibition regards the directors in the unitary management system (art. 152 reported to art. 150), under the delegation of the stock company management to one or more directors.

As it results from the analysis, for transactions of a higher value, the administrator/ director/ member of the Executive Board or the Supervisory Board needs endorsement on behalf of the extraordinary general meeting of shareholders. Thus, in order to conclude legal deeds concerning the transfer of certain assets, including rental or lease between the administrator and the company, if the goods in question have a value higher than 10% of the net assets of the company, the prior consent of the extraordinary general meeting is mandatory. The percentage of 10% is calculated by reference to the approved financial statement for the financial year prior to the one in which the operation takes place, or where appropriate, the subscribed share capital, but only if the financial situation has not been submitted and approved as the provision of art. 150 par. 3 stipulates.

The approval must be obtained beforehand and must come from the extraordinary general meeting, under the quorum and majority conditions required by the Companies Law for this assembly (respectively those provided by art. 115 of the Law). Such an act concluded by the administrator without approval is sanctioned legally by the text mentioned with nullity.

The law sets as punishment, in case of lack of approval on behalf of the extraordinary general meeting, the nullity of the act concluded in such a way, but without distinguishing whether it is absolute or relative nullity. And if these acts or transactions result in damage to the company, they shall be covered by the administrators under the civil tortious law.

In the doctrine[4] it was stated that the penalty applied in the case of lacking approval is absolute nullity, given the imperative character of the legal provision. We believe that, only in appearance, the provisions of art. 150 are mandatory, of public order. First, we have in view the purpose of the regulation, to protect the shareholders against the consequences of any decisions with impact on the company's assets that could be made by administrators, without consulting shareholders. And secondly, that the beneficiary of a measure established by law solely in his favor may waive such a favor, shareholders may waive the statutory provisions listed by a clause in articles of association. Therefore, as required by the very text of the law ("*if through the articles of association it is not provided otherwise*"), through the articles of association it may waive the requirement for approval.

Although we are reserved about such a mandatory regulation, however, based on the text "under penalty of nullity" and to protect the public interest of any company, we believe that the legislator had in view the penalty of absolute nullity. In our opinion, the deed being void, it is considered that it was never completed and, consequently, the liability for damages cannot be contractual, but only tortious.

However, the doctrine[5] stressed that such a sanction may be covered through the general meeting of shareholders decision taken on the basis of a report of the censors which explains the reasons for which the approval has not been previously obtained. In other

[4] Constantin Micu, "Organization of administration in joint-stock companies. The unitary system.", *Romanian Journal of Business Law* 2 (2007): 69

[5] Stanciu D. Cărpenaru et al., *Companies Law. Comment on articles*, (Bucharest, C.H.Beck, 2006), 464; M.G. Sabău, "Mandatory approval of shareholders in general meetings as regardsrenting of real assets of the company", *Commercial Law* 1 (2004):70.

words, there is a subsequent ratification of the operation by the assembly, and therefore, it would be unjust for the deed to be considered invalid, as long as the shareholders intend to ratify it. If, however, such an operation conducted without the endorsement of general meetings led to the misappropriation of assets of the company, it can draw even the criminal responsibility of the administrator.

In compliance with the same formalities and under the same penalty are held the people "close" to the administrator (spouse, relative or in-laws up to the fourth degree), if they dispose of or acquire goods from or to the company. Under the same strictness are the documents signed by the company concerned with a civil or commercial company to which one of the persons abovementioned is administrator or director or holds, alone or together, shares up to at least 20% of the subscribed capital. This shall not apply if either of those is the subsidiary of the other companies (art. 150 paragraph 4[6]).

2. In companies based on partnerships, according to art. 78 par. of Law 31/1990 *"(1) If an administrator takes the initiative of an operation beyond the limits of normal trade transactions practiced by the company, he must notify the other administrators before concluding it, under the penalty of bearing losses that have resulted from this.*

(2) In case of opposition on behalf of any of them, the associates representing the absolute majority of the share capital shall decide.

(3) Operation concluded against the opposition is valid to third parties who had not been communicated such an opposition."

Typically, under the powers of internal management, the administrator of a limited partnership may conclude by himself, without the others' agreement, any acts and operations, as long as they are allowed to achieve the core business of the company. However, the administrator can perform operations that exceed the normal trade of the company (for example: the sale of the stock-in-hand of the company; in block alienation of a significant part of the machinery or real assets of the company; pledging the stock-in-hand; establishment of mortgages on real assets of the company).

The law does not specify what is understood by "limits of regular operation of the trade practiced by the company" nor does it provide a criterion in this respect, therefore, in the doctrine there were outlined two opinions. In the first opinion[7], it was considered that the text envisages operations that breach the core business of the company (as is provided for in the articles of association). Along with other authors[8], we consider that the transaction falls within the scope of business of the company, but it is carried out by exceeding the ordinary commerce transactions carried out by the company. Framing within the regular operation of trade is a matter of fact, assessed on a case by case basis, depending on: the nature of the activities of the company, the volume of transactions and their value.

Exceptionally, the law allows an administrator to conclude operations that exceed the limits of operations typically carried out by the company, but only with the consent of all other administrators (art. 78 par. 1), *and in case of opposition of one of them, with the prior approval of shareholders representing the absolute majority of the share capital* (art. 78 par. 2 of Law 31/1990), *under the sanction of bearing losses that may result therefrom.* In the absence of an express formality in this regard, notification of the other administrators by the one wishing to conclude such an operation can be performed by any means. In case of litigation, the proof of this notice may be made by any means of probation and it falls to the administrator which concluded the transaction. Furthermore, in the case of an objection to the operation that is intended to be completed, the final decision belongs to the associates, who shall decide by an absolute majority of the capital, since ultimately they shall respond unlimitedly and are jointly liable for obligations of the company.

However, if the operation is terminated by the administrator against the opposition on behalf of associates, the company shall be validly kept liable towards the third party. In this respect, it is also stipulated by art. 78 par. 3 "*operation completed against the opposition made is valid towards the third parties...*", the company being so committed to them. An exception is the situation in which third parties were aware of the opposition made when concluding the operation. Therefore, the rule established by paragraph 3 is designed to protect third parties who have contracted with the company, as long as they were of good faith, and considered that the administrator is empowered to conclude the document.

Although the law does not specify, for the same reason, the same shall be the solution if the operation is completed by the administrator without informing the others. In this case, the company is validly liable to third parties. Only if the company proves that the third party knew either that the operation goes beyond the normal trade of the company, or the fact that other administrators have not been notified, it shall no longer be liable for the obligations arising from the transaction.

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[6] According to art. 50 par. 4 "*provisions of this article shall also apply to transactions in which one party is the spouse or a relative or close to the administrator until the fourth degree; also if the transaction is concluded with a civil or commercial company in which one of the persons abovementioned is administrator or director or holds, alone or together, a share of at least 20% of the subscribed capital, except one of the companies concerned is the subsidiary of the other*."

[7] Hans Kelsen, *The pure doctrine of the law*, (Bucharest, Humanitas, 2000), 187-189.

[8] George Chifan, "The special character of the ability to use of the company. Specific exceptions", *Journal of Business Law* 3 (2004): 62-63 ; Marius Şcheaua , *Company Law no . 31/1990 , commented and annotated*, (Bucharest, Rosetti, 2002) , 115

In both cases, however, the company shall bring an action against the administrator that concluded the act in disregard of the notice of opposition in order to recover any damages. This is because the operation that goes beyond normal trade concluded without the acknowledgment of others administrators or against the opposition of one of them is valid to third parties, the company is committed to them. Thus, by law, liability for any losses resulting from the operation belongs to the administrator, as a penalty that he has not notified the other administrators or disregarded their opposition, concluding an operation that goes beyond the normal trade of the company.

It should be noted that the provisions of art. 78 are optional, so that the associates, by a clause in the articles of association may derogate from them stating that administrators can have the initiative of certain operations that go beyond the usual operations of trade, on their own, without the consent of the other administrators in this regard.

4. Delegating management of the company

Powers of management (internal management) conferred to an administrator of the company must be exercised by the manager himself, according to the common law principle that the trustee must exercise his assignment.

Exceptionally, out of practical reasons, the company law allows the administrator to transmit, under the conditions expressly set, the power of managing the company to another person.

Thus, in the case of the joint-stock companies regulating the institution of delegation of management to one or more administrators, Law no. 31/1990 allowed functional separation of the executive and non-executive components, separation necessary and consistent with the principles of corporate governance, but also established legally the delegation (transmission) of the power of management towards them.[9]

According to art. 143 par. 1 of the law, "*the Board of Directors may delegate the management of the company to one or more administrators, appointing one as general director.*"[10] In essence, this delegation regards routine management tasks, namely the power of management (internal management). Therefore, the management of the company is to be exercised mainly by one or more directors appointed out of the board of directors or from outside, including people from outside the company. For the purposes of the law (art. 143 par. 5), the director of the joint stock company is only the person to whom powers of managing the company have been delegated, in other words the current administration, by exclusion of any other person, regardless of the technical name of the job occupied within the company.

However, art. 143^1 par. 1 establishes the principle that directors "*are responsible for taking all measures related to the company's management, within the limits of the company core business and subject to the exclusive powers reserved by law or by articles of association to the Board and general meeting of shareholders*." Basically, the directors may exercise any power of managing the company, except those provided by law or the articles of association as the exclusive responsibility of the Board. Obviously, there cannot be a total delegation of managing power belonging to the board, which would mean its removal, as a company body. Therefore, directors cannot be delegated the basic competencies of the board provided by art. 142 par. 2 (determining the main directions of activity, establishing accounting policies, preparing the annual report, the preparation of the general meeting, an application for opening insolvency proceedings) nor tasks assigned to the board by the general meeting of shareholders. We believe that directors may transfer those competencies related to everyday activity of the company and for which the regular convening of the council would be difficult. Furthermore, when operative management tasks are delegated to the directors of the company, the Board remains responsible for supervising their activities (art. 142 par. 2 letter d).

5. Conclusions

The task (power) of management (internal management) involves committing physical operations, the implementation of corporate intent embodied in the General Assembly decisions as well as verifying their execution.[11] Thus, the administrator is authorized by the General Assembly to execute its decisions. However, these decisions require the conclusion of legal acts (of conservation, management and disposal) implied by the company's activity, and thus, achieve its core business. However, as we noted, certain legal acts of disposition of particular importance to the assets of the company, may be concluded only with the approval of the general meeting of shareholders. These powers (functions) of the administrator concern the internal management of the company (management), that means relationships the manager has with the company and shareholders. Therefore, the power of management belongs to any administrator appointed under the law.

From the abovementioned, it results that the task of managing is granted to administrators under the

[9] In the case of joint stock companies whose annual financial statements are subject to a legal obligation of financial auditing, delegation of the company management to directors is mandatory.

[10] The text was amended by art. I pt. 92 of Law no. 441/2006. Prior to this change, the Board could delegate part of the powers to a committee composed of members chosen from administrators. This delegation of powers was seen as a rigid rule, resulting in avoidance of the delegation of executive power and its separation of the non-executive one in the joint stock company.

[11] Sorin David and Flavius Baias, "Civil liability of the administrator in the company", *Law* 8 (1992): 26.

articles of association or subsequent to the setting up of the company, by decision of the General Assembly. Instead, power of representation has a twofold character, legal for powers established by law and conventional for duties set out in the articles of association.[12]

Regarding the relationship between several administrators of the same company, and their assigned functions, the company law does not establish common rules for the internal management and the task of representation, sometimes being incomplete.

Regarding the task of managing in joint stock companies with a plurality of administrators, they organize in the board of directors, respectively directorship or supervisory board as collective management bodies with the same obligations, responsibilities and powers as the sole administrator, but with particularity that the attribute (power) of internal management is exercised collectively. Thus, decisions regarding management actions are taken by the Board, by the directorship respectively and not by the administrator alone. However, liability for incorrect administration does not belong to the manager, but it is converted into joint liability of all members that make up the collective body. For partnerships and limited liability companies, Law no. 31/1990 does not provide the possibility of organizing administrators in a collective body, nor does it contain any specific provisions regarding the administration of this company in the event of multiple administrators. However, it merely devotes a single article (art. 76 par. 1) to the rule of unanimity in the administration of the company, namely administrators can work together and make decisions by unanimous vote.

However, in terms of the powers entrusted, there is no distinction between managers, associates and those who are not associated, indicating that in carrying out deeds of administration, the associate administrator shall express a double will, of partner and administrator, so in case of abuse, he shall incur the double penalty of revocation and exclusion from the company. In this sense, art. 222 par. 1 of the law stipulates "*it may be excluded: ... d) the associate administrator who commits fraud to the detriment of the company or serves of the social signature or the social capital for the benefit of his own or others.*"

In all cases, the powers entrusted must be exercised personally by the administrator, because the Companies Act prohibits, in principle, transmission of prerogatives of management and provides joint liability for any damage to the administrators, who unrightfully substitute others. Furthermore, the powers entrusted should be exercised with prudence and diligence specific to a good administrator (art. 144^1 par. 1).

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[12] In another opinion, it is the law that, through a set of mandatory and optional rules, creates a framework for performing management and representation activities. Thus, the law is the one that allows the General Assembly to establish the number and scope of the powers of management and representation to be granted to the administrator also the law fixes the limits for granting and exercising them. Tus, this representation is lawful, even if the idea was born of a mandate, it is independent of it. The administrator of the company acts as legal representative of the company, and in reality there is no mandate relationship between the administrator and the company - Sorin David, Flavius Baias, op.cit.,:19.

THEORETICAL AND PRACTICAL CONSIDERATIONS ON THE EXECUTION OF THE LEASING CONTRACT IN ROMANIA

Raluca Antoanetta TOMESCU*

Abstract

Leasing contract: the present study was made with the scope to underline the ambiguity and the controversies between the national laws and the international norms which govern this type of contract, which is so widely used in economically developed countries.

The leasing contract is not a contract for instalments' payment nor a rental contract, it's a special type of contract, a form of financing by which all of the participants capitalize on their resources in a benefiting way, so no one loses and everybody wins.

These benefits can become a reality only by obeying strict and clear norms, which leave no room for interpretation, because any personal interpretation may radically change its legal form, converting it to something totally different from a legal point of view.

The main purpose is not to solve a previously solved equation, but to compare the national and international norms so as to raise necessary questions where they should be raised.

Keywords: *to lease, residual value, the lease term, financed amount, instalment, financial leasing, operational leasing.*

1. Introduction

Based on the translation of the word "leasing", excluding the strict morphological origin from English language, the verb "to lease"- giving towards usage, defines and benefits of a determined legal feature, to grant the right of the precarious detention (the use of something not owned) of an asset for a determined period of time, and at the end of the term having the possibility of transferring the property right, without confusing with the verb "to rent"- to lease, which consists of transferring the right of usage on a strictly determined period of time, at the end of which the owner will retrieve the asset. We make this statement in order to fundament the following theory on this principle.

Leasing is a way to finance individual or legal entities consumers , that wish to acquire movable or immovable assets, on a long time use, but which do not have financial possibilities or do not consider the investment stringently required. This way of financing comes to meet those who cannot or will not access bank loans by encumbrance of movable or immovable assets through the establishment of mortgages or liens. It has proven to be one of the most efficient means of financing productive investments, offering additional security to those who do not dispose of sufficient capital.

The complexity of this contract which at first sight seems so ordinary, together with the legislative gap in our ambiguous legislation, is and will be a constant source of research and informing, but also a controversial source of conflict.

Based on the assumption that in modern society the notion of leasing is almost known, I will intentionally omit the thorough presentation of this contracts' legal features , insisting, on the other hand, upon this contracts' position in the context of current national and international law.

Due to its particular legal structure, but also to its alternative execution conditions, the leasing contract positions itself in a particular framework compared to the other types of contracts, being viewed on an individual basis in terms of enforcing international economic-financial provisions under current legislation.

The main issue that the leasing contract encounters in Romania is represented by the faulty and confusing legislation.

1. PERFORMANCE OF THE LEASING CONTRACT

In the operational area of the leasing contracts 'performance can be found:

- The purchase agreement
- A lease
- A contract of mandate
- A real estate sale-purchase promissory agreement

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The provisions of international regulations such as SIC 17[1] and UNIDROIT[2], regarding the leasing contract, have precise specifications about its performing, under one of the two categories, financial and operational, as well as to their defining features , from both the legal and economic point of view. These directing provisions were taken respectively also in the Romanian legislation. Thus, we notice the following:

- The financial leasing contracts are defined as the leasing operation that transfers, largely, on all the risks and benefits incidental to ownership of the asset. The title deed can be transferred, eventually, or not.

I. The features that normally lead to a classification of the leasing operation, as being financial leasing, are:

1. The contract states that the ownership of the asset will be transferred to the holder by the end of the leasing term.

2. The holder has the option of purchasing the asset at a sufficiently advantageous estimated price (small enough in relation to its fair value), so as at the beginning of the leasing, there is a reasonable certainty that this option can be exerted.

3. The leasing contract covers most of the activities' economic life, even if there is no transfer of ownership.

4. The value of the actual minimum of the leasing installments (minimum leasing payments), at the date of the contracts' commencement is at least equal to almost all of the active's fair value to hire.

5. The assets that are subject to the leasing contract are of special nature so as only the holder may use them without making any subsequent changes.

II. Operational leasing contracts are defined as leasing operations which do not qualify as financial leasing.

The different aspect of land and buildings should be retained – overall, of real-estate assets – developed by SIC 17, putting this type of assets in a special class due to their longer lifespan, recommending their registration in terms of operational leasing in order to avoid , in the case of financial leasing, calculation of a high residual value or of a very high installment rate.

Within the meaning of IAS 17 (3rd paragraph), the following terms mean the following:

a) The fair value is the amount at which an asset can be traded or a liability settled, willingly, between knowledgeable parties, within a transaction in which the price is objectively determined , term which has been taken into OG 51/1997[3], as an input value representing the acquisition cost of the asset.

b) The leasing term states the period of time, irrevocable, for which the lessee has contracted to lease the asset […], with or without additional payment, option for the exercise of which the lessee is certain, to a reasonable extent, at the beginning of the leasing. – this concept has been take into OG 51/1997 referred to as the leasing period, but whose definition, although very important, cannot be found within the contents of the ordinance.

c) Economic lifespan is the period of time in which an asset is estimated to be economically used by one or more users; - term that cannot be found in the leasing national legislation, the legislator perhaps considering that the duration strictly concerns the funder;

d) The useful life is the estimated remaining period of time, from the beginning of the leasing term, without being limited thereto, during which it is expected that the incorporated economic benefits are consumed by the entity; - term that cannot be found in the leasing national legislation, the legislator perhaps considering that the duration strictly concerns the user;

e) Minimum leasing installments are payments which the lessee must or may be bound to make, during the leasing term, excluding contingent rent, cost of services and taxes that the lessee will pay and which will be reimbursed thereof – term which we absorb as installment , defined by OG 51/1997 as being "the share of the assets' entry value and the lease interest rate, which is determined based on the interest rate agreed by the parties" – in the case of financial leasing;

f) The residual value represents the estimated fair or market value of the leased asset, at the end of the contract; only did this notion was taken over by Law no.287/2006 as: "residual value represents the value at which, after payment by the user of all leasing installments stipulated in the contract and all other amounts due under the contract, the ownership transfer is made upon the asset to the lessee and is settled by the contracting parties"; whose interpretation taking over evidently raises a number of questions to those interested, being an ambiguous and generic definition which is economically and legally unrelated with the definition found in international regulations. In art. 27 alin. 3 of OG 51/1997, subsequently amended, residual value is looked upon as a random value that will be agreed upon willingly by the parties, in fact wholly misunderstood, from an economic point of view this value is mandatory agreed upon through specific regulations in the area.

In the case of returning the asset at the end of the leasing term, in order to be protected against various risks surrounding its activity and that may affect the residual value of the asset, upon request of the lessor, the lessee will ensure the achievement of the assests'

[1] IAS were issued between 1973 and 2001 by the International Accounting Standards Committee (IASC) and represents a set of accounting standards, all listed companies in the EU are now required to prepare consolidated financial statements in accordance with IFRS (new name). The main purpose of IAS 17 is the definition and disclosure of financial or operational leasing operations.

[2] International Institute for the Unification of Private Law, commonly known under the name UNIDROIT is an independent intergovernmental organization whose purpose is to study ways of harmonizing and coordinating the private law of states and groups of states and progressive preparation for the adoption by its various members of uniform rules of private law.

[3] Government Ordinance no. 51 of 28 August 1997 on leasing operations and leasing companies, the issuer Government of Romania, published in Official Gazette no. 224 of August 30, 1997

residual value to at least a certain value, consented by the lessor, thus named guaranteed residual value. Such guarantee of the residual value can be directly made by the lessee or by means of an affiliated party to the lessee.

Only that this term in our legislation, I mention, was completely ignored, although of major importance in protecting the economic point of view of the financier. The contract provides, according to defining legal rules that ownership of the asset will be transferred to the lessee by the end of the lease term. Thus, given that the lessee takes possession of the title deed at the end of the lease, it will be clear that leasing installments shall have to be sufficient in order to return the lessor his costs plus the reimbursement of invested capital. International regulations make no reference to the lessor / funder accounting registration of amounts collected in advance and that they could claim starting of the lease term. In contrast, OG 51/1997[4], article 6, section. (2) letter "c" specifies imperatively the insertion in the leasing contract of the value of the advance payment, so by default a sum paid in advance.

I subscribe to the course of performing the leasing contract, only by paying installments, without paying any amounts as advance, as defined by international regulations and established by practice, in general, through the annex schedule to the contract, thereafter being registered as revenue for the lessor/financier and as an expense for lessee/user.

Unlike loans, leasing essence is to ensure full funding of an investment, hence the entire cost of acquisition of asset that is subject to the contract.

All leasing companies in Romania claim their customers payment of an amount in advance, and this prior to purchasing the asset that is subject to a leasing contract. Under these circumstances, the financed amount becomes lower than the asset's cost of acquisition, reducing itself by the advance payment paid by the client, with which it basically auto finances.

I believe that by imposing the lessor/financer to make an advance payment as well as by paying the residual value simultaneously with the installments – the leasing contract becomes a sale- purchase agreement with installment payments, starting with the collection of the advance payment, the lessor/financer losing the capacity of lessor, while remaining financier - him becoming a promissory seller, and the lessee/user by accepting to make the advance payment, as well as the residual value simultaneously with leasing installments receives the status of a promisor buyer, thus eliminating from the very beginning the essential and defining feature of the leasing contract, being the temporary transfer of right to use, with the right to option regarding purchase or restitution of the asset that was subject to the contract, because making the advance payment confers the lessee/user not only a precarious right of possession but rather a right to effective property.

Assuming that the lessee/user, after accepting the contracts' conditions on advance payment and inclusion in all or part of the residual value in the installments, due to factors beyond their control or dependent, give up the option of buying the asset or of continuing their leasing contract during its performance, then the amounts representing advance payment, as well as the residual value collected by the financier, may constitute unjust enrichment, not constituting the subject of a leasing contract *stricto sensu* (strict sense).

In the case of leasing contracts, the investment is the lessor's/of the financier, who has the necessary funds to purchase certain movable or immovable assets, which he then gives to be used for an amount to be paid consecutively in installments as leasing rates, on a preset time, the value of the installments, upon enforcement of the contract is at least substantially equal with all of the value of the leased asset, so that at the end of this period the lessee/user can opt for termination of leasing or purchasing the asset. Only then through the collection of the market value or of the amount remaining to be depreciated, strictly defined as residual value and that will benefit the lessor/financer, as owner of the asset, in order to recover the investment made, a transfer of ownership will be done. Since leasing is different from loan precisely because it's meant to provide financing to those who lack equity or attracted (loans) for purchasing the asset, we believe that clear regulations should be imposed upon this issue in the leasing legislation, so that they could contract an asset in a leasing type system without a down payment.

2. TERMINATION OF LEASING

The leasing contract is considered terminated under the following circumstances:

a) If the user refuses to receive the asset upon the deadline stipulated in the lease.

b) If the user is in a state legal reorganization and/or bankruptcy.

c) Failure of the user's right to option.

d) Failure to perform full payment of installments obligations.

I consider analyzing for the Romanian legislator appropriate, especially the situation in which termination occurs for default of payment, as this situation has that generated most disputes relating to the leasing market in Romania last years.

Whenever there is any cause of early termination of the contract, of the nature of wrongful default by a Contracting Party of the obligations derived from the contract, the New Civil Code states that: "*When, without justification, the borrower fails to perform the*

[4] The Act includes changes in the following documents: Tax Code published in 2003; Law no. 533/2004, Law no. 287/2006, Law no. 241/2007; Law no. No 93/2009 published in the MOF. 259 of 21/04/2009; Law no. No 383/2009 published in the MOF. 870 of 14/12/2009.

*obligation and is in default, the creditor may, at its discretion and without losing the right to penalty clauses whether due to him [...] 2. obtain, if the obligation is contractual , **retroactive termination** or termination of the contract or, where appropriate, reducing their correlative obligations; [...] S. N.* "this being confirmed by para. (2) art. 1516.

In the case of the leasing contract when the lessee / user does not perform the obligation to pay the full installments for two consecutive months, calculated from the due date specified in the lease, according to art.15 of OG 51/1997, the lessor / financer has the right to cancel the lease and the lessee/user must return the asset and pay all amounts due up to the date of the refund under the leasing contract.

Art. 15. –"*If the contract does not provide otherwise, if the the lessee / user does not perform its obligation to pay in full of the leasing rate for two consecutive months, calculated from the due date stipulated in the lease, the lessor / funder has the right to cancel the lease and the the lessee / user is required to return the asset and pay all amounts due, until restitution under the lease.*"

Corroborating this benefit conferred by law to the lessor/financier with the power of enforceability of the lease term (art.8 of OG51/ 1997), recovery of the prejudice seems apparently usual. As such, issues arising from the provisions relate to its interpretation and practical application of the law, being the courts attribute.

In the matter of interest here, according to art. 8 O.G. no. 51/1997 on leasing operations and leasing companies, leases, are enforceable titles: "*Art. 8. - leases and real and personal guarantees, established in order to guarantee the obligations under the lease, are writs of execution*". If the lessor / funder will cancel the lease for failure to pay the lease rate according to art.15, the question is whether we can proceed to forced execution of the the lessor / user based on the power conferred by art.8 the lease term of the ordinance?

I think not, because once the lease terminated, it is no longer effective, it no longer has any an output between contracting parties, and a claim to that effect coming from the creditor would amount to the performance of the contract, provided that it opted itself for dissolution of the contract.[5]

1. Both the old Civil Code, the State under art. 1021, that the party who has fulfilled its contractual obligations has choice or to compel the other party to perform the convention if possible or to request cancellation of the convention with damages.

2. Furthermore in the New Civil Code the court prerogatives are intended to restore, where appropriate, the contractual balance of the consideration of benefits and avoid excessive conspicuously abuses, thus as cancellation of the contract for failure to pay, the company financing will be subject to the following provisions:

"Art. 1755 Reserve property and risks

When a sale with the installment payment, the payment obligation is guaranteed with reservation of ownership, the buyer acquires ownership of the date of payment of the final installment of the price; But good risk is transferred to the buyer upon delivery of it.

Art. 1756 Failure to pay a single rate of price

Unless otherwise agreed, failure to pay a single rate, which is more than an eighth of the price, does not give the right to terminate the contract and the buyer retains the benefit period for successive rates.

Art. 1757 Termination of contract

(1) When obtained terminate the contract for failure to pay the price, the seller is required to repay all amounts received but is entitled to retain, in addition to other damages, fair compensation for the use of the asset by the buyer.

(2) When it was agreed that the amounts received as rates remain, in whole or in part, acquired by the seller, the court may nevertheless reduce these amounts properly applying the provisions relating to the court reduced the amount penalty clause.

(3) The provisions of par. (2) applies if the lease and of the lease, if, in the latter case, it is agreed that upon termination of ownership of the property to be acquired by the lessee after payment of the agreed "

Therefore, if the creditor has chosen cancellation of the convention, it cannot require the debtor, naturally, than liquidated damages, damages that can, of course, be proved.

I appreciate therefore that obvious inconsistency between the provisions of the Civil Code and art.15 of OG 51/1997, make it impossible for them to be simultaneously enforced, the legislator being left at the interpretation of the court's judgement to resolve this conflict of laws.

Due to the unusual and complex leasing contract, and due to the lack of clear legislation in this field, leases are subject to numerous interpretations thus generating a large number of disputes.

Hoping to revitalize the leasing market in Romania, I consider it appropriate to revise the current legislation and its completion in accordance with international regulations, for this the beginning being constituted by the provisions of the New Civil Code, which already began to have effect. Based on this, although major inconsistencies appear between theory and practice, sometimes daunting, we remain nevertheless at the opinion that the variant of leasing, financial or operational, gives the user account of the undeniable advantages in comparison to other methods of buying or renting.

[5] Civil Sentence no. 1332-1307 Vaslui pronounced by the Court in April 2010 in case no. 1610/333/2010.

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SOME CONSIDERATIONS REGARDING THE NOTION OF ENFORCEMENT ORDER

Nicolae-Horia ȚIȚ*

Abstract

The issue of enforcement orders is particularly important for the field of regulations applicable to the execution. Enforcement order are the fundament of enforcement proceedings, aimed at fulfilling the obligation contained in the title. With reference to the current regulation of enforcement orders, we must distinguish between formal titles, that require a verification of their enforceability prior to the onset of the enforcement proceedings, and substantial titles, which are enforceable by law at the end of the procedure of which they emanate. With reference to this distinction, the article analyses the characteristics of enforcement orders, making a number of clarifications and remarks about the procedure for declaration of enforceability, recently reintroduced into the Civil Procedure Code by Law no. 138/2014.

Keywords: *enforcement, enforcement order, European enforcement order, declaration of enforceability, judgement.*

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1. Introduction

The issue of enforcement increasingly concerns theorists and practitioners in Romania, especially after the advent of the new Civil Procedure Code (CPC). Enforcement rules go through a strong process of autonomy to those applicable to the trial phase of the civil trial[1], a phenomenon that determines the individualization of civil execution law as a distinct branch of law[2]. There are numerous scientific papers on enforcement procedure (we refer in particular to courses and dissertations), many authors analyse enforcement issues and in many Law faculties enforcement procedure is studied as a matter separate form civil procedure. Modifications to the new CPC by Law no. 138/2014[3] intensified the interest in the matters regarding enforcement procedures, as well as the practical problems raised by the entry into force of this law, from the time application of enforcement rules to the and to change the procedural rules (among them standing out the removal of the enforcement approval procedure from the jurisdiction of the enforcement court and the its attribution to the enforcement officer, the reintroduction of the declaration of enforceability procedure for arbitration awards and enforcement orders other than judgements, the regulation regarding the possibility to appeal only the minutes of the auction, and not the act of adjudication in the forced sale of immovable assets procedure etc.).

This article aims to address the issue of enforcement orders, based on the importance and relevance to the enforcement proceedings, under Article 632 para. 1 CPC. Although the importance of this topic is relatively high, it is to be noticed in the legal literature in Romania the absence of a monographic approach to the enforcement orders; however, there are numerous general studies[4] or

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[1] In another study, we brought as the main argument of the phenomenon of autonomy of enforcement procedure the terminology used in Art. 24 and 25 para. 1 CPC and art. 3 par. 1 of Law no. 76/2012, which tends to individualize enforcement proceedings as an activity different from the trial, given the possibility that the two are governed by different procedural rules. See, in this regard, Nicolae-Horia Țiț, "Conceptual Distinctions regarding the notion of Enforcement", *Journal of Public Administration, Finance and Law* Special issue 1 (2014): 146-147, accessed March 4th, 2015, http://www.jopafl.com/uploads/issue6/CONCEPTUAL_DISTINCTIONS_REGARDING_THE_NOTION_OF_ENFORCEMENT.pdf

For the theory of the separation of the enforcement from the jurisdictional phase of the trial („déjudiciarisation partielle des procédures civiles d'exécution"), see Francois Vinckel, *La codification des procédures civiles d'exécution* (Paris: Lexis Nexis, 2013).

[2] Gabriela Răducan, *Dreptul executării silite. Titlul executoriu european* (București: Hamangiu, 2009), 5.

[3] Published in Official Journal no. 753/16.10.2014, entered into force on the 19th of October 2014.

[4] Evelina Oprina, Ioan Gârbuleț, *Tratat teoretic și practic de executare silită. Volumul I. Teoria generală și procedurile execuționale conform noului Cod de procedură civilă și noului Cod civil* (București: Universul Juridic, 2013) 300-379, Gabriel Boroi (coord.), *Noul Cod de procedură civilă. Comentariu pe articole. Vol. II. Art. 527 - 1133* (București: Hamangiu, 2013), 101-114, Ioan Leș, *Noul Cod de procedură civilă. Comentariu pe articole, art. 1-1133* (București: C.H. Beck, 2013), 899-909, Gabriela Cristina Frențiu, Denisa-Livia Băldean, *Noul Cod de procedură civilă comentat și adnotat* (București: Hamangiu, 2013), 966-977, Ion Deleanu, Valentin Mitea, Sergiu Deleanu, *Tratat de procedură civilă. Vol. III, ediție revăzută, completată și actualizată. Noul Cod de procedură civilă* (București: Universul Juridic, 2013), 85-201, Ion Deleanu, Valentin Mitea, Sergiu Deleanu, *Noul Cod de procedură civilă, comentariu pe articole, Vol. II (art. 622-1133*) (București: Universul Juridic, 2013), 29-41; Gabriel Boroi, Mirela Stancu, *Drept procesual civil* (București: Hamangiu, 2015), 941-970. For the French

dedicated to certain categories of enforcement orders. Most contain a descriptive presentation of enforcement orders, listing the main regulations applicable, but relatively few conceptual distinctions. Through this paper, we propose a novel classification of executive orders, by reference to the substantive law and in particular to the general theory of obligations. To this end, we analyse the relevant provisions of the CPC and the Civil Code (CC) and the European regulations on executive titles, in order to highlight the relevance of the existence or occurrence of an enforcement order within the obligational legal relationship. Starting from the classical distinction made between judgments and other enforcement orders, we will consider both the substantial insight concerning the enforcement in kind and though compensation obligation and the procedural one, on the formalities to be carried out prior to the enforcement application. By this analysis, we propose to determine a change of approach in the matter of enforcement orders, especially in the context of generalization, by Regulation 1215/2012, of the possibility to certify as European Enforcement Orders of judgments given in a Member State[5].

2. What we refer when we define and classify enforcement orders?

With reference to the provisions of art. 632-642 CPC, and exclusively from a formal perspective, enforceable titles can be classified into two broad categories: judgments and other documents or decisions which the law gives enforceable nature[6], the essential difference in procedural terms, among them being that the first are not subject to the procedure of declaration of enforceability, while others are (art. 640[1] CCP for documents other than judgements and art. 615 CPC for arbitral awards).

By entering into the equation the concept of European Enforcement Order (EEO), they would individualize as a separate category (art. 636 CPC)[7]. We also might identify as a distinct category of enforceable titles those emitted during enforcement procedures, for which it is not necessary for a declaration of enforcement (e.g. the enforcement officers minutes regarding expenses made during the procedure - Art. 696 para. 4 CPC, or the adjudication act as a result of forced real estate sale - Art. 855 para. 2 final sentence CPC, except that, for the act of adjudication it is necessary to create a new execution file, i.e. a new application for enforcement and a new verification of the conditions to trigger the enforcement, under Art. 665 CPC).

From another perspective, a substantial one, the enforcement order is the incarnation of a civil obligation[8], capable of being implemented within the enforcement procedure prescribed by law (Art. 628 para. 1 CPC). What determines the existence of the enforcement order is the substantial legal relationship, whose content consists of rights and obligations whose breach or failure, improper or delayed fulfilment resulted in issuing the title, either by following an adversarial judicial proceedings (in case of judgments, European order for payment procedure or the judgement given in the European small claim procedure), or following a graceful procedure (like the declaration of enforceability or the certification as a European Enforcement Order for uncontested claims[9]).

Tracing the emergence of the enforceable title, we can talk about a phenomenon of crystallization of legal relationship, of certification and liquidation of the debt, if we were to consider the features that it must satisfy according to art. 662 CPC. This phenomenon puts its mark on procedure to be followed in order to obtain an enforceable title. As a general rule (although its status rule can be easily put into question, especially in the current widespread use of the documents that are directly enforceable without the need for triggering civil judgment[10]), the appearance is the result of contentious procedure, based on contradictory and completed by the delivery of an act of jurisdiction, whether it is a judgment or arbitration award. In this procedure, finalized with a judgement, the substantial rules have a paramount importance and the role of the right holder is essential, considering the principle of availability[11].

In this regard, it should be noted that the notion of enforcement is not specific to procedural law. In substantial law, reference to enforcement is made in

doctrine, see Roger Perrot, Philippe Thery, *Procédures civiles d'exécution, 3e Édition refondue* (Paris: Dalloz, 2013), Anne Leborgne, *Droit de l'exécution, Voies d'exécution et procédures de distribution, 2e Édition* (Paris: Dalloz, 2014), Nicolas Cayrol, Droit de l'exécution (Paris : LGDJ, 2013), Philippe Hoonakker, *Procédures civiles d'exécution. Voies d'exécution. Procédures de distribution, 3e Édition* (Buxelles : Larcier, 2014).

[5] Flavius George Păncescu, *Drept procesual civil internațional* (București: Hamangiu, 2014), 253-254. For the system established under Regulation 44/2011, see Loïc Cadiet, Emmanuel Jeuland, Soraya Amrani-Mekki, *Droit processuel civil de l'Union Européenne* (Paris: Lexis Nexis, 2011), Peter Stone, *EU private International Law, Second Edition* (Cheltenham, UK, Northampton, MA, USA: Edward Elgar, 2010), 222-286, Helene Gaudemet-Tallon, *Competence et execution des jugements en Europe. Reglement 44/2001. Conventions de Bruxelles (1968) et de Lugano (1988 et 2007)* (Paris: LGDJ, 2010).

[6] Deleanu, Mitea, Deleanu, *Tratat*, 200-201.

[7] Carla Crifo, *Cross-border Enforcement of Debts in the European Union, Default Judgement, Summary Judgements and Orders for Payment* (Wolters Kluwer, 2009).

[8] Boroi, Stancu, *Drept procesual civil*, 941.

[9] Ioan Leș, Adrian Stoica, *Titlul executoriu european pentru creanțe necontestate*, Revista română de drept privat, 2(2008): 198-214.

[10] Savelly Zilberstein, Viorel Mihai Ciobanu, *Tratat de executare silită* (București: Lumina Lex, 2001), 149-150.

[11] For detailes, see Nicolae-Horia Țiț, "Considerations regarding the will of the parties in Enforcement Procedures", *Journal of Public Administration, Finance and Law* Special 6 (2014): 302-309, accessed March 5th, 2015, http://www.jopafl.com/uploads/issue7/CONSIDERATIONS_REGARDING_THE_WILL_OF_THE_PARTIES_IN_ENFORCEMENT_PROCEDURES.pdf

matters relating to fulfilment of obligations, along with the payment, as way of executing an obligation. Emphasis should be placed differently, however: the rules contained in the Civil Code (Articles 1516 – 1548) are substantial, conducting to a transformation of the legal relationship determined by voluntary non-performance of the obligation, i.e. the payment. In the absence of payment, the creditor, as provided by art. 1516 par. 2 C. civ., has three alternatives: to request for an enforceable judgement or, in case he already holds an enforceable title, to apply for the enforcement of the obligation; to obtain, if the obligation is contractual, the rescission or termination of the contract or, where appropriate, the reduction of their reciprocal obligations; to use, where appropriate, any other means provided by law to achieve its right[12].

The creditor is entitled to achieving full, accurate and timely execution of the obligation (art. 1516 par. 1 of the Civil Code.), which means that its right is automatically doubled under the law: the creditor holds two rights: a substantial one, the subjective right itself, contained by the legal relationship with the debtor and resulted either by a manifestation of will or by a legal fact, and a procedural one, embodied in the enforceability of the title, allowing him to opt between an execution in kind or by equivalent, according to Article 1527 and 1530 Civil Code[13].

The way in which the obligation is transformed, becoming an enforceable debt often relates to the completion of a judicial or arbitral proceeding, through which the court or the arbitration establishes the alleged acts and deeds indicated by the applicant and give their legal qualification, resulting in a judicial act which, by law, is apt to be brought out by enforcement. As a result the jurisdiction, the legal relationship may undergo a transformation, because, in some cases, the enforceable debt is different from the original obligation of the debtor (especially in the case of contractual relations), but an equivalent amount of money meant to cover the creditor's damage or compensate for the loss.

There may also be situations where the judgement strictly implements into and enforcement order the structure of the existing legal relationship, so that the debtor will be enforced for the exact actions that represented his obligation in the first place, by virtue of the acts or deeds that generated the legal relationship. In some cases, by virtue of the law, the obligation is ex lege enforceable, without the need for the creditor to apply to the court, given the nature of the contractual obligation and the formal requirements of the contract (for example, for the obligation to return the leased asset, the lease contract concluded for a specific period of time by an authentic document or the agreement signed under private signature and registered at the competent fiscal body shall be enforceable under the law, subject to the formality of the declaration of enforceability, according to art. 1809 par. 2 and 3 CPC).

3. Formal and substantial titles. Some considerations on the declaration of enforceability procedure

Another distinction might consider formalities required for the document to be enforceable.

Following the amendment of the CPC by Law no. 138/2014, the procedure of the declaration of enforceability was reintroduced for the titles that are not the result of a procedure in front of a court, i.e. documents that the law provide as enforceable titles (art. 640^1 CCP) as well as for arbitral awards (art. 615 and art. 635 first sentence CPC) and the decision of other bodies having jurisdiction over some special matters (Art. 635, second sentence CPC).

Some distinctions are required in this regard. It is noteworthy that in all possible situations, the enforceability of a security or title is determined solely under the law[14]; a document cannot gain enforceable power by virtue of the will of the parties, even if the content of the legal relationship is represented by rights that parties may dispose of.

Even if this issue is not explicitly mentioned in Art. 625 CPC, which regulates the principle of legality in the course of procedural enforcement, the eminently legal character of enforceability derives from the interpretation of art. 632 CPC, which establishes, first, that any procedure of enforcement execution can take place only pursuant to an enforceable title, then lists enforceable titles stating that such a character can have only those which the law provides for. Therefore, in order for the right to be achieved via enforcement procedure, there has to be first a legal provision stating the enforceable character of the title, at a general and abstract level, conferring a higher legal force to certain decisions or documents.

The distinction to which we referred in the previous paragraph envisages the procedure that the creditor must follow to obtain the writ of execution, procedure, also imperatively established by law: in cases where the law confers enforceable abstract character to certain securities, it is often not enough to trigger the execution procedure, requiring, in particular, a verification of certain formal requirements in relation to document or judgment, the verification procedure conducted through the declaration of enforceability. This is to certify that, in particular, the title held by creditor falls into the category of those who by law can be enforced and that, eventually, there are no formal impediments that would prevent the title to be enforced. During the

[12] For the substantial remedies provided by law for the creditor, see Liviu Pop, Ionuț-Florin Popa, Stelian Vidu, *Tratat elementar de drept civil. Obligațiile* (București: Universul Juridic, 2012), 254-262.

[13] Nicolae-Horia Țiț,"Conceptual Distinctions regarding the notion of Enforcement": 148-149.

[14] For the notion of law in this context, see Ion Deleanu, Valentin Mitea, Sergiu Deleanu, *Tratat*, p. 31.

procedure of the declaration of enforceability, the court will not check the requirements for triggering the enforcement, which shall be verified by the bailiff via the minutes for the approval of enforcement, under art. 665 CPC, particularly with regard to situations covered by law when the application for enforcement (Art. 665 para. 5 CPC) will be rejected by the bailiff[15]. The procedure of the declaration of enforceability concerns only the verification of the title and not of the claim, or, in other words, the substance of the right[16].

In this respect, two observations are required. The first one concerns the very notion of enforcement title or order, specifically the source of enforceability. As noted above, the enforceability arises form law in all situations; the title is enforceable under the law, not on his declaration of enforceability. A document is an enforceable title even if not declared enforceable, this character being conferred by law. The procedure of the declaration of enforceability is a non-contentious procedure which checks whether that document falls into the category of writs of execution and cannot be interpreted as a procedure through which the title becomes enforceable[17].

This interpretation is supported both by the drafting par. 1 of Art. CPC 640^1 (according to which "execution titles other than judgments can be enforced only if declared enforceable") and the content itself of the enforceable formula: "... we empower and order the bailiffs to enforce title ... "(art. 640^1 par. 6 CPC). Therefore, the title exists before the procedure of declaration of the enforceability is triggered, because its enforceability derives directly from the law and the court only checks and certifies it by the procedure of the declaration of enforceability. Therefore, the declaration of enforceability has only a declarative, not a constitutive effect. The document does not become an enforcement title as a result of the procedure of the declaration of enforceability, but is enforceable by law, and this character is only checked and certificated throughout this procedure.

Another argument in this regard is represented by the fact that the law provides for two distinct situations in which the request for enforcement may be rejected: the judgment or, where applicable, the document, is not by law an enforcement title (art. 665 par. 5 pt. 2 CPC), and that the document other than a judgment have not been declared enforceable (Art. 665 para. 5 pt. 3 CPC). The law therefore provides the two as different issues, the enforceability being conferred by the law and not by its declaration by the court.

A second observation on this issue concerns a matter discussed and controversial in the literature and recent practice. Two opinions were developed in connection with legal and technical operations related to the declaration of enforceability: first, that it is not necessary to submit the original title and the declaration of enforceability is to be contained in a separate writ of execution, communicated to the creditor, manifested especially in the practice of the courts; the second, that the original title must be filed by the creditor and the declaration of enforceability is applied on the title, becoming a part of it, expressed in the doctrine[18].

In connection with this matter, we have a mid-opinion: first, we consider that the enforcement formula should not be applied on the enforceable title. As noted above, the title exists prior to the procedure of the declaration of enforceability and it is the law, and not the declaration which gives the title its power. Enforceability exist in the abstract, as conferred by law and investiture procedure serves only formal verification and confirmation. Otherwise, the writing of art. 640^1 CPC would have to be different, namely "documents (not enforcement titles), other than judgments can be enforced only if they are declared enforceable". Such wording would be contrary to the rule laid down in art. 632 para. 2 final thesis CPC, according to which enforceable titles are the documents that "... can be enforced by law." Therefore, substantial enforceability is conferred by law: for example, the documents authenticated by a notary public, to the extent that they contain a certain and liquid debt, become enforceable titles if the debt has fallen due (art. 100 of the Law no. 36/1995 of public notaries and notary activity, in conjunction with Art. 639 para. 1 CPC)[19].

Enforceability is established by law in connection with substantial features of the claim, especially since the certainty of the claim practically merges in current regulation with the undoubted existence of the claim in the wording of the enforcement title (Art. 662 para. 2 CPC). The

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[15] In this regard, the introductory wording of art. 665 para. 5 CPC is objectionable because the executor does not solve in the procedure for the approval of enforcement an application for the approval of the enforcement, but the application for enforcement itself, launched by the creditor under art. 663 CPC. The phrase was taken from the previous regulation, prior to Law no. 138/2014 that regulated the application for enforcement and the application for the approval of the enforcement as two separate acts, the first being launched by the creditor to the executor and the second by the executor to the court. For details, see Nicolae-Horia Țiț, "Sesizarea organului de executare și încuviințarea executării silite în reglementarea noului Cod de procedură civilă", *Revista de științe juridice*, 2(2013): 192.

In this context, the wording used in the art. 665 para. 5 CPC ("bailiff will reject the application for the approval of enforcement ...") does not match the one used in par. 1 ("request for enforcement shall be settled within 3 days after its registration") and requires, de lege ferenda, to be replaced by "bailiff will reject the request for enforcement."

[16] Gabriel Boroi, Delia-Narcisa Theohari, „Sinteza principalelor modificări și completări aduse Codului de procedură civilă prin Legea nr. 138/2014", introductory study of the brochure *Noul Cod de procedură civilă și 12 legi uzuale* (București: Hamangiu, 2014), XXV.

[17] Ion Deleanu, Valentin Mitea, Sergiu Deleanu, *Tratat*, 200.

[18] Boroi, Stancu, *Drept procesual civil*, 943; Gabriel Boroi, Carla Alexandra Anghelescu, "Verificarea înscrisului în original în cadrul procedurii de învestire cu formulă executorie", http://www.inm-lex.ro/fisiere/d_175/Investirea%20cu%20formula%20executorie depunerea%20originalului.pdf (visited March 5ht 2015).

[19] Oprina, Gârbuleț, *Tratat*, 340-341.

declaration of enforceability is nothing but a formalization of the existing substantial enforceable character, by simply checking the consistency between the actual title held by the creditor and the category of documents provided by law[20].

We can conclude that there is a substantial sense of the notion of enforcement title, represented by the certain and undoubted establishment of the obligation to be accomplished by the executor, which is usually a judgment but in some cases may be determined by express provisions of the law, which removes the obligation of the creditor to apply to a court and gives him the right to take direct enforcement, based on the category of the title (e.g., promissory note, according to Art. 640 CPC) or on the formalities that were brought out while preparing the document (e.g. document authenticated by a notary public, according to Art. 639 CPC and Art. 100 of Law no. 36/1995). There is also a formal sense, different from the first, which requires certification of the court, if the title is another document than a judgment. In these circumstances, the declaration of enforceability is not a part of the substantial title, to be included in the conclusion rendered by the court for that purpose. This finding emerges from its very wording ("... for which purpose the present conclusion for the declaration of enforceability was passed")[21].

From this point of view, we do not embrace the opinion that the writ of execution shall be applied directly on the original title, but consider correct the practice of the courts that have declared the enforceability by a separate document, containing the enforcement formula. From the wording of art. 640^1 par. 6 CPC undoubtedly comes the conclusion that the declaration of enforceability is part of the court order, and not of the title itself, with the consequence that the effect it produces is strictly related to the power conferred to the creditor to request triggering of enforcement, and not necessarily to confer enforceable character to the title itself[22].

Secondly, on the question of the mandatory filing the original title along with the application for the declaration of its enforceability, we consider that, at least as a general rule, it is not necessary. As noted, the title exists and has an enforceable abstract character independent of the declaration of enforceability procedure. Enforceability precedes this procedure and derives directly and exclusively in the law. Therefore, the verification of the court has no constitutive character, but only declarative, in which case it would not be required that the original title be filed. The verification made by the court regarding the enforceable character of the title, namely if the title held by the creditor is such a title provide by law, can be made based in a copy and not necessarily the original, especially since in some cases, the creditor is not in possession of the original, preserved by the instrumentation agent (e.g. acts authenticated by a notary public, which are prepared in a single original, kept in the archives of public notary - art. 97 paragraph 1 of Law no. 36/1995). Being a non-contentious procedure, according to art. 532 para. 2 CPC, the court may take ex officio any measure necessary for solving the application, therefore could, if it considers necessary, order the original appearance for confrontation, if it considers that it is necessary for the verification and declaration of enforceability. Original submission is not required as a rule and there is no express mention in this regard as long as the formula is not to be applied on the original title, as we have shown above.

4. Conclusions

The notion of enforcement title or order has two components: one that involves the embodiment into the title of the substantial characteristics and elements of the legal relationship, in terms of the options that the law provides for the creditor (execution in kind, termination / rescission and restitution of benefits, execution by equivalent), the other, formal, given the conditions which must be met in order to proceed to enforcement. In case of judgments or other titles that do not require a declaration of enforceability enforceable (European enforcement orders, acts of adjudication), the two components are embedded and embodied in the very existence of the title. With arbitral awards and other documents requiring a declaration of enforceability, the two components are separated: in addition to the mere fulfilment of requirements provided by law for enforcement, a formal verification of these conditions must be made by a court, achieved through a declaration of enforceability. This does not confer the title its enforceable character, but only confirms and certifies that character, for which the declaration of enforceability is not a component of the title, but of the court order.

[20] Perrot, Thery, *Procédures civiles d'exécution*, 139.

[21] On the contrary opinion, see Toma Cătălin Răileanu, „Câteva considerații privind învestirea cu formula executorie", http://www.juridice.ro/360231/cateva-consideratii-privind-investirea-cu-formula-executorie.html (visited March 5th, 2015).

[22] In France, the declaration of enforceability ("formule exécutoire") is applied on a copy of the title. See, Perrot, Thery, *Procédures civiles d'exécution*, 139. However, the French legislation regarding this issue is different from the present Romanian legislation and in many parts similar to the regulation of the former Romanian Civil procedural Code, in the sense that even the judgement are subject to a declaration of enforceability, and the enforceability of the title derives from this declaration (Leborgne, *Droit de l'exécution, Voies d'exécution et procédures de distribution*, 186-187).

In French doctrine, the enforcement order is defined as the "document which bears the declaration of enforceability" („On définit parfois le titre exécutoire comme étant celui qui est revêtu de la formule exécutoire" - Perrot, Thery, *Procédures civiles d'exécution*, 139) and, therefore the declaration formula is a part of the title, unlike the Romanian system.

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THE CORRELATION BETWEEN THE INHERITED DEBT AND THE RIGHT OF OPTION ON SUCCESSION

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Abstract

A natural person's patrimony consists, apart from rights (assets of the succession), of a liabilities side as well related to obligations that the patrimony's holder bequeaths onto the heirs following his/her death. The succession implies that there are two parties, i.e. the assets of the succession and the inherited debt. The inherited debt is mainly made up of the inheritance duties and liabilities. The main components of the inherited debt are the debts the deceased has left, following that the duties shall be the obligations arising out after the succession will be opened.

However, without defining the inherited debt concept in the specialized literature, successional liabilities have been considered to mean those patrimonial obligations of the deceased toward a third party or the inheritors existing in the successional patrimony on the opening of succession, regardless of their origin (contractual, tortious or legal). Inheritance duties refer to those obligations which did not exist in the de cujus patrimony, but come into existence devolving upon the heirs on the date of succession's opening or subsequently after that time, either in consequence of the deceased's desire, or independently of it.

The main characteristic of the option on succession is that the right of option belongs exclusively to the presumptive heirs. From this point of view, the option on succession seems to have nothing in common with the inherited debt. Nevertheless, I intend to analyse the correlation between the two institutions from the perspective of the place inheritance creditors hold in the totality of rights of option. Their presence is only justified when there is an inherited debt.

Keywords: *inherited debt, duties, liabilities, right of option, inheritance.*

1. Determining the liabilities in the probate estate

Determining the inherited debt is absolutely necessary in order to establish the field of application of the rules concerning the succession rights. Establishing the inherited debt is mandatory as it considers both the persons liable to settle them, as well as the rules concerning the settling of the liabilities. These legal procedures are compulsory in the case of liquidation of any succession, when there are debts.

When determining the liabilities, one takes into consideration the link connecting the debts of the deceased, the ones part of the inherited debt and which are uncontested, these debts having in common the person liable for payment. Another common trait of the deceased person's debts is their transmissible character, having at the basis the principle of the "survival of the deceased person's debts". In another train of thoughts, the deceased person's debts don't have an *intuitu persone* character concerning the debtor, having the same legal regime.

We have mentioned in our scientific approach that the inherited debt includes the debts and duties the deceased incurred during his life, followed by an analysis of the categories of debts and duties excluded from the inherited debt.

Therefore, an opinion states that the taxes and duties related to the transmission of the right of property over the successional assets are not included in the inherited debt. The amounts accordingly due to the fiscal administration do not result from a tight assimilation with the debts of the deceased, but they don't correspond accurately to the rights of a personal creditor of the deceased[1] either.

The taxes and duties that are applied to the transfer procedures of the succession rights are considered a personal duty of the successors and not of the succession, as they benefit from this transfer. Therefore, these taxes cannot be brought at the estimation table of the available share of the estate as they are considered to be owed to the state, following the notary successional procedure of settlement of the estate and are not assimilated to the funeral expenses. Thus, the taxes and charges necessary for the transfer of the succession rights are personal duties of the inheritors.

2. Creditors of the legal inheritors. Introduction

According to Article 1107 of the Civil Code, the creditors of the legal inheritors can accept the inheritance by means of a derivative action, within the limit of settling their debt. This article of the law rules out the controversies concerning the possibility of the creditors of the prospective inheritors to exercise the inheritor's right of successional option by means of a derivative action in order to accept the inheritance but only to the extent of settling their debt. The justification given by the doctrine takes into consideration the fact that their derivative acceptance

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[1] See A.L.Banu, *Pasivul succesoral (Successional Liabilities)*, Universul Juridic Publishing House 2011, page 156.

can only consolidate the title of legal inheritor the prospective inheritor has at the opening of the succession, although it was asserted that the option cannot be exercised by means of a derivative action by the creditors of the prospective inheritors as it has a personal character, only the entitled one being able to estimate whether it's the case to accept or not the inheritance and a derivative acceptance made by the creditors of the legal inheritors would violate the principle according to which no one can be forced to accept an inheritance[2].

Although the name given by Article 1107 of the Civil Code regards the creditors in general, there is the possibility to make an acceptance of the succession the prospective inheritor is entitled to and acknowledged to him, but not to the creditors of the succession. Therefore, according to Article 1122 paragraph (2) of the Civil Code on the fraudulent consequences of waiving with effect only on the plaintiff creditor and only within the limit of his debt, the acceptance of the inheritance made by the creditors of the prospective inheritor produces effects only in the extent necessary for settling one's debt, and these effects are produced only regarding the plaintiff creditor.

In its turn, Article 1113 of the Civil Code gives the right to any concerned party (thus also to the creditors of the succession) to request the prospective inheritor to opt for the succession sooner than within the one-year time limit provided by the law. This way, the creditor has the legal opportunity to meet the circle of persons against whom one can bring civil procedures in order to recover the debt, as the prospective inheritor either accepts, or waives the inheritance.

Article 1156 paragraph (5) of the Civil Code also gives an advantage to the creditors of a succession by means of the privilege they have against the creditors of the legal inheritors and states that out of the assets attributed with the partition or out of those replacing them, the creditors of the inheritance shall prevail in being paid before the personal creditors of the inheritors.

3. Acceptance and forms of acceptance of the inheritance by the creditors

According to the provisions of the Civil Code, the creditors of the prospective inheritor can act by means of a derivative action and accept the inheritance in the place of the inactive holder of the right. The old Civil Code didn't provide this expressly, reason for which two contrary opinions were generated. According to the majority, the personal creditors of the inheritor have the possibility to accept the inheritance by means of a derivative action, the title of inheritor the prospective inheritor received upon the passing away of the testator being consolidated by means of this acceptance. The logic of this point of view was given by the fact that the right of successional option is of patrimonial instead of personal nature.

A contrary opinion states that the option cannot be exercised by the personal creditors of the prospective inheritor because, despite its patrimonial content, the right of option has potestative character which gives it a strong personal character as well. For this reason, it can be exercised only by the legal inheritors, as only they are summoned for the inheritance according to the law or to the will and only they can be holders of the right of option[3].

We acquiesce in this last point of view as we consider that the principle of the free right of successional option must be observed, even if the legislator opted for the first point if view, more objective and meant to protect the civil legal circuit. For this we shall analyse of the right of succession right of the creditor of the prospective inheritor, showing the degree in which he can become the holder of this right.

We make a distinction between the creditors of the succession and the creditors of the prospective inheritors. The creditors of the succession shall not be able to take a derivative or revocatory action, as the prospective inheritor who didn't opt doesn't become a successor, remaining alien to the inheritance, and cannot be forced to opt in any way, as a result of the potestative character of the right of option. At most, the prospective inheritor can be forced by the creditors of the succession to express the option within a shorter amount of time than the one provided by Article 1103 of the Civil Code (one year), regardless of the prospective inheritor's form of option. Only after the prospective inheritor expressed his option by becoming successor, one might put the problem of the rights of the creditors of the succession or of the creditors of the successors to act in one way or another function of their interests[4].

In order to protect his rights, the creditor of the succession has the right:

- to force the successor to opt, not to accept the inheritance, by any mean, even before the end of the one-year term provided for expressing the successional option;
- after the inheritor expresses his option, depending on his decision, the creditor of the succession is a privileged party before the creditor of the prospective inheritor and may act for reclaiming his debts by taking advantage of his advantage;
- if the option expressed is fraudulent, the creditor

[2] See F.A. Baias, E. Chelaru, R. Constantinovici, Ioan Macovei, *Noul Cod civil. Comentariu pe articole, (The New Civil Code. Reflections on amendments)*, C.H. Beck Publishing House, Bucharest, 2012, page 890.

[3] See I. Dogaru, V. Stănescu, M.M.Soreaţă, *Bazele dreptului civil. Vol V – Succesiuni (Bases of the Civil Law. Volume V – Successions)*, C.H.Beck Publishing House, 2009, page 257.

[4] See I.Popa, *Drept civil. Moşteniri şi liberalităţi (Civil Law. Inheritance and liberalities),* Universul Juridic Publishing House, Bucharest, 2013, pages 449-450.

of the prospective inheritor may take a revocatory action for annulling a waiving to an active inheritance or an acceptance of a passive inheritance[5].

As a consequence, knowing that the creditors of the succession and those of the prospective inheritor have an equal interest in recovering their debts, the difference between them being given only by the privilege of the creditor of the succession before the creditor of the prospective inheritor, the institution of separation of the estates is no longer available.

To support all the above-mentioned, we may say that the creditor of the succession, without having the right to a derivative or revocatory action by means of the presidential ordinance, may force the prospective inheritor to express an option within a term even shorter than one year time. If the prospective inheritor accepts the inheritance, the creditor of the succession in his capacity of privileged party shall be given preference over any other creditor for the recovery of the debts, but if the inheritor waives the inheritance, the creditor of the succession has no longer the possibility to take a revocatory action and shall redirect his action against the other inheritors accepting the inheritance, if they exist, and if they are not against the territorial and administrative unity in case of vacant succession.

The creditor of the prospective inheritor, although he has the possibility to speed up the prospective inheritor to opt within a shorter time and may take a derivative action which allows him to express the option in the place of the inheritor, and the revocatory action which allows him to revoke a fraudulent action, doesn't benefit however from the privilege of the creditor of the succession, therefore, when competing with the later, the creditor of the prospective inheritor shall comply with the advantage of the creditor of the succession.

4. The derivative action and the inherited debt

Article 1560 from the Civil Code defines the derivative action as the situation in which the creditor whose debts are uncontested and enforceable and who may exercise the debtor's rights and actions when the later refuses or neglects to exercise them to the prejudice of the creditor. The creditor won't be able to exercise the rights and actions closely connected to the person of the debtor.

To be mentioned that only the creditors of that inheritor meeting all the conditions to be called upon the inheritance have the possibility to exercise the right of successional option in his place. Therefore, if the prospective inheritor doesn't have the legal competence or lacks successional vocation, is unworthy or has been exhereded by the deceased, being unable to take part in the settlement of the estate, his creditors won't be able either to exercise this right in his place.

The derivative action has a range narrowed to merely exercising the rights of the debtor with patrimonial character, case in which there are several limitations nevertheless. Thus, according to an opinion, the following category of rights cannot be exercised by means of a derivative action:

- rights concerning the settling of the debtor's estate or of individually determined assets (loaning an asset, leasing a land, alienating a possession, assigning rights);
- rights and actions connected closely to the person of the debtor and implying a personal consideration from his part (dissolution of marriage, revoking a donation on grounds of ingratitude, cutting back of an allowance);
- intangible patrimony rights that, as they cannot be traced, cannot be exercised by the creditors (right to an allowance, usufruct, right of occupation)[6];

Therefore, by analysing the law, one may notice that for exercising the rights by means of a derivative action, the debt must be uncontested and enforceable, its existence must be accepted and the creditor must be able to demand the payment from the debtor, the debt must have reached its maturity and not to be barred. On the other hand, the debtor must not exercise personally his right of option, case in which the creditor of the prospective inheritor cannot take a derivative action any more. Ultimately, for exercising a derivative action, a legitimate interest of the creditor must exist, materialized in the prejudice he suffers as a consequence of the debtor's passive behaviour.

The passive debtor is part in the process, as the derivative action produces effects regarding him, regarding different creditors, but the derivative action, although individual by means of its exercise, produces collective effects, in the sense that the situation created is profitable for all the creditors, with no preference for the plaintiff creditor.

For this, acceptance of the inheritance by the creditors of the prospective inheritor is essentially different from the applicable common right of the derivative action. The legislator expressly provided that the inheritance shall be accepted only to the extent of satisfying the respective creditor who proceeded in exercising the right of option in the place of the prospective inheritor. Such an acceptance shall not be profitable but to the creditor who acted in the name of his debtor or to that creditor who, having rights similar to those of the plaintiff, intervened in the process or expressed his own acceptance[7].

So, by means of the derivative action, the creditor doesn't become the holder of the title he

[5] Idem 452.

[6] See D. Negrilă, *Dreptul de opţiune succesorală. Vol.I (Right of successional option, volume I)*, Universul Juridic Publishing House, 2014, page 174.

[7] Idem, page 175.

recovered, but only replaces the inheritor in exercising his right.

An opposite situation would be unconceivable, being known that the right to succession is conditioned by the existence of the successional vocation the successor of the deceased must have. His personal creditors, as they don't have this vocation, cannot express the option on these grounds and, in terms of the fact that, for no damage to be incurred, a limited access to the debt is given to them and conditioned by the existence of the debtor among the inheritors of the deceased.

As a result, by means of the procedure of acceptance, the creditors do not become successors and do not acquire their prerogatives, as it's well known that no person can be successor unless called upon an inheritance either according to law, or by means of a will.

In regard to the succession and to its author (the deceased), the creditor's rights are justified only by the existence of a debt against the prospective inheritor and only within the limits of this debt.

One must understand therefore that the creditors of the prospective inheritor must not be analyzed as true holders of the right of successional option, but as substitutes of the inheritor and only with partial character, in the extent necessary for settling their debts. Even if the creditor accepted a succession in the place of the inheriting debtor, the sole holder of this successional right remains the inheritor, being able to exercise it as he pleases, because one cannot speak of the irrevocability of the successional option action as there is no proper acceptance, nor about the inheritor becoming an acceptant for the entire part of the inheritance he is entitled to. The acceptance expressed by the creditor of the prospective inheritor is limited therefore only to the value of the debt, and the irrevocability of the action of option refers only to this value. For the rest of the inheritance the prospective inheritor is entitled to, the later can opt as he pleases. Nevertheless, only his personal acceptance shall make the inheritor a successor. The prospective inheritor's waiver shall retroactively annul his title of inheritor, except for the share needed to pay the debt of the plaintiff creditor.

The waiver shall determine the access to the probate estate of the other inheritors, either from the same category, or from a subsequent category, as beyond the value necessary for the payment of the debt by the creditor, the waiving successor is considered to have waived also the part rightfully his after the payment of the debt, the share being distributed to the other successors whose quotas have either decreased with the prospective inheritor's acceptance, or they would have been removed from inheriting because of his presence.

"If the inactive prospective inheritor has more than one creditor, acceptance may be executed by either of them, even separately and at different moments, if the term for expressing the option didn't expire. We have showed that the acceptance expressed by the creditors doesn't have an irrevocable character of the acceptance made personally by the prospective inheritor. It makes unavailable only the share necessary for the payment of the debt towards the creditor who exercised the right. Other creditors accepting in their turn the inheritance makes appear a conjunction of creditors, the effects of the acceptance needing to be extended to accepting all the debts"[8].

For the case in which the inactive inheritor has a share of the inheritance smaller than the total value of the debts of the accepting creditors, the payment of the creditors is made according to their preference, and if they all are unsecured creditors, the payment shall be made proportionally.

We may deduce therefore that for the case in which the creditors of the prospective inheritor didn't settle their debt after retaining the rightful share, part of the uncovered debt remaining unsettled shall pursue the debtor until the debt is covered entirely.

For the acceptance of the succession by the creditors of the inactive prospective inheritor to make the latter an acceptant of the inheritance he is entitled to, it is absolutely mandatory that the prospective inheritor to have exercised his option to this end. For this, his summoning must be made in order for him to manifest his option.

The prospective inheritor's creditor agreement for accepting shall be concluded afterwards without regard to the inheritor's presence at the settlement of the estate or to his option.

In order to draw up this document, the respective creditor must make available the title stating his uncontested and enforceable debt. The fact that the prospective inheritor is inactive must be proved by means of a notary or of a court, in the sense that if the term for expressing the option allows it, the summoning for at least a term of the settling of the estate is necessary. The fact that he doesn't shows up is a sufficient proof that will determine the successor's inactivity. The creditor's interest and the damage he may suffer are easy to prove by means of the mere existence of the debt[9].

Within the notary successional procedure of settlement of the estate, the creditor settles his debt by executing the assets to which the debtor is entitled. If the later is present to the notary successional procedure and agrees, one may conclude a voluntary division of property and draw up a certificate of payment towards the creditor, but if the prospective inheritor either doesn't show up for the debate, or is not willing to conclude this division, the creditor can benefit from these right only by means of an action in court. He will not be able to conclude a voluntary division if the prospective inheritor debtor is not present, except for

[8] D.Negrilă, *op.cit.*, page 176.
[9] Idem, page 177.

the case in which he is empowered by the later with a special certified power-of-attorney.

According to Article 1156 from the Civil Code, the personal creditors of the inheritor may request in court the division of the inherited assets and demand the presence of notaries upon the conclusion of the document of voluntary division of property.

If the inheriting debtor is the only one in his category and with his degree and waives the inheritance after the creditors accepted it or chooses to remain inactive, with the possibility to be precluded from exercising the right of option, the option expressed by the prospective inheritors of subsequent degrees and categories shall be taken into consideration, until the field of inheritors of the deceased shall be accurately determined. For example, if the respective inheritor is the only son of the deceased and waives the inheritance subsequent to its acceptance by a creditor, the relatives next in line shall be called upon, descendants from sons, daughters or relatives belonging to different categories of legal inheritors.

5. The revocatory action and the inherited debt

By way of the provisions of article 1122 of the Civil Code, the legislator allows the creditors of the prospective inheritor to revoke by means of the revocatory action the waiving of the debtor if this action is fraudulent. So, according to law, the creditors of the prospective inheritor that unlawfully waived the inheritance can request the court the revoking of the waiving in what concerns them, but only within a three-month time as of the date when they expressed the waiving. Admitting the revoking action produces the effects of accepting the inheritance by the prospective inheritor debtor only regarding the plaintiff creditor and only within the limits of his debt.

According to Article 1562 from the Civil Code, if the creditor proves that damage was brought to him, he may request that the legal document concluded by the debtor in prejudice of his rights, as those by means of which the debtor creates or amplifies a state of insolvency, be declared not enforceable. An onerous agreement or a payment for executing such an agreement may be declared not binding only when the third contracting party or the one receiving the payment knew that the debtor creates or amplifies a state of insolvency.

As in the case of the derivative action, the legislator grants to the revocatory action (or Paulian action, named from its creator, the roman praetor Paulus) several legal provisions shaping a complete and coherent judicial regime of this action.

According to an opinion, the revocatory action is that action by means of which the creditor may obtain in court that the legal documents concluded by the debtor in the prejudice of his right not be enforceable[10].

The revocatory action has the legal nature of a mean of protection of the creditor's rights, but also a special judicial nature due to its characteristic of having an autonomous legal configuration, as the creditor may exercise a personal right.

The following conditions must be met in order to exercise the revocatory action:

a) a prejudice that the creditor suffered as a consequence of concluding the legal document by the debtor must exist. This requirement implies a personal and effective prejudice of the creditor because of the fact that the debtor created or amplified the state of insolvency by concluding the legal act. The text of the law validates the difference between an act of depletion of the debtor, insufficient for promoting the action and an act of depletion by means of which the state of insolvency is created or aggravated. There are excluded the legal documents by means of which the debtor pays a debt, refuses an enrichment or makes new debts[11]. The plaintiff creditor may use any means of evidence in order to prove the insolvency of the debtor.

b) a fraud to exist, made by the debtor. The fraud shall be determined by means of simply knowing that, by waiving, a prejudice is caused, not being necessary the intention to bring a prejudice. As it is a unilateral legal act, the prejudice must exist only in connection with the prospective inheritor debtor and not in connection to other prospective inheritors or inheritors of the deceased[12].

c) the debt to be uncontested upon the introduction the action and also liquid and enforceable, but only at the date when the decision is ruled. Consequently, the plaintiff creditor must make the proof upon introducing the action only in what concerns the existence of the debt, because, as he prepares an execution of the assets in the probate estate, he must prove that the debt he refers to will become liquid and enforceable in a near future, until the decision is ruled.

d) a third party accomplice to the fraud must exist. The legal requirement for a third party to have taken part in the fraud is specified exclusively in case of onerous agreements or of the payment for the execution of such a contract. In case of documents made on a free basis, the law considers that the fraud made by the debtor is sufficient, as the third party must protect a free patrimonial advantage, as opposed to the creditor who must avoid a prejudice. The fraud made by a third party exists when the later was aware that

[10] See C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligaţiilor (Cilil Law. The general theory of debts),* IX[th] edition, revised and completed, Hamangiu Publishing House, Bucharest, 2008, page 355.

[11] See L. Pop, *Tratat de drept civil. Obligaţiile (Civil Law treaty. Debts),* volume I, General legal regime. C.H.Beck Publishing House, Bucharest, 2006, page 392-395.

[12] See D. Negrilă, *op.cit.*, page 181.

the debtor was creating or amplifying a state of insolvency[13].

Apart from these conditions, the waiving must not have become irrevocable because the succession was accepted by other inheritors or because the right of option was prescribed.

The main effect of admitting a revocatory action is the unenforceable character of the waiving in regard to the plaintiff creditor and shall determine the inefficiency of waiving to the extent necessary for settling the creditor's debt. The revocatory action introduced by a creditor cannot produce effects towards other creditors unless they have intervened in the process and requested in their turn the revoking of the waiving.

The revocatory action does not make the inheriting debtor an acceptant of the inheritance, but produces effects of partial acceptance and limited to the value of the debt. Concerning other legal connections and persons, the waiver remains as such and no title of inheritor is granted to him. Nevertheless, if no there are no other prospective inheritors to have accepted the inheritance within the time limit available for expressing the successional option, the prospective inheritor debtor, if he decides to revoke by himself the waiving, shall become inheritor acceptant, although not as a consequence of the revocatory action, but of his own revocation on the waiving. The share of the party waiving the inheritance, remaining after the settlement of the debt shall be divided between the other inheritors in equal parts. In case the share to which the debtor is entitled is not satisfactory for settling the debts of all the plaintiff creditors, they shall be paid in the order established by law, in compliance with the degree of preference of their debts.

Revoking of the fraudulent waiving doesn't turn the creditors into inheritors even if they will receive a share of the probate estate to settle their debt; this assignation takes place only because of their capacity of creditors of the inheritor and not by virtue of a right to the inheritance. Therefore, the revocatory action on the waiving doesn't make the creditors holders of the right of option; the action is personal, belonging to the creditors and, if we didn't consider that the creditor may become holder of the right of option neither in the case of the derivative action, where he was replacing the prospective inheritor, more of the less one cannot grant the creditor this capacity within the revocatory action[14].

Conclusions

Upon establishing the liabilities, one must consider the correlation between the debts of the deceased and which is uncontested, having in common their creditor; these debts have as common trait their transmissible character, according to the principle of continued existence of the debts of the deceased.

In conclusion, the universal inheritor that paid a common debt, debt exceeding his share of the inheritance, has the right to sue for compensation the other inheritors, but only for the share from the debts of the succession devolving upon each of them.

By analysing the institution related to the acceptance of the inheritance, an opinion of the majority, expressed in the literature in the domain, states that the personal creditors of the inheritors, having the possibility to accept the inheritance by means of a derivative action and consolidating therefore the title of inheritor the prospective inheritor obtained upon the passing away of the testator, exercise in the place of the inheritor the right of successional option violating as a result the principle of the right of free successional option in order to protect the principle of the natural circuit of assets. However, in our opinion, the personal creditors of the prospective inheritors can accept the succession in their place, by means of a derivative action, only if the prospective inheritor didn't exercise his right of successional option out of bad faith, in order to prejudice his creditors. This legislative approach may seem advantageous in order to protect the interests of the creditors of the prospective inheritor, but also as an exception from the principle of the freedom of right of successional option.

Concerning the institution of successional waiving, the law states that the inheritor that waived his right is not bound to pay the liabilities of the succession. The provisions of the law state that the waiver can be bound neither concerning the duties, nor the debts. Hence, even if the liability to support these expenses is more of a moral nature, the prospective inheritor owing respect to the deceased, in virtue of these rules, if a third party alien to the inheritance made expenses related to the funerals, one cannot recover his debt but in regard to the inheritors that have accepted the inheritance and not the ones that waived it, the later category having no kind of debt towards these parties, as a consequence of their waving[**].

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[13] See F.A. Baias, E. Chelaru, R. Constantinovici, Ioan Macovei, *op.cit*., page 1278.

[14] See D. Negrilă, *op.cit.*, page 182.

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A FEW NOTES ON THE EVOLUTION OF THE COMMERCIAL SALES CONTRACT REGULATION

Dan VELICU[*]

Abstract

Today, we think that the commercial sales has a long history as institution and therefore the relocation of its regulation from the commercial code to the civil code seems to be an authentic revolution inside the European or national private law.

In fact, the modern regulation of commercial sales emerged only in the nineteenth century and a proper regulation was strengthened in that very century.

The present paper aims to analyze if this kind of revolution is an useful and necessary and if, by relocation, the institution has really disappeared.

Keywords: *commercial sales contract, commercial law, comparative legal history, civil code, codification*.

1. Introduction

As we know the sales contract was and is the most useful contract in social material transactions.

For some centuries, during the Dark Ages, when the barter was the main transactional activity, the sales seemed to be only a variety of it. However, at the end of the Middle Age, when the monetized economy emerged and the necessities of coin were covered by the discovery of the gold in the Americas, the prevalence of the sales contract was assumed.

From that time up today, nothing proved to be a challenge to the sales contract and the barter became more and more a sign of backwardness, economic liability, peripheral region or economic crisis.

As we shall see, the commercial sales contract has acquired a specific profile and regulation during the nineteenth century, but can we consider it today – when most of the material changes suppose in fact a commercial sales contract – as a specific contract which needs a special regulation? If the special hipothesis turned into a general one, do we still need a special regulation contained in a commercial code?

Therefore, it seems not to be so bizarre to renounce to all these commercial codes which belong to the past and to the social stratification of the industrialization era.

On the contrary to this common opinion, I think that the distinction between civil and commercial law deserves, at least, a summary analisys, and the recent evolutions inside the private law suggest that reality has to prevail on the ideology or on the obsessive ideea to revolutionize the law.

2. The first phase: neglecting the commercial sales contract.

At the end of the eighteenth century or, at least at the beginning of the nineteenth century, the sales contract was accepted as the most complex contract which needed a specific, proper and extended regulation.

In this context, there was no surprise that the authors of the Napoleonic civil code put the regulation of the sales contract in the front of all other contracts. And, more, the regulation of the barter was regarded as a secondary institution.

Practically, from now on everybody agreed that the exception became basic or common rule and the basic rule became only an exception.

However, there were only two main issues to settle at that crucial moment.

Before the Napoleonic code of 1804, in France of the *Ancien Régime* there was an essential distinction inside the private law.

On one hand, the minor material transactions were regulated by local customs, which have been codified in the north of France, or by written rules which were conserved in Southern France.

On the other hand, the so called "commercial affairs" were uniformly regulated from the seventeenth century by the royal ordinances of Louis XIV.

Inspired by the principles of the 1789 revolution, the lawyers and the lawmakers of the republican France wanted to provide an unitary civil law in order to unify the law practice in the new society.

The long debates and, finally, the adoption of the civil code in 1804 seemed to settle that first issue.

The new code gave little or symbolic space to the local customs. All the citizens were subject to these uniform rules which, at least theoretically, permitted more safety and predictability in the social transactions and, finally, unified the French nation.

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However, it still remained the second issue to settle. What will happen to the commercial law inherited from the seventeenth century?

All these rules were also projected to unify the commercial customs in order to sustain the emergence of the national market and to grow the certitude and the predictability of the commercial transactions along the French kingdom.

In the post revolutionary age, the foreseeable option was to promulgate a new code – the *code de commerce* – which Napoleon did in 1807, at the climax of his imperial power.

It resulted that all the commercial law was in fact upgraded, modernized and set in the new code.

As the most of the energy was spent in order to elaborate a new civil code, a revolutionary one – and we know that Napoleon himself was more proud of it than of his military victories – in an historical era when the Enlightment movement had sustained the efforts towards codifications – the *Allgemeines Landrecht für die Preussischen Staaten* (ALR) was promulgated in 1794 and the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB) in 1812 – the code of commerce of 1807 appeared not as a sophisticated code which is destined to all citizens as the civil code was, but as a sectoral law in order to be use by traders which were still perceived – even the guilds were dissolved in 1791– as a distinct professional class.

Therefore, in this entire context, there is no reason to wonder that the sales contract was regulated in an extended and sophisticated way by the rules of the civil code of 1804.

Practically, the regulation of the contract was covered by 119 articles. In fact, that regulation was one of the most extensive in all the area of the specific contracts[1].

Anyway, the rules provided by the civil code which regarded the sales contract are common rules. They have to be applied in the material relations of the simple citizens but also in all other material relations which may imply the interference of a *commerçant*.

Hence, if the rules of the civil code were to be applied in this specific hypothesis – as was regarded the act of commerce – the authors of the code of commerce paid not much attention to the characteristic of the sales contract as an agreement which implies one or more traders and which can presume, on the whole, a specific regulation.

As a consequence, at that time seemed little to remain in order to regulate inside the code of commerce.

However, with the regard to the sales contract, there was an obvious exception to that conviction of the authors of the code of commerce. The code contains only one article which regulates a specific issue of the sales: the way to prove its existence.

The lawyers who elaborated the code were forced to recognize that despite the perfect and complete mechanisms of the civil code, there were some issues or at least one, that could be not regulated by the common law.

As we know by reading the civil code, in the frame of the title regarding the general regulation of the obligations, the sixth chapter – *De la preuve des Obligations et de celle du Paiement* – offered general rules regarding the modality of proving the contract and these rules were to be applied to the sales contract signed by the simple persons[2].

However, these rules couldn't be applied when the sales contract is a commercial one because it is obvious that the necessities of the trade are incompatible with the rigidity of the civil code.

Practically, the commercial activity can not develop respecting the formalities of the civil code.

Hence, if "public instruments of writing" or "instruments of writing under private signature" can be tools of proving, on one hand, there is no necessity to restrain the use of the "parole testimony", and on the other hand, there are a lot of ways to prove the existence of the duties that can not be use between simple persons as the notebook or memorandum of an exchange agent, an invoice or bill of parcels accepted, the correspondence of the parties or the books of the parties.

It seems that the obvious piece of the reality determined the authors of the code of commerce to impose specific rules on the matter.

As a consequence, the article 109 of the code, the single rule contained by the seventh title – *Des achats et ventes* –, disposed as follows: "Les achats et ventes se constatent:

- par actes publics,
- par actes sous signature privée,
- par le bordereau ou arrêté d'un agent de change ou courtier, dûment signé par les parties,
- par une facture acceptée,
- par la correspondance,
- par les livres des parties,
- par la preuve testimoniale, dans le cas où le tribunal croira devoir l'admettre".

In order to know if the contract was really a commercial sales the article 632 of the code emphasized the intermediary role of the buyer and the financial gain as main purpose of his action.

Hence, as a preliminary conclusion of our study, the French code of commerce of 1807 did not recognize in a visible manner the existence of a commercial sales as a variety of the sales contract between the commercial activities precised by the article 632.

[1] See art.1582-1701 and compare 1708-1831.
[2] See art. 1316.

3. The second phase: the emergence of the new concept – the commercial sales contract

Obviously, until 1815 the French private law was adopted in Rhineland, Belgium, and Holland or other provinces of the Napoleonic Empire, but also in other states like the Kingdom of Naples[3].

Not surprisingly the defeat of Napoleon didn't slow up the diffusion of the new codes.

In the postwar era, despite its origins, the French code of commerce served as a model and was adopted again in the frame of the new *Codice per lo regno delle Due Sicilie* (into force in 1819)[4] but also in Greece in 1835[5] and Wallachia in 1840, while in other countries it was upgraded and modified inside the process of modern codification.

During the same decades of the nineteenth century various reflections of the lawyers and other people involved in commercial transactions were taken in account and by 1830 the new projects couldn't be considered as simple reproductions.

From this point of view, the Spanish code of commerce – *el código de comercio* which was promulgated in 1829 and entered into force in 1830[6]– , emphasized really the frame of two concepts: the commercial contract and the commercial sales.

Its author, Pedro Sainz de Andino introduced a new title – *De compras e ventas comerciales* – which contains 26 articles.

Obviously, because the commercial law maintained its exceptional applicability, limited to specific commercial relations, the sales contract was to be regulated on principle by the civil law and if the civil law was unable to rule a specific hypothesis, the judges will apply if necessary the rules provided by the *código de comercio*.

Therefore, for the first time, at that moment we can consider that the frame of the commercial sales seemed to be complete.

First of all, the code establishes criteria to identify the commercial sales of goods: Pertenecen a la clase de mercantiles: las compras que se hacen de cosas muebles con ánimo de adquirir sobre ellas algún lucro, revendiéndolas bien sea en la misma forma que se compraron, o en otra diferente, y las reventas de estas mismas cosas (article 359).

On the contrary, according to article 360 it will be not considered commercial sales of goods:

"Las compras de bienes raíces y efectos accesorios a estos, aunque sean muebles.

Las de objetos destinados al consumo del comprador, o de la persona por cuyo encargo se haga la adquisición.

Las ventas que hagan los labradores y ganaderos de los frutos de sus cosechas y ganado.

Las que hagan los propietarios y cualquiera clase de persona de los frutos o efectos que perciban por razón de renta, dotación, salario, emolumento, u otro cualquiera titulo remuneratorio o gratuito.

Y finalmente la reventa que haga cualquiera persona que no profese habitualmente el comercio del residuo de acopios que hizo para su propio consumo. Siendo mayor cantidad la que estos tales ponen en venta que la que hayan consumido, se presume que obraron con ánimo de vender y, se reputarán mercantiles la compra y venta".

As many commercial sales are concluded in the absence of the goods the buyer's consent is under condition until the moment he can inspect the goods (article 361): En todas las compras que se hacen de géneros que no tienen a la vista, ni pueden clasificarse por una calidad determinada y conocida en el comercio, se presume la reserva en el comprador de examinarlos, y rescindir libremente al contrato, si los géneros no le convinieren.

More, "la misma facultad tendrá, si por condición expresa se hubiere reservado ensayar el género contratado".

On contrary, there is no such consent under condition if there is sample used as criteria and the goods are exactly as the sample: Cuando la venta se hubiere hecho sobre muestras, o determinando una calidad conocida en los usos de comercio, no puede el comprador rehusar el recibo de los géneros contratados siempre que sean conformes a la mismas muestras o a la calidad prefijada en el contrato (article 361).

As sometimes the time to delivery is crucial for buyer's business the last has the right to terminate the contract if the delivery is late: Cuando el vendedor no entregare los efectos vendidos al plazo que convino con el comprador podrá este pedir la rescisión del contrato, o exigir reparación de los perjuicios que se le sigan por la tardanza, aun cuando esta proceda de accidentes imprevistos (article 363).

If the parties did not establish a time to delivery, the seller will have to retain the goods at buyer's disposal at least 24 hours: Cuando los contratantes no hubieren estipulado plazo para la entrega de los géneros vendidos y el pago de su precio, estará obligado el vendedor a tener a disposición del comprador los efectos que le vendió dentro de las veinte y cuatro horas siguientes al contrato. El comprador gozará del termino de diez días para pagar el precio de los géneros; pero no podrá exigir su entrega sin dar al vendedor el precio en el acto de hacérsela (article 372).

Unfortunately, during the next decades the Spanish code did not influence the commercial codification in Europe except Portugal.

In Italy, for example the commercial code promoted by Charles Albert, king of Sardinia, remained under the influence of the French *code de*

[3] See Carnazza Puglisi, *Il diritto commerciale*, 45.
[4] See *ibidem*, 45.
[5] See *ibidem*, 73.
[6] See *ibidem*, 61.

commerce. As a consequence, there is only one rule regarding the commercial sales – the article 118 – which establishes the ways to prove the existence of the contract.

Only in 1865, when the unity of the Italian state was achieved, in order to offer a new and modern an entire new regulation, the new king promoted a commercial code which was modernized.

Therefore, the commercial sales contract was, finally, regulated by a distinct text (article 95 to 105).

New institutions were added but, in fact, only the next commercial code of 1882 will offer an influential frame of the commercial sales contract.

Hence, the article 59 of the last code modifies the perspective of the French lawmakers by recognizing the validity of the *sale of other person's goods*: La vendita commerciale della cosa altrui é valida. Essa obbliga il venditore a farne l'acquisto e la consegna al compratore, sotto pena del risarcimento dei danni.

Secondly, the article 60 recognizes the validity of the sale without price if the parties have established a way to settle later the price: La vendita commerciale fatta per un prezzo non determinato nel contratto é valida, se la parti hanno convenuto un modo qualunque di determinarlo in apresso.

They can choose a third person to settle the price – "la determinazione del prezzo puo essere rimessa all'arbitrato di un terzo eletto nel contratto o da elleggersi posteriormente" – and also, "la vendita fatta per il giusto prezzo o a prezzo corrente é pur valida; il prezzo si determina secondo le disposizioni dell'articolo 38".

The articles 62 to 65 are regarding the sales of goods that are transported on maritime ships but most important seems to be the entire article 68 which settle the rules to apply when the goods must be delivered at a precise moment and space and one of the parties will not participate to the delivery act.

Therefore, "se il compratore di cosa mobile non adempie la sua obbligazione, il venditore ha facolta di depositare la cosa venduta in un luogo di pubblico deposito, o, in mancanza, presso un accreditata casa di commercio per conto e a spese del compratore, ovvero di farla vendere.

La vendita e fatta al pubblico incanto o anche al prezzo corrente se la cosa ha un prezzo di borsa o di mercato, col mezzo di un pubblico ufficiale autorizzato a tale specie di atti, salvo al venditore il diritto al pagamento della differenza tra il prezzo ricavato e il prezzo convenuto, e al risarcimento dei danni.

Se l'inadempimento ha luogo da parte del venditore, il compratore ha diritto di far comprare la cosa, col mezzo di un pubblico ufficiale autorizzato a tale specie di atti, per conto e a spese del venditore e di essere risarcito dei danni.

Anyway, "il contraente che usa delle facolta sudette deve in ogni caso darne pronta notizia all'altro contraente".

A special rule is offered regarding the sales with an essential time to fulfill the obligation. According to article 69 "se il termine convenuto nella vendita commerciale di cosa mobile é essenziale alla natura dell'operazione, la parte che ne vuole l'adempimento, non ostante la scadenza del termine stabilito nel suo interesse, deve darne avviso all'altra parte nelle ventiquattro ore successive alla scadenza del termine, salvi gli usi speciali del commercio.

Nel caso suddetto la vendita della cosa, permessa nell'articolo precedente, non puo farsi che entro il giorno successivo a quello dell'avviso, salvi gli usi commerciali".

More, as an exception to the rules regarding the visible defects of the goods, the article 70 intervens and settles the issue: Il compratore di merci o di derrate provenienti da altra piazza deve denunciarne al venditore i vizi apparenti entro due giorni dal ricevimento, ove maggior tempo non sia necessario per le condizioni particolari della cosa venduta o della persona del compratore.

Egli deve denunciare i vizi occulti entro due giorni dacché sono scoperti, ferme in ogni caso le disposizioni dell'articolo 1505 del codice civile.

The necessity of regulate the commercial sales of goods was, finally, accepted even in some states which had not an authentic commercial code in the first half of the nineteenth century as Prussia or Austria.

Therefore, in 1861, the Diet of the German Confederation promulgated a General Code of commerce – *Allgemeine Deutsche Handelsgesetzbuch* – which entered into force the next years in the German states, including Austria in 1863 and retained an extended regulation of the commercial sales (articles 337 to 359).

Later, the new *Handelsgesetzbuch* (generally abbreviated as HGB) entered into force in 1900, by substituting the first, while in republican Austria it became compulsory after the *Anschluss* and was maintained from 1945 until now.

Thus, at the end of the nineteenth century the commercial sales – as a main institution inside the private law – was firmly consolidated.

4. The challenges of the twenty century

As it is obvious, the nineteenth century was in fact the century of the modern codification of the commercial law. Most of the states of the European continent had one or two successive codes and the intense scholar activity in this field contributed essentially to the improvements of the national regulations but also to the harmonization of the rules and principles despite the fact that at the beginning of the twenty century nobody could sustain there was an uniform commercial regulation even in the field of the sales contract.

A new trend in modernization seems to emerge on the eve of the World War One.

The Swiss lawmakers adopted two new codes: a civil one and a code of obligations.

For the first time in modern era, the distinction between civil law and commercial law disappeared and a real debate emerged between the lawyers in the interbellum period on the opportunity to follow this path.

Of course, Switzerland has non sea access so there was no need for a maritime commercial regulation, which is the most extended body of institutions in the commercial codes of the European nations, but the Swiss path appeared to be more adequate to our social relations simply by rejecting the exceptional characteristic of the commercial legislation.

In Italy, where the "fascist revolution" of the 1920' tried to be the vanguard of a new society, the debate produced finally a new civil code which entered into force in 1942. Most of the institutions of the commercial code – including the sales contract or the commercial societies – were literally absorbed by the new *codice civile* during the so called process of "commercialization of the civil law" – *commercializzazione del codice civile* – and were applied to all the subjects while the commercial maritime institutions were regrouped in the new *codice della navigazione*.

5. Conclusions

Up to now, it seems that there are two main streams in the process of modernization of the private law: one conservative, trying to preserve the existence of the Codes by adding new articles if necessary or new special laws –and France or Germany are perfect models – and another, innovative which integrate more or less in the new civil code the regulation removed from the commercial code by following the Swiss or Italian path.

At the end of the twenty century, or at the beginning of the twenty first century the Canadian province of Quebec and countries like the Netherlands, Brazil, and, recently, Romania embraced firmly that last tendency.

Despite the will to innovate and its real motivation, we must ask ourselves if this "commercialization of the civil law" does have real ground in our days.

It is not difficult, for instance, to remove the sales regulation from the commercial code and to place it inside the civil sales frame, but all this reform does change reality?

In fact, most of these rules – which are really the fruits of a long experience – will be applied only in commercial relations just because there were created for this very context and not for ordinary civil contracts.

Secondly, when the special rules are to be applied only to professionals – as the Romanian civil code imposes sometimes[7]– the judge will have now again as preliminary task to establish if one of the parties has to be considered a "professional" in order to apply that specific or exceptional rule.

Practically, the reform didn't change the system because the social reality opposed naturally to such a "legal revolution".

As a consequence, in our case, on one hand, the will to unify the private law failed just because commercial rules were only moved in the new code in a strange way, and the establishing of the status is needed again in order to apply the proper regulation.

On the other hand, the reform failed just because its model was outdated. There is no unification in the Romanian private law if the consumer's legislation has to be considered a special one, distinct from the civil code (and I shall not add the absence of a maritime code which will permit the predictable long survival of the commercial code, a meaningless reality which let us be witnesses of the most paradoxal reform in European legal history).

Nevertheless, I shall not say that the unification is an utopian choice for the moment. But, in my view, the unification inside the private law must regard especially the absorption of the consumer's law and not of the commercial contracts regulation.

Finally, I think that the commercial sales law survived inside the new civil code and, in fact, it is completed by the regulation of the consumer's sales law.

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PRIVATE LAW EFFECTS OF THE NON-RECOGNITION OF STATES' EXISTENCE AND TERRITORIAL CHANGES[1]

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Abstract

The study presents an outline of the effects in private law (including private international law) of the non-recognition of a state or a change of territory. Specifically, it addresses the question of what measures can another state take, in the field of private law, in order to give effect to its policy of not recognizing a state or a territorial annexation, and, in parallel, what are the means available to private parties with links to the unrecognized state or territory. The study is structured in two parts, namely 1) the effects in private law of the non-recognition of a state; and 2) the effect in private law of the non-recognition of an annexation of territory. I will make specific references in particular to the situation in Transnistria and Crimea, as examples of the two issues being addressed. The study intends to be a guide of past and present state practice at the legislative and judicial level, as well as presenting the connections between instruments of public international law, such as Sanctions Resolutions of the UN Security Council, and normative instruments of private law, such as rules of civil procedure, which must adapt to the policy of non-recognition adopted by (or imposed on) states. The study also presents specific examples of situations or administrative practices which create practical problems, and result from the existence of a non-recognized entity or change of territory: issues like air traffic coordination, postal traffic, the change in the official currency of a territory, questions of citizenship etc., the aim being to present the reader with a full picture of the issues and intricacies resulting from irregularities existing at the level of the international community of states.

Keywords: *recognition, private law, conflict of laws, annexation, independence1.*

1. Introduction

This study is proposed as a bridge between public and private international law. It covers two situations which appear in public international law, namely the proclamation of independence of a new state, and the annexation of territory, but which suffer from issues of legality on the international sphere, and thus are not recognized by the (vast majority of the) community of states. These situations, which involve a (purported) change in the sovereignty over a territory and a population, produce effects not only in public international law, but also in the conflict of laws situations, where a particular legal relation can be localized, with the help of conflictual rules of the forum, to the territory which is annexed, or which is claimed by the newly proclaimed independent entity. The issues raised by such an event are manifold, and this article does not attempt to cover them all. Its importance lies in lying the doctrinal principles which can serve as guidelines for solving conflicts of laws which may appear in such situations. The reader should find in this study a short summary of current national and foreign doctrine on the subject, as well as some jurisprudence regarding cases where issues of the effects of the existence of unrecognized entities have been raised. It bases itself on the state of the current doctrine, in particular Romanian private international law doctrine, as well as German and British studies at the crossroads between public and private international law. From the quoted jurisprudence and doctrine, I will attempt, at the end, to extract potential principles for solving situations of conflicts of law where unrecognized annexations of territory are involved, as a phenomenon which has recently reappeared on the global arena.

The events taking place to the immediate East of Romania, as well as around the Black Sea, culminating with the annexation of Crimea by the Russian Federation make clearly necessary the analysis of the private international law position which the Romanian courts could take. While unrecognized proclamations of independence are not unheard of in the international community, the forceful change of the borders of a sovereign state, which had received independence and territorial integrity guarantees, in exchange for renouncing nuclear weapons, is unprecedented in the history of international relations, and is an extremely grave affront to international equilibrium and security. Therefore, a look at the private international law effects of such a situation is warranted.

2. Content

Recognized as the principal subject of public international law, the state is also invested, by definition, with international legal capacity, and thus legal personality. Also, it is recognized as a legal subject in internal law systems, where, in particular

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through its diplomatic missions, which are amongst its organs, it concludes contracts, acquires chattel and landed property (inasmuch as the local legislation allows), is part in trials etc.[2]. Beginning with the older Romanian doctrine, it was asked whether the new state which entered the international community and which benefits of all the rules of public international law regarding its representative organs, diplomatic and consular agents, the laws of war etc., is entitled to exercise all its prerogatives on the territory of the state which granted the legal personality, and thus the right to have rights and obligations just as natural persons. The answer is in the affirmative, because the personality of a state cannot be the product of the juxtaposition of two personalities, it being unique. The legal personality of the state is only the personality of that state considered from the point of view of some of its manifestations[3].

Granting recognition to a state means accepting its presence in the international community and its enjoyment of all rights and obligations which pertain to its quality of a state. The act of recognizing a state or a government attracts for the state being recognized a number of effects, of which the most important are the following:

1 obtaining the entitlement to begin diplomatic relations with other states which recognize it and of concluding treaties with such states;

2 obtaining the right (which according to some states' laws it would not otherwise have), of beginning civil trials before the courts of the recognizing state;

3 the acquisition by the recognized state (with effects also over its property) of jurisdictional and enforcement immunity before the courts of the recognizing state, an immunity which, in some law systems such as the British one, it could not have enjoyed before recognition;

4 the acceptance of its executive and legislative acts in the courts of the recognizing state.

Besides these, in the states where legal precedent gives retroactive effect to recognition, such as the United Kingdom and the United States, the acts of the newly recognized state or government are considered legally valid from the moment when the recognized authority has been installed in power[4].

In civil issues, the states can agree so that, in limited circumstances, they allow for the reciprocal extension of the exercise of some of the state's competences beyond the limits of national territory. In civil legal relationships, with one or more extraneous elements, the private international law rules of each state usually apply. Because of the diversity of solutions which these rules give rise to, in the practice of international private law relations between state, relatively few principles or customary rules have been formed regarding the exercise of civil matter competences[5].

Correspondingly, not recognizing a state means denying it these attributes. In this sense, recognition has a constitutive character, because the act of recognition itself is the one which produces legal effects in the internal law system of the recognizing state. In comparative law, one must now analyze the positions of the United Kingdom and the United States in this regard.

British courts have taken for some time the position that an entity not recognized by the Foreign Office as a state shall be treated by the courts as not existing, and thus will not be able to invoke immunity of jurisdiction. Thus, in a case, the ships belonging to "The Provisional Government of Northern Russia", an unrecognized entity, were not granted immunity from creditors[6]. Correspondingly, an unrecognized entity may not act as a plaintiff in court. For example, in 1804, the Revolutionary Government of Berne could not stop the Bank of England from disbursing the funds of the former city administration[7]. The current main precedent regarding the effects of recognizing an entity in internal law is *Luther v Saigor*. This concerned the operations and production of a timber yard in Russia, owned by the plaintiffs, which had been nationalized in 1919 by the Soviet government. In 1920, the defendants had bought a quantity of timber from the USSR, and the right of ownership was invoked upon it in England by the plaintiffs. These argued that the Soviet decree of nationalization should be ignored because the United Kingdom had not recognized the Soviet government. The first court agreed, and the defendants appealed. In the meantime, the United Kingdom had recognized *de facto* the Soviet government and the Home Secretary had informed the Court of Appeal in writing regarding this. The result was that the higher court was obliged to take judicial notice of the Soviet decree and give it effect as a law of a recognized state or government. The Court also showed that the fact that the Soviet government had been recognized *de facto* and not *de jure* did not change the solution. Another important point is that, because in the Home Secretary's certificate it was stated that the Provisional Government of Russia, recognized by the United Kingdom, had disbanded in December 1917, the Court considered that the Soviet government had started its existence at that date.

Inasmuch as laws, contracts concluded by unrecognized states or governments will not be recognized by British courts, because the

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[2] Ignaz Seidl-Hovenveldern and Gerhard Hafner, *Liber Amicorum Professor Ignaz Seidl-Hohenveldern* (Amsterdam: Martinus Nijhoff, 1998), 86.

[3] George Plastara, *Manual de drept internaţional public cuprinzând şi o expunere a conflictelor de legi (Drept internaţional privat)* (Bucureşti: All Beck, 2004), 27.

[4] Raluca Miga-Beşteliu, *Drept internaţional public* (Bucureşti: C. H. Beck, 2010), 37.

[5] Miga-Beşteliu, *Drept internaţional public*, 117.

[6] *The Annette; The Dora* [Admiralty], 1919.

[7] *The City of Berne v The Bank of England* [Chancery], 1804.

unrecognized entity does not exist before national courts. Official recognition operates retroactively up to the time indicated by it, for example up to the *de facto* recognition, which precedes a *de jure* one. To this effect is the case *Haile Selassie*, where the *de jure* recognition of the Italian authorities as occupants of Ethiopia involved the obligation of British Courts to refuse the recognition of the Ethiopian State's legal personality, through its Emperor living in exile, with retroactive effect from the date of the *de facto* recognition of Italian occupation.

A more interesting problem appears when conflicting rights are claimed by entities exercising *de jure* and, respectively, *de facto* control over the same territory. The solution is that the actions of a *de facto* authority regarding people and goods located in its sphere of effective control will be recognized by the British courts, but when the goods of persons are in the United Kingdom, the *de jure* sovereign shall have precedence[8].

In the United States the situation is similar. Only a recognized state may act as plaintiff in American courts. However, American courts allow in limited cases the access to justice of an unrecognized state, on the basis of case by case analysis of the entity under discussion. For example, in the case *Transportes Aeros de Angola v. Ronair*, it was held that where the US State Department had clearly indicated that the plaintiff's (a company wholly owned by the unrecognized government of Angola) access to American courts was to the benefit of the foreign relations of the United States, the courts had to respect this declaration[9]. Absent such governmental declarations, American law is more flexible regarding unrecognized entities, on the basis of the "Cardozo doctrine", according to which "an unrecognized entity which has kept control over its own territory, may gain, for its own acts and decrees, a quasi-governmental validity, if otherwise our fundamental principles of justice, or our public order would be violated[10]".

One can thus observe that the non-recognition of a state does not involve *de plano* its nonexistence in the national law of other states, but only a presumption of the lack of civil capacity, as well as of the invalidity or nonexistence of its acts. This presumption can be overturned either through a declaration, even retroactive or *de facto*, of its recognition, or through a relaxation of the rule with the purpose of protecting private interests.

Citizenship is, ever since Mancini, at least in Continental Europe, the most important point of connection for personal status. By this one understands those legal relationships which concern the party or parties personally. Citizenship is generally understood as a legal community, which subjects a person to a state, and makes this state the owner of rights and obligations. Furthermore, citizenship involves the right of its holder to protection from his state. From the point of view of conflict of laws rules, this public law aspect of citizenship has a restricted importance. Such an example is art. 2600 alin. (2) of the Civil Code which protects the Romanian citizen spouse from the impossibility of terminating the marriage (if such is prescribed by the foreign law). Another example is art. 1069 alin. (2) of the Code of Civil Procedure, which foresees the compulsory jurisdiction of the Romanian courts, as a *forum necessitatis*, when the Romanian citizen plaintiff shows that he cannot begin the action abroad, or that it cannot be reasonably expected for the action to be filed abroad, even when the law does not otherwise grant jurisdiction to Romanian courts, thus protecting the citizen from a denial of access to justice.

In public international law, citizenship is a legal link, which is established on a social fact, on a link, an effective solidarity of existence, interests, feelings, as well as a reciprocity of rights and obligations. It can be said that it is the legal expression of the fact that the individual to whom it is offered is, in fact, more strongly related to the population of the granting state that to that of any other state[11]. By virtue of sovereignty, each state determines alone the criteria and means of acquiring and losing its own citizenship, as well as the rights and duties pertaining to its citizens. In international legal order, only the state as the primary subject of international law, has such a competence[12]. However, the conditions of opposing this citizenship against other states are regulated in principle, by international law. From the point of view of international law, the exercise of state competences over a person is relevant with regard to the conditions in which the legal status of citizens or foreigners is recognized and can be opposed to other states or international entities; and the compatibility of the exercise of these competences with international law rules[13].

Granting someone citizenship without asking that person first, not finding a way, as a state, to subject the granting of citizenship, the fundamental right, the one which conditions all the other rights in a state, to the will of the prospective holder, whom, at the same time, you thus deprive of the benefit of the citizenship to which he did not renounce and from which he had not been excluded, denies *ab initio* any proof that belonging to such a state is a citizenship, and creates the presumption that it is a subjugation, and thus transforms citizenship into the status of a subject[14].

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[8] Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 475.
[9] Shaw, *International Law*, 482.
[10] *Sokoloff v. National City Bank of New York* (208 App. Div. 627), 1924.
[11] The *Nottebohm* Case, ICJ Reports, 1955, 23.
[12] Beşteliu, *Drept internaţional public*, 119.
[13] Beşteliu, *Drept internaţional public,* 118.
[14] Barbu B. Berceanu, *Cetăţenia. Monografie juridică* (Bucureşti: All Beck, 1999), 23.

International law refuses to recognize the effects of complimentary, fictitious citizenships, abusively granted by some states to individuals who are not effectively attached to them. At the same time, laws regarding the acquisition or loss of citizenship, founded on racial, religious or political criteria would be considered illicit from the point of view of human rights norms, and thus could not be opposed to other states[15]. Furthermore, the exercise of state competences over persons, although in principle discretionary, must take place in consideration of the following: the regime of a state's own citizens should not irreversibly violate fundamental human rights, and the regime of foreigners should not violate their interests or those of their state of origin. At the same time, every states tries to ensure as good a regime as possible to its citizens located, temporarily or permanently, on the territory of other states[16].

In our legal system, citizenship is not considered as pertaining to the field of private international law, this opinion being in the majority. The arguments brought to this end are as follows: the fact that citizenship constitutes a criterion for determining the applicable law, for example in the field of civil status and capacity of a natural person, does not constitute an argument for including the matter within private international law, because it would mean that all the criteria which serve to determine the applicable law should pertain to this branch of law. The link between citizenship and the legal status of the foreigner does not oppose nor does it deny their separate study, within different legal disciplines[17]. In recent literature the thesis was posited that we can observe a link of interdependency between conflict of laws, conflict of jurisdictions, the legal status of the foreigner and citizenship, because their solution is sometimes preceded by the determination of a person's citizenship[18]. In French doctrine, it is considered that the citizenship, defined as the ensemble of rules which determine the link between an individual and a state, presents sufficient links with private international law so as to be included in its normative sphere. Thus, civil status and capacity of a person being given by their citizenship, the inclusion of the study of citizenship in the field of private international law is justified, as also for the reason that in all cases the legal condition of the foreigner is determined by comparison with that of the national[19].

For private international law, the significance of citizenship is that of an indicator of the appurtenance of a person to a legal system. The fact that the private interests of a party, in respect of their personal status, point towards the existence of the competence of that system of law where the party feels most integrated, leads to a presumption in favor of the appurtenance of a person to a certain system of law. Citizenship is not, however, neither in Romanian law, nor in the Continental European one, the most important point of connection, and in this quality, it is neither unique in comparative law, nor lacking political and legal critiques. In comparative law, one can observe that almost all *common law* states do not see in citizenship, but in domicile, the predominant criterion of belonging to a certain legal system. Domicile is a legal figure composed of factually determinable elements, together with the *animus* of the party, which proves a voluntary and special link towards a state, one more stable than the presence or residence on that territory. It is therefore false to relate domicile (in its *common law* definition) to such mobile spatial connection points; it is closer to citizenship in that it involves a conscious identification with a certain state. Other states (especially in Scandinavia) choose sometimes as a connecting factor, even for the personal status, the place of concluding a certain legal act and thus allow individuals a flexible adaptation to the local law (even if chosen at short notice), which sometimes even allows for manipulations. Citizenship as a connecting factor is in retreat as of the second half of the 20th century. The intervention of other connecting factors, such as habitual residence, even in personal status issues, is ever more visible.

The link between citizenship and the solutions to conflicts of laws shows how complex the legal foundations of conflictual rules are. In as much as conflicts of laws solutions cannot be outside the complexities and particularities of material life, neither can the legal foundations and solutions of private international law be outside the complexities of legal norms, of law seen in its ensemble as the most efficient way of ordering social life of all times and for ever[20]. The institution of citizenship and the condition of a citizen express, however, in the first place, a link, which is principally a static one, of the individual with the State. Evidently, the link is with a particular state. There shall be as many citizenship and as many types of citizens as there are states. And, in respect of citizens of a particular state, the citizens of other states, and stateless persons, are called foreigners[21]. The Romanian State, as it recognizes a foreign state, it recognizes its citizens as such. On the basis of such states' documents, Romanian authorities issue documents for foreigners, valid on Romanian soil, in which that foreign citizenship is attested; similarly, Romanian authorities apply visas on foreign passports, and generally on international travel documents, as the

[15] Beşteliu, *Drept internaţional public*, 119.
[16] Beşteliu, *Drept internaţional public*, 118.
[17] Bianca Maria Carmen Predescu, *Drept internaţional privat. Partea generală* (Bucureşti: Wolters Kluwer, 2010), 128.
[18] Predescu, *Drept internaţional privat. Partea generală*, 128.
[19] Predescu, *Drept internaţional privat. Partea generală*, 128.
[20] Predescu, *Drept internaţional privat. Partea generală,* 130-131.
[21] Berceanu, *Cetăţenia. Monografie juridică*, 8.

protection of a state does not always involve its citizenship[22].

The proof of a person's citizenship in private international law always takes place from the point of view of the state whose citizenship is in question. The law of citizenship is of a public nature; no state may decide on the question of whether a person is another state's citizen[23]. In as much as the Romanian State grants citizenship to a person, the foreign citizenship granted until then to such a person are not taken into account. Conversely, a person not granted Romanian citizen is a foreigner, even when another state considers him a Romanian citizen[24]. Thus, in practice, one must prove the rules of citizenship of the state whose citizenship the party might have; in most cases, this is a documentary step without any problems, but sometimes it can offer an interesting image of citizenship rules of various states, or regarding the historical development of nation-states in Europe. Thus, for example, if in 1998 the succession is opened in Slovenia of a *de cujus* born in Slovenia in 1908. During his life, he has held Austrian, Hungarian, Yugoslav and Slovene citizenships, and, perhaps, through his willing enlistment in the German Army, he also became a German, keeping this quality by virtue of the first German law regarding citizenship issues of 22nd February 1955. If, during the probate process, it is discovered that *de cujus* is himself the heir of an uncle deceased in 1944 in Romania (which was not particularly rare before the fall of the Iron Curtain over Europe), whose citizenship is questionable because of unclear circumstances in the last days of the War, the inheritance certificate can easily become a history manual.

The stateless person is that who cannot be considered citizen of any state, according to its rules of citizenship. *De jure* statelessness appears when it can be proven that, according to the citizenship rules of the present systems of law, the person is not a citizen of any of the relevant states. Also, a person holding a laissez-passer issued according to art. 28 of the UN Convention regarding the legal status of stateless persons of 28th September 1954, is a *de jure* stateless.

German law considers *de facto* stateless those persons whose statelessness cannot be clearly demonstrated, but who do not hold a citizenship which can be proven. This can be the result of the nonrecognition of their origin state by the Federal Republic, especially in case of UN nonrecognition. Thus, for example, the South African Republic had excluded of its state territory the so-called *homelands*, which had however not been recognized by the UN, which retrospectively did not affect South Africa as much as it affected their inhabitants who held an unrecognized citizenship, and thus were not treated as citizens by their recognized state of origin, South Africa. For similar reasons, in German law Palestinian refugees are also considered stateless, because, even though they might have held before the establishment of the state of Israel the citizenship of the British Mandate in Palestine, presently they are prevented by the Israeli occupation of the Palestinian Territories from placing themselves under the protection of a Palestinian state. Germany considers that the population of the Palestinian Territories themselves cannot yet benefit from a Palestinian citizenship, even after the admission of Palestine to the UN as an observer state, because of the "lack of effectivity" of Palestinian sovereignty. On the other hand, German law does not exclude conflictual application of Palestinian law, even absent recognition of a Palestinian citizenship, for persons who are habitually resident there[25]. One must observe, from the practitioner's perspective, that there is no one Palestinian law. The law being applied in the Palestinian Territories (Transjordan and Gaza) is different, being made up of rules kept from the time of the British Mandate, military public order rules imposed by Israel, Islamic law (especially in family matters), but also various rules kept from the time of the Egyptian (Gaza) and, respectively, Jordanian (Transjordan) administration.

A problem usually found in jurisprudence, the determination of applicable law in the case of an unrecognized state is specific to the modern and contemporary eras. In private international law of the 19th century, the solving of the conflict of laws in the case of the unrecognized state has been influenced by the considerations given to state recognition as being constitutive and not declarative. In French doctrine, Bartin established the theory whereby the solution to this type of conflict of laws is subject to the rules of public international law. The judge may not apply the law of a foreign state that the forum state had not recognized as a subject of international law, because that would contradict the public power of the forum state. In these circumstances, the court may not apply the law of the unrecognized state, because its national public law rules, as well as public international law principles impose this solution. Bartin's thesis has been dominant until the first half of the 20th century when, at the end of this period, a contrary thesis was argued, namely that even the laws of an unrecognized state may give rise to conflicts of law in the private sphere. This solution begins, above all, from the affirmation, in most legal systems, of the declarative nature of state and government recognition.

Supporting this theory, Henri Batiffol and Paul Lagarde show that the mission of the French judge and the French government are not situated on the same plane. The judge who applies foreign law must establish if his authority is contested on the territory of

[22] Berceanu, *Cetăţenia. Monografie juridică,* 226-227.
[23] Art. 3 of the 1997 European Convention on Citizenship.
[24] Berceanu, *Cetăţenia. Monografie juridică*, 226.
[25] Thomas Rauscher, *Internationales Privatrecht* (Heidelberg: C. F. Muller, 2012), 62-63.

the foreign state. The reasons for which the government might not recognize a state are of a different nature, much more complex, and mostly of a political nature[26]. In the second half of the 20th century, an important part of the doctrine, including the Romanian scholars, affirms the possibility that the law of the unrecognized state might give rise to the conflict of laws. This solution was reached both on the basis of general principles of law, as well as particular principles of private international law. In as much as the law of the unrecognized state is not taken into consideration, the effect is the application of a previously existing law, on the basis of its exclusive recognition, which is inadmissible, both as a legal principle, as well as with regard to the effects felt by private persons. The lack of application of the law of an unrecognized state means that the objective law which governs the subjective rights which individuals can enjoy in that state is disregarded, and the purpose of the laws is thus violated, in that they do not attain their goal of protecting individuals, of serving to satisfy their material and spiritual needs[27].

The hypothesis taken into account is that where the conflictual rule of the forum points to the system of law of a state which is unrecognized by the forum state. The generally admitted solution in practice and in literature is that the laws of an unrecognized state may give rise to the conflict of laws. This solution is traditional in Romanian private international law. To support this solution, the following arguments may be brought forward:

- recognition of a foreign state has, in principle, a declarative and not constitutive nature. Thus, a state may recognize another state, but it cannot ignore its legal order. Recognition of a state has a majority political character, and does not apply in the field of conflict of laws, where the foreign state remains a legal subject[28]. The contrary would involve violating the sovereignty of the foreign state;
- if the law of the foreign state is not applied, then the formerly existing laws ought to apply, which would lead to unjust effects for the parties;
- as private law relations are involved, it would be unjust for persons' rights to be diminished or denied because these persons belong to an unrecognized state[29].

A second problem regards the solution of the conflict of laws in the case of a state succession when the successor state is not recognized. The question is asked which law should apply: the law of the state which does not exist anymore, or that of the unrecognized state? In my opinion, the solution is clearly the same as presented above. Thus, this conflict appears when the state, to whose system of law points the conflictual norm, "disappears" between the moment of the legal relation's birth and that of the trial. A just solution involves taking into consideration the context in which this change has taken place. It was thus proposed that, in case the state was disbanded through "force", the idea of the protection of legitimate interests of persons affected directly by the abusive change in sovereignty should prevail. This would mean applying the law of the disappeared state. If we are in the presence of a voluntary unification or split, the rules of the treaty of unification or division should be applied. I concur with this opinion, with the note that, in order to establish the character of the international change of legal personality, one must take into account the official position of the forum state regarding that particular situation[30]. Jurisprudence retains several situations where the non-recognition of a state was invoked, as a reason to deny the application of the currently existing law of the foreign state, and to continue to apply the old law, the one applicable before the change of political regime. Thus, after the establishment of the Soviet Union in 1917, French courts continued to apply tsarist law for more than a decade, such solutions being encountered even much later. In the Scherbatoff / Stroganoff case, solved by the Court of Cassation in Paris, in 1966, it was held that the non-recognition of the foreign government is an impediment for the French judge to apply the foreign law given by this government, before its recognition by the forum state[31].

A similar question is raised by the unrecognized annexation of territories. In such a case, the main difference is that both relevant states continue to exist, and demand the application of their laws to legal relationships which are localized in the territory being annexed. This issue is also connected to the state's presence in such a territory, for example with control over state resources, companies and institutions. In such cases, I believe that the "character" of the annexation takes precedence over considerations of private interests, because of a strong presumption that the unrecognized annexation does not reflect the real attachments of the persons living on the territory, but on the contrary, it is being imposed from above, as an illegitimate act. Furthermore, one must take into account the relevant UN Security Council or General Assembly Resolutions which express an opinion over the annexation, as well as potential rulings of international courts to the same effect. In as much as a UN Security Council calls for the denial of recognition of a factual situation, it would be unlawful for courts of a state, which are part of its official organs, to grant even indirect recognition by applying the law of the unlawful sovereign. This illegality in international law

[26] Predescu, *Drept internaţional privat. Partea generală*, 235.
[27] Predescu, *Drept internaţional privat. Partea generală,* 236.
[28] Nicoleta Diaconu, *Drept internaţional privat* (Bucureşti: Lumina Lex, 2009), 125-126.
[29] Dragoş-Alexandru Sitaru, *Drept internaţional privat* (Bucureşti: C.H. Beck, 2013), 39-40.
[30] Dan Lupaşcu and Diana Ungureanu, *Drept internaţional privat* (Bucureşti: Universul Juridic, 2012), 64-65.
[31] Predescu, *Drept internaţional privat. Partea generală*, 235.

would preclude any national laws or considerations to the contrary. Where there is no such binding international determination, then I believe that courts should follow the official opinion of the government on the issue of the legality of annexation, so as to protect the interest of the state in not giving recognition to a situation which might affect its international relations. Where the state does not issue any official positions, previously discussed considerations apply, and the court should check whether the parties of the legal relation have indicated expressly the law they understand as being applicable, because in such a case it should be first and foremost for the parties to express their attachment to one or the other system of law in presence.

We can see that where unrecognized states or territorial annexations are concerned, the notion of sovereignty is brought to the fore, and therefore we can think of the principles expressed above as determining the notion of a law proclaimed by a sovereign power as the basis for the appearance of a conflict of laws[32]. I believe that in such a situation the criterion of effectiveness should also find its plenary application, as it exists in public international law. In as much as an entity effectively controls a territory and a population, with private law effects in the legal relations of its members, then its acts should be recognized at least private international law effects because otherwise, the obligation of non-involvement in other states' affairs would be violated, as well as the rights and interests of the persons concerned. Furthermore, private international law has the means, amongst which first and foremost is the notion of public order, to censure the application of the laws of an unrecognized entity which would not be compatible with its national principles.

3. Conclusions

The article has looked at the private international law effects of unrecognized proclamations of independence and annexations of territory. It has illustrated the state of national doctrine, as well as bringing forward approaches from other countries' doctrine and jurisprudence. It has established a number of principles, which could be applied by Romanian courts when confronted with these special types of conflict of laws. I hope this article will serve as a starting point for a bigger discussion in the doctrine and practitioners' forums regarding the means whereby the legal world (by which I understand courts, attorneys, but also the public administration) could react in an appropriate and unified manner to the unrecognized, and often violent, changes taking place in the international community nowadays. I also hope that, during my doctoral studies, I will be able to continue the research on these topics in other legal systems, so as to be able to present a general European view of the matter, in the spirit of unified European principles of law, especially when dealing with threats to the security and balance in the European Union's near abroad.

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[32] Predescu, *Drept internaţional privat. Partea generală,* 233.

THE SIMPLICITY OF THE FORM AND COMPLEXITY OF NORMATIVE CONTENT OF CONSTITUTION

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Abstract

The coding is not only the expression of the political will of the law maker, it firstly is a complex juridical technique for the choosing and systematization of the normative content necessary and adequate to certain social, political, economical, institutional realities. Since Constitution is a law, yet it nevertheless distinguishes itself from the law, the problem is to establish which juridical norms it contains. The solving of this problem needs to consider the specific of the fundamental law and also of the requirements of the coding theory. The determining with all scientific stringency of the normative content of the Constitution is indispensable both for the removal of any inaccuracy in delimiting the differences from the law, for the stability and predictability of the fundamental law and last, but not the least, for the reality and effectiveness of its supremacy.

In our study we realize an analysis based on compared criterions of the techniques and exigencies for the choosing and systematization of the constitutional norms with reference to their specific, to the practice of other states and within a historical context. The analysis is aiming to the actual proposals for the revising of the Constitution.

Keywords: *Constitutional norms, constitutional norm establishing criterions, technical – judicial structure, supremacy of Constitution, normative content.*

I. Introduction

Simplicity is a concept that is constantly to be found in the theoretical elaborations of theology, but in most philosophical doctrines, is associated to the idea of unity of rationality, and generally, of the existence. Understanding the concept of simplicity, involves a comparative report with contradictory accents: simplicity opposes to diversity and composed realities that do not shelter under a law or order. Simplicity does not exclude, however, the complexity of the content, be it rational, of an idea or an objective reality. Simplicity is contrary to uniformity: it is the expression "of one diverse in itself". In the reality plan, the concept of "person", for instance, expresses, in our opinion, the dialectical coexistence between simplicity of the form and the inexhaustible depth of the existential content complex.

We consider as significant in philosophical thinking plan, the philosophical ideas of the great Romanian philosopher Constantin Noica: "The pace of history, in philosophical thinking. The simplicity of pre-Socratic *element* (that gives the composition of world), the simplicity of *self-knowledge*, with Socrate, of *Idea*, with Platon, of *the form*, logical and substantial, with Aristotel, of *subjectivity*, with the Christianity, of *divine*, with medieval philosophy, of *simple natures*, with Descartes, of *perception and representation*, with the empiricists, of *the monad*, with Leibniz, of *transcendental conscience*, with Kant, of *the Self*, with Fichte, of *the Spirit*, with Hegel. The pulsations of history"[1].

In the meanings given above, the simplicity can be accepted as a fundamental aspect of law, mainly in the form imposed by contemporary realities. In the sphere of juridical, the diverse, opposed to simplicity, is mainly made of a multitude of normative regulations that do not answer to a unifying idea and to the unity of the principle expressing the essence. The requirement of simplicity in the sphere of juridical, in our opinion, is best expressed and may be accomplished by the principles of law, as their normative form, simple, preserves at the same time the complexity of the content.

In the followings, we try to make a brief analysis of the notion of principle of law associated both to the idea of simplicity, as to the idea of complexity of content. The normative act that by its nature can highlight better this blend between simplicity of the form and complexity of the content, specific to the principle of law, is the Constitution. That's why we will customize the analysis on the principles of law with referral to the normative content of Constitution.

II. PAPER CONTENT

In philosophy and, in general in science, the principle has a theoretical and explanatory value as it is meant to synthesize and express the foundation and unity of human being, of the existence in general and knowledge, in their manifesting diversity. The discovery and assertion of the principles in any science gives the certitude to knowledge, both by expressing the *prime element* that exist by itself, without the need to be inferred or demonstrated, both by accomplishing the cohesion of system, without which no knowledge or scientific creation may exist. The principle has multiple meanings in philosophy and science, but for our scientific approach, to remember this one:

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[1] C. Noica, *Carte de înţelepciune, "Book of Wisdom"*, Humanitas Publishing House, Bucharest, 2009, p.71.

fundamental element, idea, basic law on which is grounded a scientific theory, a political, juridical system, a behavior norm or the totality of laws and basic concepts of a discipline". [2] The common place for all meanings of the term of principle, is the *the essence*, an important category for philosophy and law.

A good systematization of the meanings which the notion of principle has is done in a monography[3] : a) the founding principle of this domain of existence; b) what would be hidden to the direct knowledge and requires logical-epistemological processing; c) logical concept that will allow knowing the particular phenomenon." This systematization, applied to law means: a) discussion on the essence of law; b) whether and how we may know the essence of law; c) operability of settlement in the phenomenality of law, correlated or not with the essence."[4] The need of the spirit to climb up to the principles is natural and particularly persistent. Any scientific construction or normative system need to relate to principles to guarantee or substantiate them.

The law, as it implies a very complex ratio, between essence and phenomena, and a specific dialectic to each of the two categories in terms of theoretical reality, normative but also social one, cannot be outside the principles. Mircea Djuvara states: "All science of law consists not in reality, for a serious and methodical research, other then in releasing from the multitude of law provisions, of their essential, meaning just the ultimate principles of justice from which the other provisions derive. Thus the entire legislation becomes of a greater clarity and what is called the juridical spirit, is being captured. Only then is done the scientific development of the law."[5] The words of the great philosopher Kant are still actual, which we propose for meditation to any contemporary legislator: "It's old the desire, which, who knows when?, will it ever be fulfilled: to be discovered for once, instead of the infinite variation of the civil laws, *their principles*, as only in this will reside, as one says, the secret to simplify the legislation."[6] In our opinion this is the starting point for understanding the principles of law.

In the literature in specialty, there is no unanimous explanation with regard to the definition and significances of the principles of law[7]. One can identify a series of common elements which we emphasize in the followings: a) the principles of law are general ideas, guiding postulates, fundamental requirements or foundations of the law system; b) The general principles of law configure the structure and development of the law system, ensure its unity, homogeneity, balance, coherence and developing capacity; c) The authors distinguish between the fundamental principles of law, which characterize the entire law system and reflect what is essential within the respective law system and the valid principles for certain branches of law or juridical institutions.

One of the great problems of juridical doctrine is the ratio between the principles of law, law norms and social values. The views expressed are not unitary they differ depending on the legal concept. The natural law school, rationalists, Kantian and Hegelian philosophy of law admit the existence of some principles outside the positive norms and superior to them. The principles of law are grounded on human reason and configure in term of values, the entire juridical order. Contrary, the positivist law school, Kelsian normativism considers that the principles are expressed by the law norms and in consequence there are no law principles outside the juridical norms' system. Eugeniu Speranţia established a correspondence between the law and the principles of law: "If the law appears as a total of social norms, mandatory, the unity of this totality is due to the consistency of all norms related to a minimum number of fundamental principles, they themselves having a maximum of logical affinity between them."[8] In connection to this problem, in Romanian literature in specialty is stated the idea that the principles of law are fundamental prescriptions of all juridical norms.[9] In another opinion, was considered that the principles of law orientate the elaboration and applying of juridical norms, they have the force of superior norms, to be found in the normative act texts, but can be inferred from the "permanent social values" when they are not expressly formulated by the positive law norms .[10]

We consider that the general principles of law are delimited by the positive norms of law, but undoubtedly there is a relation between the two realities. For instance, equality and freedom or equity

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[2] *Dicţionar explicativ al limbii române*, "*Romanian Language Explanatory Dictionary"*, The Socialist Republic of Romania, Bucharest, 1975, p.744.

[3] Ghe. C. Mihai, R I. Motica, *Fundamentele dreptului. Teoria şi filozofia dreptului,"The Fundamentals of Law. Theory and Philosophy of Law",* All Beck Publishing House, Bucharest, 1997, p.19

[4] Ibidem, *quoted works*, p.20

[5] M. Djuvara, *Teoria generală a dreptului. Drept raţional, izvoare şi drept pozitv, "General Theory of Law. Rational law, sources and positive law"* All Beck Publishing House, Bucharest, 1999, p.265.

[6] I. Kant, *Critica Raţiunii Pure, "Critique of Pure Reason"* Gold Encyclopedic Universe Publishing House, Bucharest, pp.276 – 277.

[7] On this meaning please see: I. Ceterchi, I. Craiovan, *Introducere în teoria generală a dreptului, "Introduction into General Theory of Law"* All Publishing House, Bucharest, 1993, p.30; Ghe. Boboş, *Teoria generală a statului şi dreptului, "General Theory of the State and Law",* Didactical and Pedagogical Publishing House, Bucharest, 1983, p.186; N. Popa, *Teoria generală a dreptului, "General Theory of Law",* Actami Publishing House, Bucharest, 1999, p.112-114; I. Craiovan, *Tratat elementar de teorie generală a dreptului,"Elementary Treaty of General Theory of Law"* All Beck Publishing House, Bucharest, 2001, p.209,; R. Motica, Gheorghe Mihai, T*eoria generală a dreptului, "General Theory of Law",* Alma Mater Publishing House, Timişoara, 1999, p.75.

[8] E. Speranţia, *Principii fundamentale de filozofie juridică,"Fundamental principles of Juridical Philosophy",* Cluj, 1936, pg.8. On this meaning see N. Popa, *quoted works* p.114.

[9] N. Popa, *quoted works*, p.114.

[10] I. Ceterchi, I. Craiovan, *quoted works*, p.30.

and justice are foundations of the values of social life. They need to find their juridical expression. In this way appears all kind of juridical concepts that are expressing these values, which concepts become foundations (principles) of law. From these principles the juridical norms derive. Unlike the other normative regulations, the general principles of law have an explanatory value as they contain the grounds of the existence and evolution of law. [11]

Alongside other authors[12], we assert our opinion, that the juridical norms are related to the principles of law in two ways: the norms contain and describe most of the principles; the principles are then accomplished by putting into practice the conduct prescribed by the norms. In relation to the principles, the juridical norms have a teleological, explanatory value, more restricted, the scope of the norms being the preservation of the social values, not to explain the causal reasoning of their existence. We may say that the most general principles of law coincide with the social values promoted by the law.

One can identify several most important features of the principle of law:

A) Any principle of law must be of the order of essence. It cannot be identified with a specific case or an individual appreciation of the juridical relations. The principle needs to represent the stability and balance of judicial relations, regardless of the variety of normative regulations or particular aspects specific to judicial reality. Consequently, the principle of law must be opposed to randomness and express the need as essence. Being of the essence order, the principles of law have a generalizing character, both on the variety of judicial relations, as well as for the norms of law. At the same time by expressing the essential and general of judicial reality, the principles of law are the grounds for other normative regulations.

There are important principles of law that do not depend on their consecration through judicial norms, yet the norm of law determines their definite content, in relation to the reference historical time.

B) The principles of law are consecrated and recognized through constitutions, laws, customs, jurisprudence, international deeds or formulated in the judicial doctrine.

With all variety of ways of consecration and recognition of the principles of law, it is obvious the necessity of at least of their recognition in order to be characterized and applied to the law system. This consecration or recognition is not enough to be doctrinaire, yet it must accomplish itself through norms and jurisprudence. It should however be applied a distinction between the consecration and recognition of law principle, and on the other side, on their application.

C) The principles of law represent values for the law system, as they express both the judicial ideal, as the objective requirements of society, have a regulatory role for the social relations. In case the norm is unclear or it does not exist, the solving of litigations can be achieved directly based on the general or special principles of law. As an ideal, they represent a basis for the coordination of the work for lawmaking.

The principles of law, by their nature, generality and depth, are themes for reflection, primarily for law's philosophy. Only according to their construction in the sphere of metaphysics of law, these principles can be applied in the general theory of law, can be normatively consecrated and applied to jurisprudence. Moreover, there is a dialectic cycle as the "meanings" of the principles of law, after the normative consecration and jurisprudential development, are to be elucidated also within the law philosophy.

Such a finding imposes nevertheless the distinction between what we may call: *constructed principles of law*, and on the other side *"metaphysical principles of law*. The distinction we propose has as philosophical substantiation, the distinction between 'constructed" and "given" in the law.

The constructed principles of law are by their nature, judicial rules of maximum generality, elaborated by the judicial norm or legislator, in all situations explicitly consecrated by the law norms. These principles can establish the internal structure of a group of judicial relationships, of a branch or even of the unitary law system. The following features can be identified: 1) are developed within the law, being as rule, the expression of manifestation of the will of legislator, consecrated in the norms of law: 2) are always expressed explicitly by judicial norms; 3) the work of interpretation and application of law is able to discover the meanings and determinations of law constructed principles, which obviously cannot exceed their conceptual limits, established by the legal norm. In this category we will find principles such as publicity of the hearing, the contradictoriness principle, of law and Constitution's supremacy, principle of law non-retroactivity, etc.

The metaphysical principles of the law may be considered as a "given" related to the judicial reality and by their nature are outside the law. At their origin they don't have a legal, normative, respectively jurisprudential, drafting. They are a transcendental 'given" and not transcendent of the law, therefore they are not "beyond" the sphere of law, but are "something else" in the justice system. In other words, they represent the essence of values of the law, without which this constructed reality cannot have an ontological dimension. Not being constructed, but being a metaphysical, transcendental 'given" of the law, they need not be explicitly expressed through judicial norms. The metaphysical principles may have an implicit existence, discovered and exploited in the work for interpretation of law. As an implicit "given"

[11] N. Popa, *quoted works* p.116-117.

[12] N. Popa, *quoted works* pp.116-117, R.I. Motica, Ghe. C. Mihai, *Teoria generală a dreptului. Curs universitar, "General Theory of Law. Academic course",* Alma Mater Publishing House, Timişoara, 1999, p.78.

and at the same time as a transcendental essence of law, these principles need to be found, at last, within the content of each judicial norm and in any act or manifestation that represents, where appropriate, the interpretation or application of the legal norm. It should be emphasized that the existence of the metaphysical principles grounds also the teleological nature of law, as any manifestation in the legal sphere, in order to be legitimate, needs to be adequate to such principles.

In our opinion, the metaphysical principles of the law are: *principle of justice; principle of truth; principle of equity and justice; principle of proportionality; principle of freedom.* In a future study, we will expose extensively the general considerations that allow us to identify the principles above mentioned as having a metaphysical and transcendental value in relation to the legal realities.[13]

The constitutional norms are provisions containing the formulation of the general principles of law or constitutional law. These norms legitimate the power of state, bases and organizing of the power, define some of the institutions or consecrate principles applicable to the fundamental rights. In this context we emphasize that the constitutional regulations containing the formulation of some law principles cannot be excluded from the sphere of the concept on judicial norm because here we find all features specific to them. [14]

The compliance of entire law with the fundamental Law is an important consequence of supremacy of the Constitution, and it should be understood not only through the correspondence in content and form of the lower norms as legal force with the constitutional ones, but also through the need to translate the constitutional regulations and rules (within their spirit and letter) in other judicial regulations.

To note as an important feature of the constitutional norms that arises from the principle of supremacy of fundamental law, the possibility and even the necessity to be translated, concretized through normative regulations, in other branches of the unified system of law. In relation to this element of specificity of the constitutional law norms, is necessary for the constituent legislator to establish a synthetic content, generalizing these norms' content, and not an analytical, procedural one. In the event that, when in the normative content of a constitution would prevail the descriptive, procedural character of the norms, this would lose too much of its constitutionalism finality, the one of being an essence, generalizing factor, for the whole law system. However, the generality of the constitutional law norm's formulation, would not exclude its clarity and precision. Therefore, any codifying work in the matter of constitutional law, is difficult as it should combine dialectically the generality specific to some norms containing law principles, and on the other side the clarity and precision, the last one absolutely necessary to ensure their correct application and to avoid thus, the arbitrariness or possibility for asserting in the name of some constitutional values, of any partisan political interests. This requirement's fulfilling, can be verified in the practice for transposing and interpretation of the constitutional norms met in all state authorities.

One of the most important problems to elucidate the specific of the constitutional norms' aims the answer to the question if all constitutional provisions contain legal norms. The constitutional provisions that aim the economical, social or financial system are norms of constitutional law with the value of a principle, and not mere political goals, as they regulate the conduct of the law subjects taking part in specific social relations. Likewise, the constitutional norms in question establish genuine legal rights and obligations for the law subjects. For example the constitutional obligation for the derived legislator (Parliament or Govern) like in the process of law making to comply these constitutional regulations, otherwise may intervene the sanction of unconstitutionality of the normative acts in question. We note in conclusion that all constitutional provisions contain legal norms because they have the essential features of a norm of law: prescribe the conduct of the subjects to whom they address and generate legal obligations, and such obligations' breaching may attract legal sanctions specific to constitutional law.

The logical-formal structure of the constitutional law needs to contain all three elements: hypothesis-provision-sanction. The main feature of these norms lies in the way the sanction is being expressed. Thus, for several provisions a single sanction may be present. Also there are specific sanctions in the constitutional law, for instance declaring as unconstitutional a legislative act or revocation of a state body. Given the structuring role of constitutional law for the entire law system, the logical-formal appreciation of the constitutional norms must also be made by reference to other categories of legal regulations. For the regulations of principle or of maximum generality contained in the fundamental law, some sanctions are included in the norms of other branches of law (civil law, criminal law, administrative law). In this regard, the solution of principle was correctly mentioned into the doctrine: "I think that sanctions are to be found even in the constitutional norms for the violation of any provision provided that the obligation or

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[13] For development see M. Andreescu , *Scurte consideraţii despre principiile dreptului şi filosofia dreptului . Brief considerations about the principles of law in Review* "The Law" no. 12/2012 pp 71-86

[14] I.. Muraru, E. S. Tănăsescu, *Drept constituţional şi instituţii politice, "Constitutional Law and Public Institutions".* C.H, Beck Publishing House, Bucharest, 2004, vol. I, p. 20;

G. Burdeu, *Droit constitutionnel et institutions politiques,* LG *"Constitutional Law and Public Institutions*". DJ, Paris, 1966, pp. 71-90.

entitlement is exactly identified, in other words the conduct of the subjects of law."[15]

Another element of particularity for the principles with legislative value of the constitutional law refers to the regulation subject. Without going into detail, we retain the idea contained in the contemporary doctrine, according to which the common element and proper only to social relations that form the regulation subject of the constitutional law norms, is that they appear in the process for establishing, maintaining and exercising of state power.[16]

All norms contained in the constitution are norms of constitutional law, and also principles of law, even if some of these regulate also the social relations specific to other law branches. Having into consideration that the constitutional law, in particular the constitution, contains norms with value of principle, referring not only to the organizing and functioning of state authorities but also referring to the social and economical system. In consequence, the subject for regulation of the constitutional law is formed by the social relations that appear during the process for the establishing, maintaining and exercising of state power, but also those referring to the bases of the power and bases for power organizing. These categories refer to the sovereignty of the people, characters attributed to the state, to the territory of population, included those referring to the fundamental features of social economical system.

From the technical, juridical point of view, the regulation object of the norms with principle value of the constitutional law and implicitly of a constitution, can be split into two categories of social relationships: a) specific relations of constitutional law that relate to the organizing and exercising of state power and cannot be a regulatory object for other juridical branches; b) double legal natured relationships, governed both by the constitutional law norms and by the norms of other law branches.[17] The existence of such legal relationships justifies by because between the branches of the law there is no rigid demarcation. One needs to consider also the superior legal force of the constitutional law norms, the criterion differentiating them from other norms of law, which confers a structuring value for entire law system.

III. CONCLUSIONS

Constitution is a law, but at the same time through its juridical force and content distinguishes from all other laws. At the same time, the fundamental law supremacy confers to it the quality of a primary formal source for all other branches of law.

In a comparative analysis of the regulations contained in the contemporary constitutions is noticed that the historical, political, national, cultural, religious etc. diversity of the states, does not directly result in a diversity of the legislative content for the fundamental laws. The content of the modern states' constitutions present many resemblances and sometimes wordings almost identical with some of the institutions regulated.[18] This resemblance is determined mainly by the identity of the regulatory object of the constitutional norms.

On the other side, the diversity in the normative content removes the idea of uniform standards generally valid for the contemporary constitutions. The diversity of normative content is a consequence of the fact that the fundamental law of the state is determined in terms of the content of social, political and economical realities, on the characters and attributes of the respective state, historically expressed and at the same time on the will of the constituting legislator, essentially a political will, at a certain historical moment.

Along with other authors, we believe that the scientific definition of constitution is the main criterion for identifying the normative content. Such a criterion ensures the generality necessary to give a scientific character to the scientific elaborations in the matter and it explains at the same time the regulatory unit but also the constitutional normative diversity.

For the purpose of this scientific approach, we retain the essence of every attempt to define the fundamental law namely: "The Constitution is a political and legal fundamental establishment of a state"[19]. In the legal acceptance, the fundamental law is the act through which it is determined the power statute and therewith all legal rules, having as object the regulation of the bases of power and bases for power organizing.

The legal concept of constitution can be expressed in two different meanings, respectively in a substantial and a formal meaning. Analyzed separately, the formal and material acceptation cannot be a sufficient criterion for identifying the normative content of the fundamental law. Accepting the formal criterion has as a consequence that the fundamental law could regulate any social relationship, regardless of their importance or object of regulation. [20] The material criterion is also unilateral as it excludes the procedural elements, required for a scientific

[15] Ibidem, *quoted works* p. 21.

[16] I. Muraru, E. S. Tănăsescu, *quoted works*, p. 14

[17] I. Muraru, E. S. Tănăsescu, *quoted works*, pp.16-18; Ghe. Iancu, *Drept constituţional şi instituţii politice*, *"Constitutional Law and Political Institutions"* Editura C.H.Beck. Bucharest, 2010 pp. 12-15

[18] C. Ionescu, *Tratat de drept constituţional contemporan, "Treaty of Constitutional Law and Political Institutions"* C.H.Beck Publishing House, Bucharest, 2008, p.208-209.

[19] I Deleanu, *Instituţii şi proceduri constituţionale ,"Institutions and Constitutional Procedures"* C.H. Beck Publishing House, Bucharest, 2008 p.88

[20] For example Swizerland Consitution, by article 25 bis states rules for cattle sacrificing.

characterization of the fundamental law. The scientific approach regarding the identification of the normative content of the constitution must consider cumulatively both the formal and the material acceptation to which the political dimension referred above, is added. Therefore, we consider one may identify three criteria in order to establish the normative content of a constitution:

The establishing of the normative content of constitution is made according to the specific, importance and value of the social relation regulated. We share the view expressed in the literature that, unlike other categories of legislative acts, the norms contained in the constitution should regulate the fundamental social relations that are essential for the establishing, maintaining and exercising of power, but also those referring to the bases for the power, respectively the bases for power organizing. Therefore, the constitutional norms are always principles of law having a decisive role in establishing and functioning of the government bodies and in determining the form of the state, namely its character and attributes.

The normative expression of the constitutional principles, themselves simple as a normative form, but complex in nature and in the content determined by the object of regulation, constitutes a source and the normative-value ground of the unity and simplicity of entire legislative system of the state. The reporting of legislator to the constitutional principles, not only for guaranteeing the simple formal correspondence between the judicial norm and the fundamental law, but mainly to legislate in respect to these principles and having as a finality their content, is a prerequisite to eliminate the diversity of norms, a natural consequence of the governors' excess of power in legislative matters. There are therefore two ways through which the power can legislate: the first that is disregarding the teleological reporting to the constitutional principles and in general to the principles of law, aiming only the formal correspondence with the constitutional norms, and the second one teleological oriented to the content, meaning and limits imposed by the principles of law. In the first case, the result is the normative diversity, lacking a rational, unifying factor; in the second hypothesis there is at least the possibility of achieving the simplicity and unity of the normative system within the content's complexity.

It is important to underline the constitutional dynamism. The fundamental law is a dynamic, opened act, and in a continuous crystallization process. The constitutional status is achieved through a continuous and complex process of interpretation and application of the texts contained in the body of the constitution by state authorities. Furthermore, the constitutional norms cannot and must not provide definitions. For instance also in Romania's constitution exist such concepts, definable by way of interpretation and forming an object of analysis for the Constitutional Court: "spirit of tolerance and mutual respect" (article 29, paragraph 3); "identity" (article 30, paragraph 6); "private life" (article 30, paragraph 6); "lawful state principles" (article 48, paragraph 2); "public interest" (article 44, paragraph 3); "proportionality and public moral" (article 53) or "extraordinary situations" (article 115, paragraph 4).

The normative content of constitution needs to be understood and determined by having into consideration the teleological criterion highlighted in the above stated definition. Namely, the fundamental law's structuring role for entire social, political and state system, guarantor of fundamental rights and liberties. The fundamental law must achieve the social dynamic balance but also the stability and institutional harmony, the efficient guaranteeing of the fundamental rights, essentially the real constitutional democracy requirements based on the values of the lawful state, on institutional and social balance and on proportionality[21].

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[21] For development regarding the application of the principle of constitutionality and proportionality in state organization of power, see M. Andreescu, *Principiul proporţionalităţii în dreptul constituţional, "Principle of proportionality and Constitutionality"* C.H. Beck Publishing House, Bucharest, 2007, pp.267-298.

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THE APPLICABILITY OF THE EU CHARTER OF FUNDAMENTAL RIGHTS: NATIONAL MEASURES

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Abstract

After the entry into force of the Lisbon Treaty on 1 December 2009, the European Union's Charter of Fundamental Rights ('the Charter') has found a place among the formal sources of EU law, and has become a standard of review for the validity of EU acts. It became legally binding for EU institutions, bodies, offices and agencies of the Union, but also to the Member States.

Even after the entry into force of the Charter', some doubts regarding its legal effects are still looming large. Among them is whether, and to what extent, the Charter applies to national measures that are connected to EU law but are not intended to implement it directly. This legal uncertainty affects the position of individuals seeking to assert their fundamental rights before a national judge. In particular, whereas the application of the Charter warrants disapplication of the conflicting national measures, the same remedy is often not available when plaintiffs rely only on other fundamental rights instruments (like the European Convention on Human Rights or national constitutions). There is no doubt that the borderline between EU law and national law is not always easy to establish in a concrete case.

This article discusses theoretical and practical problems arising out of the application and interpretation of Article 51(1) of the Charter, according to which the Charter is addressed to the Member States 'only when they are implementing Union law'.

Keywords: *Charter of Fundamental Rights; European Union Law; Fundamental Rights; European Union; Competences of the European Union; Court of Justice of European Union; Applicability of EU Charter at National Level.*

Introduction

After the entry into force of the Lisbon Treaty, the European Union's Charter of Fundamental Rights (the Charter)[1] has found a place among the formal sources of EU law, and has become a standard of review for the validity of European Union (EU) acts.

The original purpose of the European Union's Charter was to consolidate those fundamental rights applicable at the EU level into a single text "*to make their overriding importance and relevance more visible to the Union's citizens*". As such, it should have served as a showcase of the achievements of the EU in the field of human rights protection.[2]

With the entry into force of the EU's Lisbon Treaty on 1 December 2009, the Charter became legally binding for EU institutions and national governments, just like the EU Treaties themselves - the legal bedrock on which the EU's actions are based.[3]

One of the sticking-points in the negotiations on the Charter of the European Union[4] was the question of its applicability at national level. The Charter is addressed, first and foremost, to the EU institutions. It complements national systems and does not replace them. Member States are subject to their own constitutional systems and to the fundamental rights set out in these. Member States need only have regard to the Charter when their national measures implement EU law,[5] as stipulated in Article 51 of the Charter.[6]

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[1] Official Journal of the European Communities, C 364/1.

[2] This effort was premised on the reassuring assumption that the rights listed would not entail additional State duties; the modest purpose of the Charter, as reflected in the Preamble, was that of "*making those rights more visible*,"*i.e.* not to create them anew (nor to extend the existing ones). An accurate reconstruction of the origin of each right is provided in the Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), accounting for the "conservative" value of the Charter. A full list of the sources of the rights included in the Charter is set out in the updated "explanations" of Presidium. See OJ 2007 C 303/17.

[3] The Treaty of Lisbon not only makes the Charter a legally binding document but also endows it with the status of Union primary law. According to Article 6(1) TEU, as amended by the Treaty of Lisbon, the Charter 'shall have the same legal value as the Treaties'. It is noteworthy that Article 6(1) TEU also provides that the Charter shall be interpreted 'with due regard' to the Explanations which were drawn up as a way of providing guidance in its interpretation. The Explanations have been published as an annex to the Charter as adapted in 2007, [2007] OJ C303/717. See, e.g. Case C-279/09 *DEB*, judgment of 22 December 2010 nyr, para 32.

[4] The Charter was first proclaimed by the European Parliament, the Council and the Commission as an instrument of soft law, [2000] OJ C364/1. Article 6(1) of the TEU, as amended by the Treaty of Lisbon, refers to a slightly modified version ('as adapted at Strasbourg, on 12 December 2007'), reprinted in [2010] OJ C83/389, and makes it clear that the adapted Charter 'shall have the same legal value as the Treaties', in other words, have the status of Union primary law.

[5] The link between an alleged violation of the Charter and EU law will depend on the situation in question. For example, a connecting factor exist: when national legislation transposes and EU Directive in a way contrary to fundamental rights, when a public authority applies EU law in a manner contrary to fundamental rights, or when a final decision of national court applies or interprets EU law in a way contrary to fundamental rights.

[6] See Rosas, A.; Armati, L. EU Constitutional Law: An Introduction. Oxford: Hart Publishing, 2010, p. 147−151; Rosas, A.; Armati, L. EU Constitutional Law: An Introduction. 2nd rev edn. Oxford: Hart Publishing, 2012, p. 164−168 (forthcoming); Rosas, A.; Kaila, H. L'application

As is well known, the introduction of a fundamental rights regime into EU law is essentially a story of judge-made law. In 1969, the European Court of Justice (ECJ) recognised the importance of fundamental rights by holding that they form part of the general principles of Community law whose observance the Court ensures.[7] Some landmark judgments of the early 1970s developed and refined this approach.[8]

Later developments include political declarations made by the then Community institutions and the gradual insertion of fundamental rights and human rights clauses in the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC).[9]

Decisive steps have been taken towards a Europe of fundamental rights. The Charter has become legally binding[10] and the Union is going to accede to the European Convention on Human Rights (ECHR).[11]The European Parliament[12] and the European Council[13] have made promotion of fundamental rights in the Union one of their priorities for the future of the area of justice, freedom and security. There is now a member of the Commission with specific responsibility for the promotion of justice, fundamental rights and citizenship, and the members of the European Commission promised, in a solemn undertaking before the ECJ, to uphold the Charter.[14] More generally, the Lisbon Treaty is a major step forward in that it has extended the co-decision procedure, removed the pillar structure set up under the earlier Treaty, given the Court of Justice general responsibility in the field of freedom, security and justice, and confirmed the place of human rights at the heart of the Union's external action.

In addition, The Union's accession to the ECHR[15] was made obligatory by the Lisbon Treaty (Article 6(2) TEU) and will complement the system to protect fundamental rights by making the European Court of Human Rights competent to review Union acts. This external judicial review should further encourage the Union to follow an ambitious policy for fundamental rights: the more the Union tries to ensure that its measures are fully compliant with fundamental rights, the less likely it is to be censured by the European Court of Human Rights.

Finally, it should be noted that Article 6(3) TEU, as amended by the Treaty of Lisbon, preserves the idea, expressed in the case law of the ECJ since 1969, that fundamental rights constitute general principles of Union law. This arguably will mean that the rather open-ended list of sources of inspiration which the Court has relied upon to 'find' the general principles of Union law, including other human rights conventions than the European Convention, as well as the constitutional traditions common to the Member States, will not lose its relevance altogether. On the other hand, the Charter will arguably be much more important in guiding both the Union legislator and the EU Courts.[16]

1. The Charter and its content

The European Communities (now the European Union) were originally created as an international organization with an essentially economic scope of action. Initially, therefore, there was no perceived need for rules concerning respect for fundamental rights.

However, once the Court of Justice affirmed the principles of direct effect and of primacy of European law, according to which Community law takes

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de la Charte des droits fondamentaux par la Cour de justice: un premier bilan. Il diritto dell'Unione Europea. 2011, XVI: 19−20; Ladenburger, C. European Union Institutional Report. In: Laffranque, J. (ed.) The Protection of Fundamental Rights Post-Lisbon, Reports of the XXV FIDE Congress Tallinn 2012. Vol 1.

[7] Case 29/69 *Stauder* [1969] ECR 419.

[8] See, in particular, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case 4/73 *Nold* [1974] ECR 491.

[9] See the preamble of the Single European Act of 1987 (http://www.civitas.org.uk/eufacts/FSTREAT/TR2.php) and Art. F of the TEU (later to become Art. 6 TEU), established by the Treaty of Maastricht of 1992 (Official EN Journal of Wuropean Union C 326/13)

[10]Article 6(1) of the TEU. In addition, Article 6(3) reaffirms that fundamental rights as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States are general principles of EU law.

[11] Article 6(2) TEU.

[12] European Parliament resolution of 25 November 2009 on the Communication from the Commission – An area of freedom, security and justice serving the citizen – Stockholm programme, P7_TA(2009)0090.

[13] Stockholm Programme, OJ C 115, 4.5.2010.

[14] Text of the solemn undertaking:

I solemnly undertake:

- to respect the Treaties and the Charter of Fundamental Rights of the European Union in the fulfilment of all my duties;
- to be completely independent in carrying out my responsibilities, in the general interest of the Union;
- in the performance of my tasks, neither to seek nor to take instructions from any Government or from any other institution ,body, office or entity;
- to refrain from any action incompatible withmy duties or the performance of my tasks.

I formally note the undertaking of each Member State to respect this principle and not to seek to influence Members of the Commission in the performance of their tasks. I further undertake to respect, both during and after my term of office, the obligation arising there from, and in particular the duty to behave with integrity and discretion as regards the acceptance, after I have ceased to hold office, of certain appointments or benefits.

[15] See http://human-rights-convention.org.

[16] The term 'Union Courts' refers, apart from the ECJ, to the General Court (previously the Court of First Instance) and the EU Civil Service Tribunal, which are all seated in Luxembourg. Here, the term does not refer to national courts of the EU Member

States, although they may be viewed as EU courts in the large sense or at least as courts which are part of the EU judicial system.

precedence over domestic law,[17] certain national courts began to express concerns about the effects which such case-law might have on the protection of constitutional values.[18] In response to this, in 1974 the German[19] and Italian[20] constitutional courts each adopted a judgment in which they asserted their power to review European law in order to ensure its consistency with constitutional rights.

At the same time, the ECJ developed its own case-law on the role of fundamental rights in the European legal order. As early as 1969 it recognized that fundamental human rights were 'enshrined in the general principles of Community law' and, as such, protected by the Court itself.[21] Its subsequent reaffirmation of the same principle eventually led the German Constitutional Court to adopt a more nuanced approach, recognizing that the ECJ ensured a level of protection of fundamental rights substantially similar to that required by the national constitution, and, thus, that there was no need to verify the compatibility of every piece of Community legislation with the constitution.[22]

For a long time, the protection of fundamental rights against action by the Communities was therefore left to the ECJ, which elaborated a catalogue of rights drawn from the general principles of Community law and from the common constitutional traditions of the Member States. [23]

The Charter did not invent any new rights, but certainly smuggled into the Union some that had not been previously contemplated as Union rights *per se*. The drafters put together civil, political and cultural rights, on the one hand, and a selection of social and economic rights, on the other hand.[24]

This approach had been deliberately avoided in previous codification efforts[25]). The classic (and simplistic) view is that civil rights and liberties mostly require that States abstain from acting against them (a negative obligation), whereas economic and social rights impose a positive obligation on States to provide their citizens with tangible benefits, through which the enjoyment of those rights is possible. Accordingly, States are reluctant to enter into commitments.[26]

In fact, the reality now might be a little different, and the issue of enforceability of positive obligations might indeed arise. Concern about the direct invocability of certain norms is, in fact, visible in the Charter itself, which specifies that its provisions can be either rights or principles (or both). The main purpose of this distinction was clearly to single out those clauses that could not be deemed directly enforceable, and Art. 52(5) – a clause that was introduced at the request of the United Kingdom – tries to make this point painstakingly clear.

However, in order for this distinction to be relevant a head-count would be necessary: which of the provisions are rules and which are principles? The

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[17] Costa v. ENEL, Case 6/64.

[18] If European law was to prevail even over domestic constitutional law, it would become possible for it to breach the fundamental rights granted by national constitutions.

[19] See Solange I - Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel, decision of 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540.

[20] See *Frontini v Ministero delle Finanze* [1974] 2 CMLR 372. The *Frontini* case (1973) is of key significance, primarily for what has become known as the "Frontini Re serve". In this case, the CCI proclaimed that limitations on Italian state sovereignty imposed by the EC, are legitimate only in areas which are explicitly set out in the 1956 EC Treaty. More specifically, the *Frontini* case declared that European law can force the Italian national courts to revoke national laws that contradict European law; but, importantly, that this cannot apply to national laws that regulate the basic principles of the Italian constitution.

[21] Ibid. Supra 8.

[22] See Solange II - Wünsche Handelsgesellschaft decision of 22 October 1986, BVerfGE 73, 339, case number: 2 BvR 197/83, Europäische Grundrechte-Zeitschrift, 1987, 1, [1987] 3 CMLR 225, noted by Frowein (1988) 25 CMLRev 201.

[23] However, the absence of an explicit, written catalogue of fundamental rights, binding on the European Community and easily accessible to citizens, remained an issue of concern. Two main proposals were made on repeated occasions with the aim of filling this legislative gap. The first was that the European Community could accede to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), an already existing regional instrument aimed at protecting human rights, whose correct application by States Parties is supervised by the European Court of Human Rights. This option, however, was ruled out after the Court of Justice rendered an Opinion [2/94], according to which the Community lacked the competence to accede to the Convention. As a consequence, this avenue could only be pursued after the Treaties had been amended. The necessary amendments were finally adopted with the entry into force of the Treaty of Lisbon. Article 6 TEU now requires the Union to accede to the ECHR.The other proposal was that the Community should adopt its own Charter of Fundamental Rights, granting the Court of Justice the power to ensure its correct implementation. This approach was discussed on a number of occasions over the years and was proposed again during the 1999 European Council meeting in Cologne. See Conclusions of the European Council in Tampere, 15 and 16 October 1999, Annex ("Composition, Method of Work and Practical Arrangements for the Body to Elaborate a Draft EU Charter of Fundamental Rights, As Set Out in the Cologne Conclusions"). Meetings of the body responsible for preparing the draft Charter (renamed the "Convention") took taken place from December 1999 until the autumn of 2000. After agreement by the Convention of a final text of the Charter, the Presidents of the European Parliament, the Council of the European Union and the European Commission proclaimed the Charter on the 7th December 2000 on the fringes of the Nice European Council. See [2000] OJ C 364/8, 18 December 2000.

[24] The Charter, as now contained in the Constitution, is divided into seven parts: Title I: Dignity (Articles 11-61 to 11-65); Title II: Freedoms (Articles 11-66 to 11-79); Title III: Equality (Articles 11-80 to 1-86); Title IV: Solidarity (Articles 11-87 to 11-98); Title V: Citizens' Rights (Articles 11-99 to 11-106); Title VI: Justice (Articles 11-107 to 11-110); and Title VII: Final Dispositions (Articles 11-111 to 11-114). It includes not only restatements of traditional rights, but also innovations.

[25] ECHR is mostly concerned with the former kind of rights, but consider also the separation of the 1966 UN Covenants Namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

[26] Instead, the concept that no new State obligations could be derived from the Charter prevented at the outset the trite debate about negative and positive obligations, and defused concerns that positive rights, once written into the Charter, might give rise to obligations enforceable in courts.

Charter is silent more ambivalent on this point, and the Presidium's explanations failed to establish clear distinctions.[27] Ultimately, it seems to be something for case-law to decide upon; the courts will clarify which principles deserve direct application, *i.e.* which economic rights impose, except where otherwise noted content on this site is licensed under a Creative Commons 2.5 Italy License E – 26 positive obligations on Member States.[28]

2. Interpretation of the EU Charter

In order to understand the impact of the Charter on EU law the scope of it has to be determined, both regarding when it is applicable and how the provisions within it should be interpreted. According to Article 51 para 1 of the Charter, the provisions of the Charter are addressed to the Member States only when they are implementing Union law. Explanations relating to the Charter ,[29] which (according to the Article 6 of the TEU and Article 52 para 7 of the Charter) provide guidance in the interpretation of the Charter, state that as regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law. The Explanations are used to show that case-law pre-dating the Charter is applicable in interpreting the meaning of the provisions. The Court of Justice confirmed this case-law in the following terms:

'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...'.[30] This case-law includes two situations where the Charter imposes obligations on the member states, in accordance with Article 51 of the Charter. The first one is when there is an EU obligation that requires the member states to take actions; the second one is when a member state derogates from EU law. When the member states implement legislation that does not follow from an EU law obligation the Charter is not applicable.

In *Wachauf*[31] and *Karlsson*[32], which both dealt with fundamental rights based on the general principles, the CJEU held that those rights where binding upon the member states when applying a normative scheme put in place by the EU legislator.[33] According to Lenaerts the *ERT* case[34] shows, contrary to the view of other scholars, that the Charter in fact does apply when the member states derogate from EU law.[35] The *ERT* case is mentioned explicitly in the Explanations concerning Article 51, which supports that the fundamental rights in the Charter must be respected when member states derogate from EU law.

Following the rules relating to the application of the Charter, the Charter shall not be applicable as to the "exclusive Member States competences" or belonging to their "reserved domain". But even in the fields where Member States remain competent to regulate while the Union is not competent to lay down rules, the Member States must exercise their competence with regard to Union law.[36]

ECJ in the cases of *Melloni*[37] and *Åkerberg Fransson*[38] have received due attention. Both cases dealt with the interpretation of the Charter, and hence with the future course fundamental rights protection at the EU level is likely to take. In *Melloni*, first, the ECJ ruled that in principle Member States are allowed to apply (higher) national fundamental rights standards in matters falling within the reach of EU law, but only 'provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not

[27] A very accurate appraisal of the Praesidium's explanations, which also accounts for their ambiguity on the right/principle divide, is provided in Sciarabba: 2005.

[28] On the similar duty as undertaken by the ECtHR (through the expansive use of Arts. 2, 3, and 8 of the Convention, and through the development of new safeguards for non-discrimination and procedural fairness (Arts. 6 and 14).

[29] Explanations relating to the Charter of Fundamental Rights. OJ C 303, 14.12.2007, p. 17 - 36. The Explanations relating to the Charter are not legally binding but an interpretative tool. The interpretative value of the Explanations should be higher than that of *travaux préparatoires* since the authors to the Treaty of Lisbon and those of the Charter has stressed the importance of the Explanations. Hence, in practice the CJEU cannot interpret the Charter contrary to the Explanations without engaging in judicial activism.

[30] Judgment of 13 April 2000 in a case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds. This rule applies to the central authorities of the Member States as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

[31] Case 5/88 [1989].

[32] Case C-292/97 [2000].

[33] As regards the derogation situation Lord Goldsmiot (The Charter of Rights, Freedoms and Principles, Common Market Review 38: 1201-1216, 2001) and former Advocate General Jacobs (J.G Jacobs, Human Rights in the European Union: The role of the Court of Justice, European Law Review, No. 4, 331-341, 2001) among others have argued that the Charter should not apply, while the general principles should apply.

[34] Case C-260/89 [1991].

[35] In the *ERT* case the ECJ states that when deciding whether rules that obstruct the freedom to provide services can be justified according to EU law it has to be 'interpreted in the light of general principles of law and in particular of fundamental rights'. The *ERT* case also confirms that fundamental rights were considered general principles before the Charter was adopted. When member states derogate from EU law, the general principles demand that the fundamental rights are respected.

[36] See, for example: Judgment of the Court of Justice of 2 October 2003 in case *C-148/02 Carlos Garcia Avello v Belgian State*, European Court reports 2003 Page I-11613, paragraph 25. Judgment of the Court of Justice of 12 May 2011 in a case C-391/09 *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others*, paragraph 63.

[37] Case C-399/11 [2013].

[38] Case C-617/10 [2013].

thereby compromised'.[39] Secondly, in *Åkerberg Fransson* the ECJ opted for a wide interpretation of Article 51(1) of the Charter. This section holds that the provisions of the Charter are addressed 'to the Member States only when they are implementing Union law'.[40]

According to Article 6 of the TEU, the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. Article 51 para 2 of the Charter confirms that the Charter may not have the effect on extending the field of application of Union law beyond the powers of the Union as defined in the Treaties. But, extending the scope of application of the Charter by the way of extending the scope of application of EU law is not excluded by these provisions. It follows that in order the Charter to be applied the link with EU law has to be established. Whenever a link can be established between a national measure and the application of the provisions of EU law (e.g., with respect to EU law on European citizenship, by moving to or visiting another Member State – cross-border link), the protection of fundamental rights at EU level is activated and thus the Charter of Fundamental rights should be applied. If, such a link is not found, the Charter will not apply. Extending the field (scope) of application of the Union law has the effect of extending the scope of application of the Charter.

Finally, the relationship between ECHR and the Charter is mainly regulated in Article 52(3) which "is intended to ensure the necessary consistency between the Charter and the ECHR", "without thereby adversely affecting the autonomy of [EU] law and of that of the [ECJ]". The autonomy of EU law could mainly be grounded on the principle "of the more extensive protection", which means that the provisions formally affirm that the level of protection maintained under EU law could never be lower than that guaranteed by the ECHR. In light of the Explanations relating to the Charter the provisions are formulated in a way allowing the Union to guarantee more extensive protection and never offer a lower protection of the rights than contained in ECHR.

As a final point, the Charter does not pose a serious threat towards the national constitutions. The implementation of the Charter does not alter the division of competence between the Union and the member states. Also, the existence of the Charter is not aimed to extend the competence of the EU institutions, especially that of the ECJ.[41]

Applicability of the Charter to the Member States

The question of application of Union fundamental rights at Member States' level has caused more discussion and concerns. When should national courts and authorities apply the Charter, and Union fundamental rights in general, rather than fundamental rights recognised in the national constitution and in international human rights instruments binding on the Member State in question?

In the light of the above, it should not have come as a surprise to anyone when the ECJ, in *Wachauf*, confirmed that Union fundamental rights 'are also binding on the Member States when they implement Community rules'.[42] In *ERT* and subsequently, the test was formulated as a requirement that the national measures 'fall within the scope of Community law'.[43] Contrary to what some of the discussions at the Convention which prepared the Charter of Fundamental Rights appeared to assume,[44] the Court did not launch any radical new principle in these judgments but simply stated the obvious.

That said, it has not always been easy to draw the line separating those national rules that fall within the scope of Union law from those falling outside that scope. In some cases, the ECJ has concluded that the link between the national measures and Union law was not sufficiently direct or strong and that the national measure thus fell outside the scope of Union law (perhaps the most well-known case concerned a prisoner who attempted to invoke his Union law right to move and reside freely as a basis for contesting his prison sentence).[45] A number of examples best illustrate the issues that can arise.[46]

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[39] Para 60.

[40] However, in *Åkerberg* theECJ did not consider this reason to refrain from reviewing an issue concerning an offence of national value-added tax evasion and the application of the *ne bis in idem* principle in Sweden.

[41] It is also worth noting that the translations to the Charter are not coherent between the language versions. This will lead to problems when it comes to how the Charter should be interpreted in practice when the formulations are dissimilar between the member states. For how the ECJ handles this issue, see the recent judgment in *Åklagare v. Hans Åkerberg Fransson* (Case C-617/10 [2013]).

[42] Case 5/88 *Wachauf* [1989] ECR 2607, para 19. See also Case 36/75 *Rutili* [1995] ECR, 1219; Case 63/83 *Kent Kirk* [1984] ECR 2689; Case 249/86 *Commission v. Germany* [1989] ECR 1263.

[43] Case C-260/89 *Elliniki Radiophonia Tileorassi* (ERT) [1991] ECR I-2925. See also Case C-159/90 *Grogan* [1991] ECR I-4605, para. 31.

[44] Rosas, A. Is the EU a Human Rights Organisation? *CLEER Working Papers 2011/1.* The Hague: T.M.C Asser Institute, 2011.

See, e.g. de Búrca, G. The Drafting of the European Union Charter of Fundamental Rights. *European Law Review.* 2001, 26: 126, 136; Eeckhout, P. The EU Charter of Fundamental Rights and the Federal Question. *Common Market Law Review.* 2002, 39: 945, 954.

[45] Case C-299/95 *Kremzov* [1997] ECR I-2405. See also Case C-159/90 *Grogan, supra* note 19; Case C-306/96 *Annibaldi* [1997] ECR I-7493.

[46] See Case C-60/00 *Carpenter* [2002] ECR I-6279, paras 37–40; Case C-117/01 *KB* [2004] ECR I-541, paras 30–34. In the case of *Goodwin v UK* and *I v UK*, judgment of 11 July 2002, the European Court of Human Rights had held that the fact that it was impossible for a transsexual to marry a person of the sex to which he or she had belonged prior to gender reassignment was a breach of the right to marry; Case C-71/02 *Karner* [2004] ECR I-3025; Case C-144/04 *Mangold* [2005] ECR I-9981; Case C-555/07 *Kücükdeveci* [2010] ECR I-365. In *Kücükdeveci*, the problem did not arise in the same way as the deadline for the implementation of Directive 2000/78 had expired. These two cases also raise the question of horizontal application of Union fundamental rights; and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed term work concluded by ETUC, UNICE and CEEP, [1999] OJ L175/43.

National judges are increasingly aware of the Charter's impact, and they seek guidance from the Court on its application and interpretation under the preliminary rulings procedure.[47] To determine whether a situation falls within the scope of the Charter, as defined in its Article 51, the Court examines, in particular, whether the relevant national legislation is intended to implement a provision of EU law, the nature of the legislation, whether it pursues objectives other than those covered by EU law, and also whether there are specific rules of EU law on the matter or which may affect it.[48]

Three recent cases are good examples of situations where the Court held that the Member States were not implementing EU law, and thus where the Charter did not apply.

First, in *Pringle*[49]*Pringle*4, the Court held that when Member States established a permanent crisis resolution mechanism for the Eurozone countries, they were not implementing EU law. The Treaties do not confer any specific competence on the EU to establish such a mechanism. Consequently, Member States were not implementing EU law within the meaning of Article 51, and the Charter did not apply.

Second, in *Fierro and Marmorale*[50],*Marmorale*5, the Court examined Italian legislation which requires a deed of sale of real estate to be annulled if the real estate was modified without regard to town planning laws. Such automatic annulment hampers the exercise of the right to property (Article 17[51]). The Court declared the case inadmissible as there was no link between national laws on town planning and EU law.

Third, in *Cholakova*[52], the Court examined a situation where the Bulgarian police had arrested Mrs Cholakova because she had refused to present her identity card during a police check. The Court held that, as Mrs. Cholakova had not shown an intention to leave Bulgarian territory, the case was of a purely national nature. The Court held that it was not competent to deal with the case and declared it inadmissible.

There are currently three situations in which it is clear that the application of the Charter is triggered.

First, 'implementing EU law' covers a Member State's legislative activity and judicial and administrative practices when fulfilling obligations under EU law. This is the case, for instance, when Member States ensure effective judicial protection for safeguarding rights which individuals derive from EU law, as they are obliged to do under Article 19 (1) TEU. The Free Movement Directive[53] permits Member States to restrict the freedom of movement of EU citizens on grounds of public policy, public security or public health. The Court held in the *ZZ* case that the basis for such a refusal must be disclosed to the person concerned.[54] In this case, the grounds for a decision refusing entry into the UK were not disclosed for reasons of national security. The Court confirmed that a person has the right to be informed of the basis for a decision to refuse entry, as the protection of national security cannot deny the right to a fair hearing, rendering the right to redress ineffective (Article 47).

Second, the Court established that the Charter applies when a Member Stat authority exercises a discretion that is vested in it by virtue of EU law. In *Kaveh Puid*[55], the Court confirmed its previously established case-law[56]and held that a Member State must not transfer an asylum seeker to the Member State initially identified as responsible if there are substantial grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment, in violation of Article 4 of the Charter.

Finally, national measures linked to the disbursement of EU funds under shared management may constitute implementation of EU law. In *Blanka Soukupová*[57]*Soukupová*12, the Court held that in implementing Council Regulation 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund Member States are required to respect the principles of equal treatment and nondiscrimination, enshrined in Articles 20, 21(1) and 23 of the Charter. When providing early retirement support for elderly farmers, Member States are required to ensure equal treatment between women and men, and to prohibit any discrimination on grounds of gender.

Conclusion

The Charter is binding on the Member States when they act within the scope of application of Union law. Member States are binding by the provisions of the Charter whenever the link with EU law is established. In such case, national measures, even the ones falling within the exclusive competences of the Member States, has to respect the provisions of the Charter.

[47] See Article 267 TFEU.
[48] ECJ, C-309/96 *Annibaldi* 18.12.1997, §§ 21 to 23, and C-40/11 *Iida*, 8.11.2012, § 79.
[49] ECJ, C-370/12, *Thomas Pringle*, 27.11.2012.
[50] ECJ, C-106/13, *Francesco Fierro and Fabiana Marmorale v Edoardo Ronchi and Cosimo Scocozza*, 30.5.2013.
[51] Subsequent articles referred to in brackets are Charter articles.
[52] ECJ, C-14/13, *Gena Ivanova Cholakova*, 6.6.2013.
[53] Directive 2004/38/EC, OJ 2004 L 158, p. 77.
[54] ECJ, C-300/11 *ZZ v Secretary of State for the Home Department*, 4.6.2013.
[55]ECJ, C-4/11 *Bundesrepublik Deutschland v Kaveh Puid*, 14.11.2013.
[56] ECJ, joined cases C-411/10 and C-493/10, *NS v Secretary of State for the Home Department*, 21.12.2011.
[57] ECJ, C-401/11 *Blanka Soukupová*, 11.04.2013.

In 2013 the Court dealt with a large number of cases concerning the Charter's applicability at national level. This highlights the Charter's increasing interaction with national legal systems. In this context, the *Åkerberg Fransson* judgment plays an important role in further defining the Charter's application in the Member States by national judges, even though the case law in this respect is still evolving and likely to be continuously refined. National judges are key actors in giving concrete effect to the rights and freedoms enshrined in the Charter, as they directly ensure that individuals obtain full redress in cases where fundamental rights within the scope of EU law have not been respected.

EU institutions have made significant efforts to ensure the consistent application of the Charter's provisions since it gained legally binding force as primary EU law. Any impact on fundamental rights needs to be carefully considered during legislative procedures, especially at the stage of elaborating final compromise solutions. A strong inter-institutional commitment is required to achieve this goal. EU legal acts can also be challenged before the Court for any infringements of fundamental rights. The Court's scrutiny extends to Member States as well, but only where they implement EU law. Outside that area, Member States apply their own national fundamental rights systems. This is a clear and deliberate choice made by the Member States when designing the Charter and the Treaty. The EU institutions must go further than merely respecting the legal requirements following from the Charter. They must continue fulfilling the political task of promoting a fundamental rights culture for all, citizens, economic actors and public authorities alike. The fact that the Commission has received more than 3 000 letters from the general public regarding the respect of fundamental rights indicates that individuals are aware of their rights and demand respect for them. The Commission supports their endeavours.[58]

It is not yet clear how far the ECJ will go to interpret the Charter favourably in the application of EU law, whether it will engage with principles in a normative fashion or actually add nothing to the existing law. However it has already started to use the Charter in its consideration of cases, both indirectly and upon application.

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VALUES AND VALORIZATION

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Abstract

I live with the feeling that, in the past few years, Romania has been a drifting ship. We do not know where is it going, nor the place it will arrive at. Like any individual endowed with reason, I wonder why chaos took over this society and, if I would have the power to change anything, what would be the solution to less troubled waters. I think we lost our way because we forgot to always refer to the values that should guide us ... or because we refer too often to non-values. I think we could find our way and stop wandering if we will rely our evolution on values, if we will teach our children from a young age what values and non-values are and if we could run our existence in the spirit of a real value horizon.

People live together, not just coexist, as so deeply professor Gheorghe Mihai highlighted[1]. Coexistence is specific to herds, packs, hordes; but human community means collaboration, cooperation, consensualisation, which implies a consciousness towards values. "What is missing now to the human society is a behavior that relates to a code of virtue"[2].

Moral values are the support for the legal values. Unfortunately, today, it seems to me that values are inverted and that the belief in the perfectibility of the individual (and therefore the perfectibility of law) is increasingly being questioned. Contemporary society is characterized by lack of motivation, lack of a strategy and the absence of any ideals. In this context, I believe that the individual today feels the necessity of some value referrences more acutely, whilst the society needs a law deeply based on moral values. As morality itself contributes to the valorization of the law, I think that moral appeal is more necessary today than yesterday, as a remedy for the individual and, consequently, the law to overcome their crisis.

For all these reasons and also because I share the view that "the concrete law is not viable without values and these values are always expressed in the defining principles of a law system"[3], I felt the need to write about values and valuation.

Keywords: *value, valuation, law crisis, principle, ideal.*

INTRODUCTION

The rules of cohabitation within the society are not spontaneously produced by the intuition. Mircea Djuvara noted that „the concept of value is present within all the legal relations and therefore it can be said that the law in its integrity is nothing but a research of values. They are classified in increasingly higher values, having the same nature as the very idea of obligation, being set out as unconditional values"[4].

First of all, the values concern the process of creation of the law by being valorized by means of the enacted rules of law. The lawmaker creates the ideas within an axiological area. The law always starts from the social actions, but it also means legal consciousness, ideals and social values. Ion Craiovan noted that an action becomes a value as soon as it falls under the dynamic field of our interests and opinions[5]. Each and very rule outlines social values, defined as „appreciation criteria, standards, norms" which are values representing "fundamental principles of choice" for human life. As soon as the values acquire legal expression, they are promoted and protected by the rules of law they translate. Within the society, the values motivate the individual, guide it and grant reference models and systems to it. Therefore, we speak about the perception of the values in what concerns the individual and the valorization function of the values on the human inwardness.

The specific element of the society is the praxio-axiological cooperation of its members. Gheorghe Mihai deeply outlines that people do not coexist, the people live together[6]. The coexistence is specific to the herds, packs or hordes; but the human community means collaboration, cooperation, unity which implies the value awareness. The individuals, as free beings endowed with sense and consciousness, choose their behaviors, measure their actions, relate to behavior standards and assess the consequences of their actions. Therefore, „the feature of the individual of being free, able to choose based on a rational purpose is the one that differentiates so radically the animal from the human being".

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[1] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, page 164.

[2] Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului*, C. H. Beck Publishing House, Bucharest, 2006, page 11.

[3] Gheorghe Mihai, *Fundamentele dreptului*, vol. I - II, All Beck Publishing House, Bucharest, 2003, page 167.

[4] Mircea Djuvara, *Teoria generală a dreptului (Enciclopedie juridică)***,** (General Theory of Law (Legal Encyclopedia)), All Publishing House Bucharest, 1995, page 216.

[5] Ion Craiovan, *Tratat de teoria generală a dreptului*, (The Treaty on the General Theory of Law), Universul Juridic Publishing House, Bucharest, 2007, page 480.

[6] Gheorghe Mihai, *Fundamentele dreptului*, (The Basis of Law), vol. I - II, All Beck Publishing House, Bucharest, 2003, page 164 and the following ones.

CONTENT

The axiological dimension of the law represented a point of interest for the whole philosophy of the law. Ioan Humă outlines that the legal axiological condition is the key condition of the law. The substance of the law lies not only in the normative dimension of the law, but also in the valuable contents which confer the axiological meaning to the field of the law. Therefore, the field of the law and especially its regulatory framework "falls under the scope of the creative tension between what it actually is and what it should be, between the reality and the ideal and between the fact of life and the value. To remove the law from the axiological field means to reduce it to a pile of facts, of things belonging to the entropic fact of life and not to the human action able to model the social reality and the human being itself"[7].

The principles of the law are the expression of the values promoted and defended by means of the law. According to J. Locke, „the principles have such an influence on our opinions that we usually judge the truth and weigh the probability by means of them to such extent that all that is not compatible with them is so far from us that we do not even think it can be possible"[8].

Such great is the importance of the values, that they classify any positive law from the axiological point of view. However, the people do not cohabit only legally, but also morally, politically and religiously. The law does not exhaust the wealth of the horizon of the values: besides the independent legal values which build the rules of law, there are also other values, namely non-legal values which are necessary for the human coexistence and which the law takes over, legalizes, promotes and defends by means of its rules. „The philosophy of the value is the only one which can justify both the general human nature of the value and the fact that the different types of value are complementary, so that if the human being does not cultivate values it is unilateral, poor and in the end comes to be inauthentic"[9].

Therefore, the legal axiology does not investigate only the legal values. Since it aims the legalization of the other social values, the principles represent the field where the law meets the philosophy, moral, politics and the other social fields. The circumscription of the content and of the purpose of the general principles of law inevitably engages the theory in formulating valuable statements which are opened to the philosophical horizon so that the real penetration of their meanings necessarily implies the philosophical meditation: the philosopher is the one who "queries the whole law, the concept of the law while the lawyer "queries the concreteness of the law"[10]. Ion Craiovan noted that the philosophical universe of the value, „attracts, repulses or causes reluctance, but it proves to be unavoidable by the human being within its permanent attempt of self-definition and construction"[11].

Ioan Humă outlined that the philosophical truth is different from the scientific truth due to the fact that, by studying not the thing itself but its impact on our spirit, the philosophical truth confers value[12]. Notwithstanding, the author establishes that the two subjects are complementary: „the science of the law certifies the philosophy of the law and the latter is nourished by the living truths of the former".

The ethics also represents an axiological criterion of the law. There are several law principles that claim the defense of certain values coming from the moral; therefore, the fairness, dignity, the good and the useful thing, the truth and the good faith are categories of the moral. Sometimes, the doctrine assesses the individual itself as a value, seeking answers to the question of whether the individual as a distinct personality is or has value. Therefore, according to Ion Craiovan, „the human being creates values and creates itself by means of the values which become coordinates of the human action and ontological determinations of the human condition".

The moral values represent the basis of the legal values. In our opinion, the two social fields, namely the law and the moral are complementary in the field of the law and they merge in order to achieve the scopes of the society without being mutually exclusive. However, within the accepted legal principle, the existence of the law was sometimes perceived as a subsidiary intervention: „the law exists as long as the individuals are incapable of morality, in its meaning of virtue"[13]. We believe that the substance of the law is not the coercion, the perfection being achieved by means of the valorization function of the moral within the law. First of all, the law is claimed in order to educate, to valorize and to prevent (this is why the majority of the individuals comply with the normative prescription) and only to the extent necessary the law is claimed in order to coerce and to punish.

The distinction of perspective between the law and the moral in terms of the value consists in the fact

[7] Ioan Humă, *Teorie şi filosofie în orizontul de cunoaştere a fenomenului juridic*, în Studii de Drept Românesc, (Theory and philosophy in the horizon of the knowledge of the legal phenomenon in Romanian Law Studies) year 17 (50), no. 3-4/2005, page 264.

[8] *Apud* Dumitru Mazilu, *Teoria generală a dreptului*, (General Theory of Law), All Beck Publishing House, Bucharest, 1999, page 126.

[9] Ioan N. Roşca, *Introducere în axiologie. O abordare istorică şi sistematică*, (Introduction to axiology. An historical and systematic approach), Fundaţia România de Mâine Publishing House, Bucharest, 2002, Foreword.

[10] Gheorghe Mihai, *Fundamentele dreptului*, (The Basis of Law), vol. I - II, All Beck Publishing House, Bucharest, 2003, page 7.

[11] Ion Craiovan, *Tratat de teoria generală a dreptului*, (The Treaty on the General Theory of Law), Universul Juridic Publishing House, Bucharest, 2007, page 478.

[12] Ioan Humă, *Teorie şi filosofie în orizontul de cunoaştere a fenomenului juridic*, în Studii de Drept Românesc, (Theory and philosophy in the horizon of the knowledge of the legal phenomenon in Romanian Law Studies) year 17 (50), no 3-4/2005, page 260.

[13] *Idem*, page 33.

that "the moral admission of the value of the human life is universal and absolute and no speculative derogation of it can affect its substance, while the legal admission of the same vale is suddenly neither universal nor absolute as long as the same lawmaker falls in contradiction in the same respect"[14]. Therefore, we understand that what is important is the admission of the values, not the way they emerge within a positive law system which changes from an era to another, but within their logical anteriority, the everlasting values of the founding principles of the positive law being the ones that really matter. In what concerns the political influence, the principles of law are "the result of the continuous and necessary observations of the social needs and none of these principles represents just the result of the abstract speculation"[15]. Before being embodied into a principle of law, a certain principle represents the object of the political ideologies; up to the extent the idea takes shape in the common legal consciousness of the society, the concept sets oneself up as a principle of law, being then translated into the rules of law. According to Ion Craiovan, the political values such as peace, freedom, equality, independence express the aims of the social-political system, the content and the structure of the power, the mechanisms of exercising the political leadership and ideologies[16].

According to Montesquieu, to pretend that the justice exists only if the positive law discloses it would be as absurd as if someone pretended that the radii of the same circle were not equal before drawing the circumference.

The draw up of the list of all values would have no practical use. However, we believe that the values such as justice, legal security, social order, peace, social progress, freedom, equality, human dignity, property, democracy, rule of law, national sovereignty represents the invariabilities of the legal judgment. We distinguish between legal, moral, political, religious, aesthetic, economic and philosophical values. The legal accepted principles notes the existence of the scope values which are sought by means of the action and of the instrument values by means of which we are able to reach the scope value[17]. The scope values, „although spiritual creations of the society, arising from cohabitation, live by means of their subjective interpretation of the human experience which engages them in dreams, aspirations and ideals of life". For example, according to Djuvara, the scope value is the justice which „orders by means of its own authority. It must be heard for ourselves and inside ourselves without reference to any other purpose, because there cannot be any other purpose higher than it"[18].

The philosophy of the law often attempted to classify the values in a particular hierarchy. Each of those who approached the study of the values of the law classified within this hierarchy the values which they considered to be the most important. Therefore, there is a multitude of systematizations, claiming a diversity of "higher rank" values. As far as we are concerned, we move away from the attempt to classify the values, wondering under what criteria we might consider that a certain value is more important and other less important for the universal human being? Therefore, we agree with the words of the professor Craiovan: „the originality and irreducibility of the values lead to the failure to admit the superiority of rank, and at most, to temporary priorities depending on the human social needs related to them"[19]. It is shown that the hierarchy of the values should not be understood as a mechanical subordination of the values, likely to cancel the specific of each value.

Throughout the evolution of thinking, the values were "ranked" depending on the importance they granted to the human community, according to the aspirations of the respective historical moment. For the Romanian lawyers, the law was the art of the good and of the equitability, Toma d`Aquino defined the law by means of the idea of equality, according to Kant the law means the individual freedom, to Bentham the utility, to Duguit the solidarity, while the positivists remained to the state law. Most of the philosophers considered the ideal of justice to be the supreme value. Mircea Djuvara wrote that „our sense does not conceive anything higher than the idea of justice; we necessarily understand that there cannot be any another interest above justice; the ideal of justice is higher than any other ideal, is an ultimate ideal in this respect"[20]. François Terré noted the ambivalence of the law: the law is a mediator between the right thing and the wise thing, it tends to reconcile the aspirations of the law with the requirements of the society[21].

J.-L. Bergel also admits the possibility to classify the general principles of law depending on their value, arguing that: everything related to the social order prevails over the personal interest; the requirements of the public order prevail over the non-retroactivity of the law or of the individual property; the fundamental

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[14] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* (The Basis of Law. The Theory of the Legal Liability), vol. I - II, All Beck Publishing House, Bucharest, 2003, page 55.

[15] Mircea Djuvara, *op. cit.*, page 242.

[16] Ion Craiovan, *Tratat de teoria generală a dreptului*, (The Treaty on the General Theory of Law), Universul Juridic Publishing House, Bucharest, 2007, page 482.

[17] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* (The Basis of Law. The Theory of the Legal Liability), vol. I - II, All Beck Publishing House, Bucharest, 2003, page 43 and the following.

[18] Mircea Djuvara, *op. cit.*, page 441.

[19] Ion Craiovan, *Tratat de teoria generală a dreptului*, (The Treaty on the General Theory of Law), Universul Juridic Publishing House, Bucharest, 2007, page 481.

[20] Mircea Djuvara, *op. cit.*, page 214.

[21] François Terré, *Introduction générale au droit*, 7th edition, Dalloz Publishing House, 2006, page 47.

freedoms have priority over any other legal categories. Basically, the conjugation of the principles of law depends to some extent on their specialty or generality, so that the principles applicable to a certain subject shall have precedence over the general principles[22].

Paul Roubier outlined the necessity to explain the law based on the theory of the values. The definition of the rule of law fundamentally involves an essential dimension, as the law is a normative science situated in the field of the "should be" and subject to the law of the purpose. The law is not an explanatory discipline, it does not describe the reality on the indicative mood but on the imperative, the law is founded on valuable judgments and its assessments are always set by reference to an ideal[23].

Paul Roubier noted the existence of the three-dimensional theory of law, in the sense that each of the three main thinking movements – the positivism, the natural law and the realism – explained the concept of the law by reference to a certain value. Each of the values discovered by these accepted legal principles correspond to a certain stage in the evolution of the society, as follows: the positivism considers that the key value is the legal security, the value of the justice prevails in the field of the natural law, and the realism seeks the purpose of the law within the social progress. According to Roubier, the trilogy of the legal security, justice and progress represents the hierarchical order of the values.

According to Rickert, there are certain principles that give meaning to the history and they consist precisely of the fundamental values that govern the development of the humanity. The accepted legal principle shows that „in formal terms, they are timeless by means of their validity, regardless of the historical transformation, but their content depends on the historical life. Therefore, in what concerns the history, the system of the values has an open character"[24].

The historical continuity of certain values asserts their importance and the absolute nature, regardless of the changes recorded from a society to another. By being located within the natural law, these values are absolute and represent a legal constancy. The evolution of the ideals emerges from the consciousness of the society, however, to a certain extent it can lead to a re-valorization of the law. Therefore, by being related to a particular system of positive law, the social values established within the content of the rules of law may be subject to "transformations", rearrangements. Therefore, in terms of the axiological dimension, the Romanian constitutional system was established in 1991, the supreme values being referred to in art. 1 of the Basic Law. By means of the review of the Constitution in 2003, the democratic traditions of the Romanian people and the ideals of the Revolution of 1989 supplemented these values. Thereby, certain ideals, aspirations and values were taken over from the natural law and were expressly provided by means of the rules of law, by being transformed from real sources into formal sources of law.

Mircea Djuvara showed that the ascertainment of the ideal built by the society must be the beginning of any scientific research of the law. According to Gheorghe Mihai, the value „is not natural, as the properties of the things, it is not based on the real world, but on the ideal world, of the pure validity"[25]. However, although the individuals are similar by means of the values they receive, they are still different by means of their valorization, due to the fact that „each and every value is valorized by means of the actions". Therefore, the human being is endowed with responsibility, is aware of the values that the rules of law engage, adopts them and chooses between the legal and the illegal, the licit and the illicit actions. By means of the actions, the human being decides to adopt a certain legal conduct and commits to translate the values admitted by it.

Therefore, the value represents the mark of the responsibility and the validity of the rules of law falls under the conditions of the acceptance. Those who disregard the rules of law defy the values involving them. Therefore, the fulfillment of the law depends on whether it is accepted and assumed as a value and a rule by the members of the society. The coercion is not the one which essentially ensures the force of the law, but the power to valorize the rules of law imposed on the individuals. In this regard, the understanding of the fulfillment of the law is an act of assessment and search of the justice and of the other acknowledged values.

Ion Craiovan distinguishes between the action of valorization and the action of preference, as follows: the action of valorization, by being emerged within the social consciousness prevails over the actions of preference which occur within the individual consciousness[26]. The value is a "generic human quality", although it is inner: it is repeated in the individual consciousnesses which live it, as if it belongs only to a single individual; the value remains universal by means of its structure, no matter the historical time. The values propose to the individual "a complex of coded solutions that store the collective experience of the group to which it belongs, anticipate and humanize its creations".

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[22] Jean - Louis Bergel, *Théorie générale du droit*, 4th edition, Dalloz Publishing House, 2003, page 109.

[23] Paul Roubier, *Théorie générale du droit, Histoire des doctrines juridiques et philosophie des valeurs sociales*, 2nd edition, Dalloz Publishing House, 2005, page 163.

[24] *Apud* Ioan N. Roşca, *Introducere în axiologie. O abordare istorică şi sistematică*, (Introduction to Axiology. An Historical and Systematical Approach), Fundaţia România de Mâine Publishing House, Bucharest, 2002, page 27.

[25] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* (The Basis of Law. The Theory of the Legal Liability), vol. I - II, All Beck Publishing House, Bucharest, 2003, page 42 and the following.

[26] Ion Craiovan, *Tratat de teoria generală a dreptului*, (The Treaty on the General Theory of Law), Universul Juridic Publishing House, Bucharest, 2007, page 480 and the following.

The law is „generated and structured within and directed towards the inseparable connection with the constellation of values of the historical time in which it is developed and in certain conditions the law itself accedes to the statute of value"[27]. The author conceives the culture as a merger between the knowledge and the value. The knowledge is not sufficient in order to grant an unitary view to the act of culture, therefore the value appears as a "fulfillment of the knowledge" in relation to the human being, its aspirations and needs. In the first place, the culture, by involving valuable judgment, represents the crystallization of the knowledge and in the second place the embodiment of the value. The elements of the knowledge are "capable of valorization within the humans' area by means of their very essence and genesis, therefore they are potential or actual values of the human being".

Petre Andrei distinguishes between the process of knowledge and acknowledge (valorization) of the values. Therefore, the process of knowledge is theoretical and results in making existential judgments; it grants us the "explanatory theoretical values" on the top of which the value of the truth is laid. The process of acknowledge is a practical process which results in valuable judgments. The valorization, preceded by the knowledge, consists in the "research of the correspondence, matching between a middle value and a scope value which we consider as a feasible fact". Within the valorization process the individual is engaged intellectually, emotionally and volitionally. The result of the valorization process is an absolute, general and supra-individual value consisting of all the values that create the culture: the cultural ideal[28]. In the same time, as stated in the literature: (...) empowering people through their involvement in community life can be perceived as a factor related to democracy, to the development of the society[29].

The values, ideals and aspirations of the society find their expression in the content of the rules of law. A certain concept, a certain value, such as equality may be a subjective right considered essential. Therefore, we speak about the subjective right to equality. In addition "certain subjective rights are selected based on the criteria of values due to their importance and registered as fundamental rights"[30]. Equally, the same value, by being one of the basis of the law, may achieve the content of the principle of the objective right. „Therefore, the equality and freedom, as the basis of the social life need to find their legal expression. Therefore, the legal concepts of the equality and the freedom which shall become basis (principles) of law emerge, thus resulting in the emergence of the rules of law"[31].

The qualification of these ideas, concepts and values depending on their importance and consecration within the legal, national or supra-national order is not an easy task. The long discussions prior to the draw up of the European Union Treaty on the coverage of the "values of the Union" proved the difficulty of such a process, determined by the meaning to be granted to the concept of "value"[32]. Therefore, difficulties were encountered in trying to establish if one of the ideas should be considered as values or objectives, the replacement of the „values" with „principles", of the „human rights" with the „fundamental rights or fundamental freedoms" emerged, the area of the objectives of the Union extended. Basically, it was considered that the values able to accomplish the following two requirements should be recorded as values of the Union: the fundamental behavior and the basic legal content which is clear, without controversies, so that the member states know their obligations and the penalties which emerge in case of the failure to fulfill the obligations. That way, the former "principles" become "values" in the Treaty of Lisbon and, for the first time, the rights of minorities are mentioned[33].

Ion Deleanu noted that, „by means of an original feed-back circuit, once the law is created, it becomes mandatory to the state which is a subject of law, like other subjects. In order for the law to have the power to become mandatory, several minimum terms are indisputable; the postulation of the genuine and persuasive moral and political values of the global civil society and of the individual, by means of the rules of law; the establishment of a democratic environment; the strengthening of the state responsibility principle; the establishing of control means over its activity; the creation of a coherent and stable legal order; the strict promotion of the legality and of the constitutionality principle; the conversion of the human being into the cardinal axiological mark"[34].

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[27] *Idem*, page 31.

[28] Petre Andrei, *Filosofia valorii*, în Opere sociologice, (The philosophy of the value, in Sociological works), vol. I, Academiei Publishing House, Bucharest, 1973, *Apud* Ioan N. Roşca, *Introducere în axiologie. O abordare istorică şi sistematică*, (Introduction to Axiology. An Historical and Systematical Approach), Fundaţia România de Mâine Publishing House, Bucharest, 2002, page 78-79.

[29] Elena Emilia Ştefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest, 2013, page 18.

[30] Ioan Muraru, Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*, (Constitutional Law and Political Institutions), 12th edition, vol. I, All. Beck Publishing House, Bucharest, 2005, page 139.

[31] Nicolae Popa, Mihail C. Eremia, Simona Cristea, *Teoria generală a dreptului*, (General Theory of Law), 2nd edition, All Beck Publishing House, Bucharest, 2005, page 103.

[32] Roxana Munteanu, *Elemente de noutate în Tratatul instituind o Constituţie pentru Europa*, în Studii de drept românesc, (Novelty Items in the Treaty Establishing the Constitution for Europe in Romanian Law Studies) year 17 (50), no. 1-2/2005, page 99-142

[33] Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene* (Introduction to European Union Law), Universul Juridic Publishing House, Bucharest, 2011, page 86.

[34] Ion Deleanu, *Drept constituţional şi instituţii politice*, (Constitutional Law and Political Institutions), vol. I, Europa Nova Publishing House, Bucharest, 1996, page 113.

CONCLUSIONS

The importance of the principles of law and their related values is suggestively expressed by Gh. Mihai in the following lines: „The algebraic equations and the chemical schemes are also beautiful, the demonstrations of the geometry and the sociological investigations are fascinating, but neither of them breaths the human beauty in the same way the legal truths succeed in doing it, by means of which we aspire to live surrounded by the good and the right things. The people need not only the harmony and the balance but how could they hope to spend effectively the other needs if the balance and the harmony are missing and are altered?"[35]

If the specialized literature records a consensus over the importance of the existence of the principles, the determination of the number of the general principles leads to many disputes. The four principles of natural law established by Grotius – the obligation to repair the damage caused by own actions, the fulfillment of the undertaken commitments, the respect towards the assets belonging to another persons, the fair punishments of the offenders – were gradually supplemented by tens of principles, by revealing a real passions of the theorists to list principles. Gh. Mihai noted in the works of the doctrinarians the existence of at least one hundred principles, classified in four levels: essential for *omni et soli*, essential for the Romanian law in force, essential for a branch of the law, essential for the legal institutions. Furthermore, the difficulty increases when the principles are to be stated; for example, the author shows that the principle of freedom was granted 47 statements within the works published in 2004.

According to Gh. Mihai there is one single principle which organizes the law and which does not need any acknowledgement: the principle of justice. The justice, as an ontological principle is registered in the spiritual essence of the human being. This principle of „what it should be" is multidimensional and its dimensions lead to another dispute: the representatives of the monism assert the single dimension of the principle; the representatives of the pluralism argue that „the basis is represented by a plurality of principle, without agreeing on their number"[36]. In what concerns the dimensions of the principle of justice, Gh. Mihai claims the equality, freedom and responsibility. The independence of justice is not only a desiderate of the Constitution`s editors, it is a reality, it has practical application, so it is not only a state of mind [37].

The multitude of opinions can be justified as follows: we are situated in a field which confers a generous space to the creative role, so that each and every researcher makes all the efforts in order to bring something new, by exceeding the level of the knowledge already settled. However, we must not forget that the principles represent a guarantee for the stability of the legal order, a requirement which should not be sacrificed in favor of the creative vanity. What is really important is the existence of the principles: „a principle, whatever it may be, in relation to which all individual relations are arranged, is essential for the maintenance of the society; the significance of this principle, the things it allows or prohibits do mot matter, but its existence is fundamental for the social body"[38].

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[35] Gheorghe Mihai, *Fundamentele dreptului*, (The Basis of the Law) vol. I - II, All Beck Publishing House, Bucharest, 2003, page 6.
[36] *Idem*, page 179-181.
[37] Elena Emilia Ștefan, *Reflections on the principle of independence of justice*, published in the proceeding of the Conference Challenges of the Knowledge Society, The 7th Edition, „Nicolae Titulescu" University, Bucharest, 17-18 may 2013, *CKS* - journal 2013, page 671.
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THE RESPONSIBILITY PRINCIPLE

Elena ANGHEL*

Abstract

"I'm wishing Law this: all legal obligations sholud be executed with the scrupulosity with which moral obligations are being performed by those people who feel bound by them ...", so beautifully portraited by Nicolae Titulescu`s words[1].

Life in the society means more than a simple coexistence of human beings, it actually means living together, collaborating and cooperating; that is why I always have to relate to other people and to be aware that only by limiting my freedom of action, the others freedom is feasible. Neminem laedere should be a principle of life for each of us.

The individual is a responsible being. But responsibility exceeds legal prescriptions. Romanian Constitution underlines that I have to exercise my rights and freedoms in good faith, without infringing the rights and freedoms of others. The legal norm, developer of the constitutional principles, is endowed with sanction, which grants it exigibility.

But I wonder: If I choose to obey the law, is my decision essentially determined only due of the fear of punishment? Is it not because I am a rational being, who developed during its life a conscience towards values, and thus I understand that I have to respect the law and I choose to comply with it?

Keywords: *responsibility, freedom, juridical liability, values, principles.*

INTRODUCTION

The International Bill of Human Rights, by claiming that freedom and equality of dignity and rights are inborn, shows that human beings are "endowed with sense and consciousness and should behave fraternally towards each other". Therefore, freedom, dignity and equality emerge from the human sense and consciousness and not from the objective right. Similarly, this study aims to show that the need to comply with these core values of the human quality has the same justification, being based on the human sense and consciousness which represent the premises of the responsibility.

According to Gh. Mihai, the responsibility is a concept of justice as value, together with freedom and equality as values. As far as we are concerned, we believe that the major difference consists in the fact that while freedom and equality are inborn, the responsibility is to be cultivated in time due to the fact that it is not innate. „The human being is not born with a formed responsible personality (…), but with the ability of being responsible for what happens throughout its psychosocial formation as a subject able to know itself and the others"[2].

Therefore, the responsibility is an attribute of the human personality, a synthesis of the responsibility feeling and the responsibility knowledge. The extent of the responsibility is given by the level of the self-awareness. The society has an important role in this respect. The individual lives and evolves within a social environment; it expresses itself within the social life, interacts and permanently relates to values. And the values are those which proclaim and defend the society at one point in time: it sets up a model to be followed up and requires its members to comply with it. In this regard, the assumption of the values and the compliance of the individual behavior with the social regulations shall be performed voluntarily, without involving any compulsory social forces, which are outside of the individual's environment, but only a high level of civic consciousness.

If the individual does not meet the standards of conduct and violates the social relation, its behavior also reflects the extent to which the society managed (or did not manage) to valorize the actions of the individual and to implement the sense of responsibility on it. „The antisocial behaviors should be viewed not only as punishable actions, but as diseases of the individual of which remedy must be sought if it has not been found or as diseases of the society itself due to the fact that it is not exempt from any sort of psychosis. The disease is often due to the environment and therefore it is necessary to treat the environment, although this should not be generalized"[3].

Therefore, we can discuss the educational role of the law on the completion of the individual's personality and we will detail it in the following lines.

CONTENT

By focusing on the coercion at the expense of the education, the law succeeds in restore the social order for the moment. But this is only an apparent success due to the fact that „the effect is the one focused and

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[1] Nicolae Titulescu, *Reflecţii,* Albatros Publishing House, Bucharest, 1985, page 2.

[2] Gheorghe Mihai, *Fundamentele dreptului, Teoria răspunderii juridice,* (The Basis of Law. The Theory of the Legal Responsibility) vol. V, C. H. Beck Publishing House, Bucharest, 2006, page 34.

[3] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *op. cit.*, page 55.

the cause is ignored. The appearance and the violation of the rules that regulates the social report are removed and the substance is kept: namely the lack of socialization of the individual". The law should implement in the consciousness of the individual not only the fear of coercion and punishment, but should act for the improvement of the individual by means of education, under the consequence of the improvement of the entire social order. It is argued that the law „should have as a final purpose the re-modeling of the individual's self-awareness", due to the fact that „what is missing is the faith in the human being's perfection"[4].

This is the moral dimension of the responsibility. in what concerns the legal dimension of the responsibility, this takes the shape of a general law principle which involves on the one hand the promotion of the social and human values by means of the rules of law and on the other hand the defense of these values within the process of the law.

Therefore, the value is a mark of the responsibility. The responsible human being develops throughout its life, the ability to distinguish between values, pseudo-values and non-values. Despite this, the criterion of the values varies from one legal system to another and even within the same system, depending on the periods of time. For example, the homosexuality is an offense which violates the social values of Colombia but which is not sanctioned in Spain where it is not deemed to violate a social value. Therefore, the legal responsibility is related to the relative law system and it is impregnated by its precariousness"[5].

The perspective distinction between the law and the moral in terms of value is that „the moral admission of the human life is universal and absolute and no speculative derogation of it can affect its substance, while the legal admission of the same value is suddenly neither universal, nor absolute, as long as the same lawmaker falls in contradiction in the same respect"[6]. Therefore, we understand that what is important is the admission of the values, not the way they emerge within a positive law system which changes from an era to another, but within their logical anteriority, the everlasting values of the founding principles of the positive law being the ones that really matter. We can say that the difference between law and morality consists, on the one hand, in the purpose (law envisages general interest - social welfare, public utility, while morality is related to moral elements, other factors than economic order, opportunity) and, on the other hand, in the effectiveness of the two (law imposes coercive sanctions, morality does not)[7].

The criteria of the legal responsibilities is represented by the legal values expressed by the regulatory system by means of the rules of law, as well as by the other social values which, without falling in *abinitio* under the scope of the regulation, are then legalized and valorized by means of the rule of law.

The principle of the responsibility concerns both the process of drawing up the laws (targeting both the responsibility and the liability of those who perform the respective duty, reflected in the selection of the values that correspond the best to the interest of the society), and the fulfillment of the law, by emphasizing that the law should not be understood only as a tool used in the field of the damage already occurred but also as a tool used to develop the feeling and awareness of the responsibility. Recent doctrine stated that "responsibility principle can be inferred even from his interpretation of the Romanian Constitution which provides the principle of responsibility of state powers and civil servants[8]. According to Hayek, the most important role of the law lies in its ability to predict the individual's actions, so that by being established on prevention and on the coordination of the individual behaviors in the desired direction, the social order is ensured[9].

From the etymological point of view, the term ("responsabilitate") „responsibility" comes from the Latin s*pondeo*, which in Romanian law means the official obligation of the debtor to the creditor to fulfill the performance undertaken under the agreement. The distinction between responsibility-liability (responsabilitate – răspundere) is reflected in the legal language by using different words, as the case of the Romanian language, or of the English language: „liability" (răspunderea), and „responsibility" (responsabilitatea).

By analyzing the content of the two terms, Gh. Mihai shows that the responsibility belongs to the personality as a whole, while the liability „is divided in as many forms as the number of persons expressing this personality; I am personality, but I disclose my moral person in moral relations, the legal person in legal relations and the political person in political relations"[10]. Furthermore, in practice, the author shows that the specific of the personality is revealed by means of the natural person in civil legal relations, by an offender in criminal relations and by a citizen in constitutional relations. The positive law holds liable a

[4] *Idem*, page 54.

[5] Gheorghe Mihai, *Fundamentele dreptului, Teoria răspunderii juridice*, (The Basis of Law. The Theory of the Legal Responsibility) vol. V, C. H. Beck Publishing House, Bucharest, 2006, page 55.

[6] *Ibidem.*

[7] Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene, (*Introduction to European Union Law), Editura Universul Juridic, Bucureşti, 2011, pag. 12.

[8] Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* (Legal Liability. Special focus on liability in administrative law), Editura Pro Universitaria, Bucureşti, 2013, p. 22.

[9] *Apud* Sever Voinescu, *Drept şi logos*, in Studii de Drept Românesc, (Law and Logos in Studies on the Romanian Law) year 11(44), no. 1-2/1999, page 27.

[10] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* (The Basis of Law. The Theory of the Legal Responsibility) vol. V, C. H. Beck Publishing House, Bucharest, 2006, page 28-29.

certain person as a natural person in civil relations, as an offender in criminal relations and as a taxpayer in fiscal relations. However, the author outlines that „not all the persons of the same individual take part in the creation of the legal values, but its personality due to the fact the personality is the value which valorize, while its persons valorizee, wear and express the values by means of different social relations, including legal relations".

Starting from the above mentioned, Gh. Mihai points out that each human being is a person, a subject endowed with judgment, feelings, will, emotions, attitudes, it is able to distinguish the right from the wrong, the truth from the lie, the justice from the injustice, it can be hold liable for its own choices which are revealed by means of its behavior; furthermore, each human being is a personality, thanks to these features which distinguish it from any other human being. Therefore, the author concludes that, „I am a person as any other human being but I am judged based on evidence as a personality"[11].

The responsibility is the „sine qua non existential quality of the human being who knows itself and the others and who performs the action no matter in how many forms it is divided (moral, legal, political)"[12]. By representing a value, the responsibility is an indestructible merger between the feeling and the knowledge, so that we can speak about the feeling and the knowledge of the responsibility.

According to Dumitru Mazilu, the responsibility is „an intrinsic coordinate of the human behavior which plays a decisive role in the freely consented performance of the provisions of the rules of law and in preventing the violations of the law"[13].

The process of the self-awareness involves two dimensions: the responsibility represents the positive side, by meaning the extent to which the society managed to implement its system of values on the individual, and the legal liability which represents the negative side by emerging in cases where the law failed to fulfill its educational, preventive function. The legal responsibility is an institution by means of which the lawmaker expresses the vocation of legal liability of certain persons due to the potential acts and legal actions committed. The legal responsibility is prior to the committed offense, unlike the liability which emerges only after the occurrence of the act or legal actions which caused damages and only under the terms provided by the law.

On the field of the damage already occurred, the legal liability contributes in order to ensure the legality, as the simple approval of several penalty measures would not be enough if by their application the restoration of the rights established by the law and violated by the individual was not pursued. On the other hand, the prevention and education of the law pursue to highlight „its ability to engage collective response binding upon the person who violates the rule of law which anticipation is able to lead to the respect and compliance of the members of the society who do not want the legal penalties to be applied on them"[14]. Legislative changes that occur at a time raise serious issues to different areas of law in terms of interpretation and application of legislation[15].

By being endowed with sense and consciousness, the human being is free to choose, to decide and to act. Only the independent human being is responsible and therefore liable. It is aware of the values, understands and internalizes them, then chooses between them and translates them into its actions. Given this, we outline that the discussion on responsibility becomes meaningless if we do not have the free will as a prerequisite. „In order to question whether an act of some persons is right or wrong, we firstly must take into account that the respective person was free when it committed the act. If the person was not free, then all the problems disappear and only the scientific problem, which has nothing to do with the law, emerges"[16].

The existence of the responsibility requires the fulfillment of two conditions: the freedom of the personality and its ability to decide, in other words the ability to act freely and consciously. Therefore, the freedom is the *sine qua non* condition of the responsibility. We cannot speak about responsibility if the will of the individual was determined by external means, was forced or directed. The responsible involvement within the social life means the free admission of the values, the knowingly assessment of the causal consequences and the uncontrolled decision to act according to own will.

In this respect, Gh. Mihai noted that the responsible person is the individual who makes the choices, decides and carries out its spiritual and material actions[17]. Therefore, by being self-aware, the individual, the recipient of the law, chooses between the legal and the illegal actions, the licit and the illicit facts, decides on those to be carried out by it and undertakes to commit them, which means that it is

[11] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* (The Basis of Law. The Theory of the Legal Responsibility) vol. V, C. H. Beck Publishing House, Bucharest, 2006, page 25.

[12] *Idem*, page 33.

[13] Dumitru Mazilu, *op. cit.*, page 144.

[14] Ion Craiovan, *Teoria generală a dreptului*, (General Theory of Law), Militară Publishing House, Bucharest, 1997, page 49.

[15] Elena Emilia Ștefan, *Contribuția practicii Curții Constituționale la posibila definire a aplicabilității revizuirii în contenciosul administrativ,* (The contribution of the Constitutional Court`s practice in possible defining of revision applicability in administrative law), in Revista de Drept Public nr. 3/2013, Universul Juridic Publishing House, Bucharest, pages 82-83.

[16] Mircea Djuvara, *op. cit.*, page 160.

[17] Gheorghe Mihai, *Fundamentele dreptului. Teoria răspunderii juridice,* (The Basis of Law. The Theory of the Legal Responsibility) vol. V, C. H. Beck Publishing House, Bucharest, 2006, page 50.

responsible. Therefore, we can say that the independent individual who is aware the values of the rules of law, internalizes and adopts them, is the individual legally responsible; if it does not adopt them and chooses other values, which it undertakes to translate in actions and deeds, it is also legally responsible. „The human being is legally and morally responsible for the scopes knowingly assumed, meaning the scopes that it evaluated, assessed, thought and chose and for the actions controlled by its judgment and deliberately wanted"[18].

As a basic principle, the principle of the responsibility is directly linked to the principle of freedom due to the fact that it is based on the free will: „all the determinations of the law are determinations of the will, starting from property, exchange, illicit actions and ending with the civil society and the state"[19].

In terms of knowledge and will, the human being is responsible for its actions and it can be hold liable only up to this extent. Its will should not be constrained by internal or external factors, so that the individual, in order to be liable, has to be aware of and to agree with its actions. The connection between freedom and responsibility was also discussed by Hayek: „The freedom does not mean only the fact that the individual has both the opportunity and the burden of the option; it also means that it is bound to bear the consequences of its actions and the fact that he will be praised or blamed"[20].

The social liability emerges as a consequence of placing the individual into a regulated social environment; the latter always relates to the values; the violation of the regulations bearing values (meaning the shortage of their assimilation, introspection and self-awareness fulfillment) leads to the liability of the person in question.

Basically, each and every violation of the existing social regulations leads to the moral, religious, political or legal liability, meaning the obligation to bear the consequences of the failure to comply with the rules of behavior, an obligation incumbent on the offender who violated the rule. The legal liability is one of the expressions of the idea of social responsibility.

The social liability existed since the primitive times under archaic forms such as private vengeance or private compensation. We should recall that the subject of the legal liability was also discussed in the works of the great ancient thinkers. According to Platon, nobody should remain unpunished for disregarding the law, no matter the damage it causes by means of the respective committed offense. The beginnings of the theory of the prevention are found in Platon's works, the philosopher considering that the liability must emerge "not in order to pay for the committed mistake, because once the damage has been done, it cannot be repaired, but in order for the guilty and for the persons who see it being punished to sincerely hate injustice and to release themselves of this weakness in the future".

In what concerns the Romans, *The Law of the Twelve Table* established, beyond the rule of the private vengeance, the system of the legal structure whereby the pecuniary compensation right for the damage incurred of the victim of an offense was recognized. G. delVecchio noted that this was the reason why „the less harsh trends of replacing the vengeance with the compensation did not fail to occur. Instead of being avenged, the offense was compensated, either according to the award of an arbitrator chosen by the parties among the elder persons or according to an established rate"[21].

Later on, Grotius established the four principles guiding the whole law, the principles which are nowadays the pillars of the field of the legal liability: *alieni abstinentia* (the respect for the other's assets); *promissorum implemendorum obligation* (the fulfillment of the commitments); damni culpa dati reparation (the compensation of the damages caused to other persons); poene inter hominess meritum (the fair punishment of those who violate these principles).

Mihail Eliescu believes that the liability, by being a social fact which „is limited to the reaction caused by an action that the society of the place and time of the committing considers it punishable[22]. Nicolae Popa added that in case the legal liability is dispersed, the social reaction has different distinctive features, being an institutionalized reaction triggered by an offense and being organized within the limits set by the law[23].

In the accepted legal principle, the legal liability institution is defined as the unit of the rules of law concerning the relations that arise in the field of the activities carried out by the public authorities under the law, against those who violate or ignore the rule of law, in order to ensure the compliance with and the promotion of the rule of law and public good[24].

According to another opinion, the legal liability is analyzed as a „special legal relation, consisting in the obligation to bear the penalty provided by the law, as a result of committing an attributable legal act. However, this obligation falls into a complex content

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[18]Gheorghe Mihai, *Fundamentele dreptului*, (The Basis of Law) vol. I - II, All Beck Publishing House, Bucharest, 2003, page 188.

[19]Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *op. cit.*, page 66.

[20]*Apud* Nicolae Popa, Ion Dogaru, Gheorghe Dănişor, Dan Claudiu Dănişor, *op. cit.*, page 532.

[21]Giorgio delVecchio, *Lecţii de filosofie juridică*, (Legal Philosophy Courses) of the 4th edition of the Italian text, Europa Nova Publishing House, Bucharest, *sine anno*, page 192.

[22]Mihail Eliescu, *Răspunderea civilă delictuală*, (The offensive legal liability), Academiei Publishing House, Bucharest, 1972, page 5.

[23] Nicolae Popa, *Teoria generală a dreptului*, (General Theory of Law), Actami Publishing House, Bucharest, 1998, page 202.

[24]Lidia Barac, *Câteva consideraţii cu privire la definirea răspunderii juridice*, (Several considerations on the defining of the legal liability) in Law no. 4/1994, p. 29.

which is supplemented by its relevant and related rights"[25].

We hereby outline that the legal liability is not the only type of liability which sanctions the violations of the rules of conduct. The legal liability is related and complementary to other forms of social liability. Therefore, the individual may be hold liable by the society by means of disapproval or even by the individual itself by means of its inner feelings and its consciousness of being a responsible person. In this case, the authority competent to perform the judgment is the individual itself: „a responsible person judges itself and therefore assumes the result of the judgment; it is demanding with its own person as a result of the self-judgment and assumption of the strictness against itself"[26].

According to Gh. Mihai the liability emerges from the responsibility, the legal liability is the awareness of an illegally committed act, the fact of holding someone legally liable is the consequence of committing an illegal act, namely the violation of the legal provision by means of a knowingly material behavior, while the fact of holding someone religiously liable for example, is the consequence of the violation of a divine rule „by means of the words, facts and thoughts"[27]. In what concerns the area of the law the responsibility is an existential quality of the individual by means of which it expresses its personality within social relationships, while the irresponsibility emerges *per accidens*. The irresponsible person manifests, binds and looses the relationships with other persons, but the social liability is not assigned to it, so that it is not hold liable for illegal acts. Unlike but not opposed to the rule of law, the moral regulation expressly establishes the irresponsibility cases also called "causes that remove the legal liability", outside of which we are legally responsible and able to be held liable.

Therefore, the mandatory character of the rule of law is different from that of the moral regulation; however, it is essentially to outline that the field of the responsibility is set between the two categories, the ethics and the law: being enhanced by the moral, the law is implemented by the individual as the awareness of the need for the rule of law, and not as being essentially binding. If the legal order gathers the social harmony and the coercion, in this order and not vice versa, the legal penalty emerges only as a potential element, „if needed". Therefore, this is the purpose of the law: to educate, to valorize, to prevent (this is why the majority of individuals comply with the normative prescription) and only to the extent that the social harmony is disturbed by antisocial actions, to re-establish the rule of law by applying penalties. Therefore, an increased responsibility is translated by the installation of the legal liability on the theoretic level; the deeper the responsibility is implemented in the individual's inner the less the individual is held liable on the field of the law, by incurring penalties.

Essentially, both the moral regulation and the rule of law addresses to the individual's consciousness, the perfectibility of the individual representing the scope to be reached. In the field of the law, the consequences are more generous, meaning that the perfection of the individuals reached by the valorization function of the moral law, leads to the perfection of the legal order, the final scope of any society.

We note that in the accepted legal principle, the order of fulfilling the functions of the law is sometimes reversed. Therefore, one opinion[28] shows that, by establishing the conduct to be followed, the law creates automatic behaviors: the subject complies with the rules of law without the creation of new behaviors being necessary; the law is the one that has to fulfill the creative task. If the individual complies with the rules of law, means that it assimilated the prescribed behavior, the assimilation being explained by the author by means of two reasons: „firstly, because the law has the sanctioning power", then due to the fact that the "law has a creative ability and it is persuasive". Therefore the penalty is not a potential and alternative element which is perceived only when needed, but the decisive element of the individual for the purpose of assuming the imposed conduct. Furthermore, the persuasive value of the law is not imagined as being due to the valorization ability of the law with the consequence of making the individual to be responsible, but to the idea that „the will of the authority means a lot for the individual, de facto it means an order".

All the above mentioned are also supported by logical and legal considerations: the penalty is only one of the three elements that make up the structure of the rule of law. No doubt that the legal penalty is the one that confers specificity (chargeability) to the rule of law, unlike the other types of social regulations. This must not lead however, to the equivalence between the legal liability and the legal penalty. We are liable, due to the fact that, above all we are responsible and only to this extent we can be held liable. The liability is a stage prior to the application of the penalty. The legal frame of awarding the legal liability is broader and cannot be limited to the penalty. The content of the legal liability is complex, consisting of the right of the state to hold liable the individual who violated the rule of law and to apply the penalty provided by the law, on the one hand, and on the other

[25]Gh. Lupu, Gh. Avornic, *Teoria generală a dreptului*, (General Theory of Law), Lumina Publishing House, Chişinău, 1997, page 210.

[26]Gheorghe Mihai, *Fundamentele dreptului, Teoria răspunderii juridice*, (The Basis of Law. The Theory of the Legal Responsibility) vol. V, C. H. Beck Publishing House, Bucharest, 2006, page vol. V, Edit. C. H. Beck, Bucureşti, 2006, page 51.

[27]*Idem*, page 34.

[28]Sever Voinescu, *Drept şi logos*, în Studii de Drept Românesc, (Law and Logos in Studies on the Romanian Law) year 11 (44), no. 1-2/1999, page 35-36.

hand, of the correlative obligation of the individual who committed an offense to bear the respective penalty. The basis of the legal liability is the illicit action and its consequence is the application of the penalty. The penalty is only one aspect of the relationship of the legal coercion, namely the reaction of the society to the committed offense. However, the liability should not be based on the coercion; beyond the repressive function (the application of the penalty), the legal liability has also an educational function, or it would be more appropriately to say that it has the role to reeducate the individual, and is embodied in the social responsibility of those who proved the lack of admission of the values by means of violating the rule of law.

CONCLUSIONS

„The law shall exist as long as the individuals are incapable of morality, in its sense of virtue"[29]. D. C. Dănişor, I. Dogaru, Gh. Dănişor outlined that the basis of the law is the education and not the coercion, regardless if it is based on the will of the majority or on the state or most of the time on the arbitrary penalty. The law should belong to the sense so that the "idea of scope which is not imposed by force, regardless if this force is led by the majority, should take priority in the field of the law. The things that really happen fade in front of the things that should happen, but what should happen is not outside the law, but this is the law itself"[30].

Therefore, if the legal liability lays within the area of the law, is related to the public authority and aims de facto the compliance or the non-compliance with several prescriptions contained in the rules of law, is indifferent to the position of the individual in relation to these prescriptions since it does not imply any option, interest, conviction or initiative of the individual, the legal responsibility has a value content due to the fact that the individual relates to the values expressed and included by the legal normative system of the society by means of its own options, interest, by creating an own value system in relation to which it manifests its attitude within the social area[31].

According to Gheorghe Mihai, the value „is not natural, as the properties of the things, it is not based on the real world, but on the ideal world, of the pure validity"[32]. However, although the individuals are similar by means of the values they receive, they are still different by means of their valorization, due to the fact that „each and every value is valorized by means of the actions". Therefore, the human being is endowed with responsibility, is aware of the values that the rules of law engage, adopts them and decides to adopt a certain legal conduct and commits to translate the values admitted by it. Sever Voinescu noted that the law is a criterion by means of its ideality, due to the fact that by means of the valorization of the human's actions the law contains the project of the ideal social relations[33].

Within the society, the individuals acquire different levels of freedom that they tend to exercise in strict consideration of their personal interest. This is why the law appears as the limitation of the individualism, acting in order for the freedom of all members of the society to be possible. The individual freedom should be accompanied by the feeling of the responsibility, this is why, regardless of all the theories on this subject, we consider that the law cannot accomplish its mission without being supported by the moral. In this respect, François Terré noted the ambivalence of the law: the law is a mediator between the right thing and the wise thing, being the articulation of the individual and the social actions[34].

The law is built in consideration of its social effectiveness, consisting in the adherence of the society members to the rules of law. By being addressed to free subjects, endowed with will and consciousness, the law should be accepted by the society members as value and as regulation. Therefore, the implementation of the law should be based on the coercion only as an auxiliary element: „the implementation of the law by means of the enforcement and compliance with the regulations depends on the way a certain hierarchy of values and interests is required by the consciousness. This public consciousness is the real basis of the law, and not the coercion which is only a corrective measure"[35].

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[29] Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, *op. cit.*, page 33.
[30] *Idem*, page 26.
[31] Lidia Barac, *Elemente de teoria dreptului*, (Theory of law concepts), All Beck Publishing House, Bucharest, 2001, page 155.
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[33] Sever Voinescu, *Drept şi logos*, în Studii de Drept Românesc, (Law and Logos in Studies on the Romanian Law) year 11 (44), no. 1-2/1999, page 36.
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THE RIGHT TO NONDISCRIMINATION. THE EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE – A MONITORING BODY OF THE COUNCIL OF EUROPE

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Abstract

Along the last six decades, the Council of Europe, as an international regional organization, generated a complex body of both binding and non-binding legal instruments. The importance of non-binding legal documents, also identified as European soft-law, is demonstrated by the Council of Europe's constant and growing involvement in monitoring activities and the creation of non-conventional monitoring structures, particularly in the field of human rights. One such structure is the European Commission against Racism and Intolerance (ECRI), which, throughout its' broad and complex areas of competence has helped define and consolidate the European framework in matters of broadly identified as racial discrimination. ECRI had also brought a substantial contribution to the adoption of the 12th Protocol 12 of the European Convention on Human Rights (ECHR) and to the consolidation of related case law before the European Court for Human Rights (ECtHR).

Keywords: *Council of Europe, ECRI, non-discrimination, racial discrimination, soft-law, recommendations, monitoring.*

1. The Council of Europe and the rule of law. The importance of monitoring activities as *early warning* instruments.

Democracy, the rule of law and the respect for human rights and fundamental freedoms are the original common values of the Council of Europe, that continue to unite the 47 member states.

According to its Statute, the Council of Europe, as a regional intergovernmental organization of *cooperation*, does not have supranational competences. Thus, legally binding obligations originated in the activity of the organization, can not be imposed on member states. For instance, wthin the framework of the European institutional architecture, the Council of Europe endevours to elaborate an important **common european conventional network**, in various fields of cooperation[1]. Those Conventions are not compolsury, they are *only recomended* for ratification to the memberer States of the Council of Europe[2].

Safeguarding the respect of human rights and strengthening of neccesary democratic reforms can thus be achieved by establishing common standards of conduct**,** that has been and continues to be a difficult task that member States have assigned to the organization. Since such standards are not legally binding[3], compliance is achieved by means of a specific system that promotes them, which consists of: elaboration of *soft law* regulations and introduction of a variety of *monitoring activities* for their implementation.

The European *soft law* regarding human rights. The concept of ***soft law*** in contemporary international law has a variety of meanings; its most generally accepted description is that of *a legally non-binding instrument*. It describes *inter alia* some UN General Assembly resolutions, declarations of international conferences, guidelines, codes of conduct, common standards of conduct, or certain general "principles" to be observed in different international interactions.

- **Monitoring mechanisms.** According to international institutional law, **monitoring activities** in international organizations pertain to the more general concept of **supervision**, which includes all methods by which "*Member States are encouraged to comply with the rules, not only by the threat of sanctions being imposed for non-compliance, but also through the possibility that there will be some form of supervision or official recognition of violations.*"[4]

In the European context, monitoring the respect of human rights is seen as „the starting point for a clear understanding of the nature, extent, and location of the

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[1] A total of 215 Conventions were adopted, as to September 2014.

[2] Among them,only the European Convention on Human Rights and Fundamental Freedoms (**ECHR**),adopted by the Council of Europe as early as 1950 and entered into force in 1953, has particular normative consequences for the states that ratify it. The Convention sets up the European Court of Human Rights (**EctHR**), as an important jurisdictional *supranational* body, since the Court judgements impose legal obligations upon States parties.

[3]Among them,only the European Convention on Human Rights and Fundamental Freedoms (**ECHR**),adopted by the Council of Europe as early as 1950 and entered into forcein 1953, has particular normative consequences for the states that ratify it.The Convention sets up the European Court of Human Rights (**EctHR**), as an important jurisdictional *supranational* body, since the Court decisions impose legal obligations upon States parties.

[4] H.G.Schermers, N.M. Blokker, *International Institutional Law,* Nijhoff Publ.,p.864-866.

problems which exist and for the identification of possible solutions".[5]

For almost sixty years, the Council of Europe has constantly perfected the functioning of several now well-established **independent bodies** endowed with the task of *monitoring* a wide variety of standards in member States and *anticipating* possible malfunctioning[6]. The expertise and professionalism of these bodies allows the Council of Europe to pinpoint non-compliance issues and offer *recommendations* to its Member States.

There are two categories of such monitoring mechanisms: Convention based structures and Non-conventional monitoring structures.

- ***Convention based structures*** are**:** The **European Committee for Social Rights,** created by the the *European Social Charter*; the **Committee for the Prevention of Torture** within the *European Convention for the Prevention of Torture*; the **Consulting Committee** of the *Framework Convention for the Protection of National Minorities*; the **Committee of Experts** of the *Charter for Minority Languages;* the **Group of Experts on Action against Trafficking in Human Beings** (GRETA), acting within the framework of the *Convention on Action against Trafficking in Human Beings* [7].

All the afore mentioned bodies are set up with the task to evaluate ,at regular intervals, each State Party's compliance with the respective treaty provisions.They recommend improvements in legislation, policy and practice in each of the state parties.The results of those monitoring activities are eventualy presented to the Council of Europe's main institutional structures - the Committee of Ministers, Secretary General and Parlamentary Assembly. This way the members of the 47 National Parliaments are constantly informed about the application of the provisions of the respective Convetions and are able to exert, if necessary, political pressure in encouraging national governments to take appropriate measures[8].

- ***Non-Conventional Monitoring Structures*** set up within the Coucil of Europe are: **The Commissioner for Human Rights** was established in 1999, by Resolution (99) 50**),** as an independent institution, mandated to promote awareness of and respect for human rights in the 47 member states. The activities of the Commissioner and his Office focus on three major, closely-related areas: a system of *country visits* and *dialogue with national authorities and civil society* to identify vulnarabilities and key issues in the countries visited; *thematic work* and *awareness-raising activities*, such as the release of opinions regarding specific human rights issues. Since the entry into force of Protocol No. 14 to the ECHR, the Commissioner has the right to intervene *ex officio* as a third party in the Court's proceedings, by submitting written comments and taking part in hearings[9].

The Committee of Experts on the Evaluation of Anti-Money Laundering Measures, set up in1997 is an anti-money laundering evaluation and peer pressure mechanism, subsequently renamed **Moneyval**. After the events of 11 September 2001, Moneyval's terms of reference were revised by the Committee of Ministers of the Coucil of Europe, to include compliance with the relevant standards on terrorist financing, as some of the techniques which apply in money laundering are relevant also in identifying terrorist financing. Currently 28 Council of Europe member states are evaluated by Moneyval[10].

The Group of States against Corruption (GRECO). Over more than a decade of efforts to combat economic crime (including, inter alia, bribery) at European level, in 1994, Ministers of Justice of Council of Europe member States agreed that corruption should be addressed at European level, as it poses serious threats to the stability of their democratic institutions. In 1997, at the 2nd Summit of Heads of State and Government of the Council of Europe, Member States decided to intensify their anti-corruption efforts and adopted *Twenty Guiding Principles against Corruption* (Resolution (97) 24) and on the 1st of May 1999, the **Group of States against Corruption (GRECO)** was set up by 17 founding Member States (Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Lithuania, Luxembourg, Romania, Slovakia, Slovenia, Spain and Sweden)[11]. By *monitoring compliance with Council of Europe anti-corruption standards*, GRECO aims at improving the capacity of Member States to fight corruption. Through mutual evaluation and peer pressure, it helps to identify deficiencies in national anti-corruption policies, promotes the necessary legislative, institutional and practical reforms, provides a platform for the sharing of best practices in the prevention and detection of corruption[12].

[5] See Ph. Alston, J.H.H.Weiler, Introductory remarks in *The EU and Human Rights* (Ph. Alston, ed., 1999).

[6] "*The Council of Europe must be the lighthouse of Europe, a house for early warning"*(Thorbjorn Jagland, the Council of Europe's Secretary General, at the Ministers' Deputies' meeting on 20 January 2010)

[7] GRETA is a multidisciplinary panel of 15 independent experts set up as a mechanism to monitor compliance with the obligations contained in the *Convention on Action against Trafficking in Human Beings*, adopted by the Council of Europe in May 2005.

[8] http://.www.coe.int/minlang/

[9] http://www.commissioner.coe.int/tical

[10] http://www.coe.int/Moneyval/

[11] At present, all Member States of the Council of Europe are participating in Greco.

[12] http://www.coe.int/greco

2. The inception of the European Commission against Racism and Intolerance (ECRI), as a non-conventional monitoring body of the Council of Europe.

The fight against racism and discrimination has always been one of the *raison d'etre* of the Council of Europe, whose historical and political roots go back to the Second World War and the need to prevent its horrors from happening again. For over 50 years, efforts to promote tolerance have been at the heart of the Council's work, reflected in its various institutional structures and programs in political, legal, social and cultural fields.

In the early 90s the upsurge of racist violence in Europe and other parts of the world gave a new urgency to this combat. In October 1993 the Vienna Summit of the Council of Europe's Heads of State and Government decided to set up a new specialized body -**European Commission against Racism and Intolerance (ECRI**), as a monitoring mechanism to combat manifestations of **racism, xenophobia, anti-Semitism and intolerance**, from the perspective of fundamental human rights protection, in all the Member States of the Council. The decision to establish ECRI was taken at the highest political level and was the result of the conjoint will of the European Heads of State to give a new impetus to the fight against racism and discrimination in Europe. [13] In October 1997, the second Summit of the Council of Europe, held in Strasbourg, strengthened ECRI's action and in 2002 the Committee of Ministers of the organization granted ECRI **autonomous Statute**[14], thereby consolidating its role as an independent human rights monitoring mechanism to combat manifestations of racism and other forms of racial discrimination in all Member States of the Council of Europe.

3. General mandate, composition and functioning.

ECRI's general mandate was conceived to provide the Council of Europe's Member States with concrete and practical advice on how to tackle problems of racism and discrimination in their respective countries. To this end, it examines the legal framework for combating racism and racial discrimination in **each country**, its practical implementation, the existence of independent bodies to assist victims of racism, the situation of vulnerable groups in specific policy areas (education, employment, housing, services etc.) and the tone of political and public debate around issues relevant for these groups. As previous experience has proven, all these concepts and circumstances are changing and can take different forms, covering not only the most blatant abuses of human rights, such as state-sanctioned segregation, apartheid or Nazism, but also other, more subtle forms of racism and discrimination, which are nonetheless harmful means of differential treatment experienced in everyday life. They can include the targeting of persons on the grounds not only of race or ethnic origin, but also of religion, nationality or language, or a combination of such grounds.

The Commission is made up of 47 members – one from each Member State of the Council of Europe. Members are appointed by Member State governments, for a renewable term of five years in accordance with the following terms of ECRI's Statute: *The members of ECRI shall serve in their **individual capacity**, shall be independent and impartial in fulfilling their mandate. They shall not receive any instructions from their government*.

ECRI meets and takes its decisions in Plenary Sessions, held in Strasbourg, three times a year. **Working groups**, made up of different ECRI members, prepare the drafts of ECRI's future decisions. The continuity of the activity is assured by a permanent Secretariat, provided by the Council of Europe within the Directorate General of Human Rights and the Rule of Law.

4. ECRI as a monitoring body of the Council of Europe.

As opposed to other monitoring bodies within the Council of Europe, whose mandates are treaty-based[15], ECRIs monitoring activities are not based on the stipulations of a specific treaty. Its role lies mainly in *detecting and signaling manifestations* of racism, xenophobia, anti-Semitism and intolerance within all Member States. A distinct characteristic of ECRIs mandate resides in the fact that it takes into consideration not only the extreme and serious manifestations of human rights violations, but also *those encountered in everyday life*, which can build up to constitute important obstacles to equality and nondiscrimination. Another characteristic of ECRIs more recent activity is the extension of its monitoring focus to also include *new categories of vulnerable groups* (such as migrants and asylum seekers). In addition to this, ECRI pays particular attention to racist *hate speech* and violence and also to effective *anti-discrimination legislation* in Member States.

[13] See *Declaration and Plan of Action on Combating Racism, Xenophobia, Antisemitism and Intolerence*, 9 Oct.1993.

[14] See Appendix to the Council of Europe Resolution (2000)8.

[15] See *supra* I.1. - European Court of Human Rights – the European Convention for the Protection of Human Rights and Fundamental Freedoms (http://www.echr.coe.int); European Committee for Social Rights – the European Social Charter; Committee for the Prevention of Torture – the European Convention for the Prevention of Torture (http://www.cpt.coe.int); Consulting Committee – Framework Convention for the Protection of National Minorities;Commitee of Experts-Charter forMinority Langueges.

3.1. The "three pillars" of its activity.

ECRI statutory activities are put in practice through three main components ("pillars"):

- *Country-by-country monitoring* of the phenomenon of racism, discrimination and intolerance in each Member State of the Council of Europe. In the light of relevant findings and accomplishments in each country visited by ECRIs experts, individual ***Country Reports*** are drafted and **specific recommendations** are formulated, for concrete improvement measures in the fight against racism and discrimination.
- Work on general themes, which consist of drafting *General Policy Recommendations* (GPRs), covering the main domains of racism, intolerance and discrimination.
- *Relations with the civil society*, in each Member State, by information and communication activities, with the aim of *awareness-raising* on issues under ECRIs mandate.

4.1.1. Country-by-country monitoring.

In the framework of its *country-by-country monitoring*, ECRI examines the situation concerning manifestations of racism and intolerance in each of the 47 Council of Europe Member States. The findings, along with specific recommendations as to how each country should deal with the problems identified, are published in separate documents as **Country Reports.** These Reports are drawn up after a **contact visit** to the country in question and a confidential dialogue with the national authorities. The country-by-country monitoring takes place in 5-year-cycles, covering nine/ten countries per year. The *fourth round* of country-by-country monitoring procedure ended in 2012 and the *fifth round* is in progress.

3.1.2. General Policy Recommendations (GPRs).

Prepared and adopted by ECRI plenaries, the GPRs are addressed to all Member States. They contain guidelines on general themes related to ECRI's specific mandate, covering some important issues, such as: key elements of national legislation to combat racism and racial discrimination (GPR No. 7); the creation of national specialized bodies to combat racism and racial discrimination (GPR No. 2); combating racism against Roma and antigypsism (GPR No. 3 and GPR No. 13); combating islamophobia (GPR No. 5), racism on the internet (GPR No. 6); combating racism while fighting terrorism (GPR No. 8); anti- Semitism (GPR No. 9); racism and racial discrimination in the activity of the police (GPR No. 11); education (GPR No. 10); sports (GPR No. 12) and employment (GPR No. 14).

Relations established with civil society

Combating racism can only be effective if the anti-racism message filters down to society in general. For this reason, awareness-rising among the general public and a communication strategy are crucial. In 2002 ECRI adopted a **Program of action** to consolidate this aspect of its work, which involves, among others: **Round tables** in different member States, cooperation with other interested parties in each country, as NGOs, the media and youth sector. The round tables are frequently organized upon publication of the last Country Report in a particular member State.

3.1.3. Interdependence between ECRI activities.

Activities carried on through ECRIs "three Pillars" are not separate from each other but *closely linked and interdependent.* The C**ountry Reports (1)** bring to light particular problems and, taken as a whole, highlight the main trends in all Member States of the Council of Europe. Some of these trends call for concerted and carefully considered strategies, which ECRI develops when drafting **General Policy Recommendations (2).** Implementation of all the recommendations, general and country-specific, is promoted through **information and awareness-rising activities** involving the civil society, on national and international level **(3)**.

3.2. Specific working methods and procedures within ECRI.

Since its first meeting in March 1994, ECRI action developed on a ***step-by-step*** principle. The strategy has been to gradually build up activities and procedures, thus ensuring that, in line with its founding documents, those activities are constantly evaluated, consolidated and used as a basis for the next step forward.

3.2.1. Concerning the ***country by country monitoring*** ("Pillar 1"): The research, drafting and adoption of all Country Reports follow some **basic stages**, in order to reach the best impact of this activity:

1st stage - A working group, formed of 5 ECRI members, examine the information and prepare ***a monitoring visit,*** which takes place, in each Council of Europe member State. Two of the rapporteurs carry out the visit, where they meet and exchange information with both government and the civil society partners. On the basis of the information gathered, ECRI plenary adopts a ***draft Country Report.***

2nd stage - The draft report is sent to the authorities, through the *national liaison officer* (NLO), for comments. The draft report may be revised in light of the comments of the authorities (only concerning *factual errors*). ECRI plenary adopts the ***final report***.

3rd stage - The Report is sent by ECRI to the government in question through the *intermediary* of the Committee of Ministers of Council of Europe. Only after presentation to the Committee of Ministers, the final Country Report is published.

3.2.2. The principle of reporting on an "equal footing". The structure of all Country Reports follows a **uniform pattern**, reflecting ECRI's mandate and its concern to treat all member States, regardless of their particularities, *on an equal footing.* Thus, the <Table of contents> of any Country Report comprises information, evaluations and recommendations on the following issues:

- the country's legal and institutional framework, relevant for ECRIs mandate: ratification or signing of the important human rights treaties; antidiscrimination legislation -constitutional, criminal, civil and administrative law provisions- and the degree of their implementation;
- in each Country Report, a number of the same **core issues** are examined: **discriminations in various fields** -education, employment, housing, healthcare, services; **manifestations of racism,** such as racist violence, anti-Semitism, racism in public discourse, conduct of law enforcement officials, hate speech, racism on the internet; the situation of **particularly vulnerable groups** facing discrimination, in each country. Vulnerable/target groups may vary, from country to country, in connection with internal or international events.
- in each country report a number of different **specific recommendations** are formulated, regarding different critical areas of discrimination identified in the countries visited.

3.2.3. Constant procedural improvements. ***Four rounds*** of Country Reports were accomplished until 2012 and the ***fifth cycle*** of country reporting is in progress since 2013.One of the new and important elements already introduced in the fourth round of reporting is an ***interim follow-up procedure***. It consists of selecting, from all the recommendations formulated in each Report, ***two or three specific recommendations,*** for which ***priority implementation is requested***, after a **two years period**. Those recommendations should be ***important, feasible*** and ***measureable.*** Two years after the publication of the Report, ECRI will address a "communication" to the government in question, asking whether those specific recommendations, for which priority implementation was requested, have actually been put into effect.

In line with other procedural improvements, are also the Appendices which, at the governments request, might be attached to the Country Reports, containing particular governmental view points; they are transmitted by the Governments, at the end of the confidential dialogue with ECRI and may still be changed or amended by the government in question, at the meeting of the **Committee of Ministers of the Council of Europe**, during which **the final Country Report** is transmitted to the government.

4. The role of ECRI in the adoption of the 12th Protocol of the European Convention on Human Rights.

4.1. From the principle of equality to the assertion of a right to nondiscrimination.

In the context of the protection of human rights and fundamental freedoms, the concept of nondiscrimination, was expressly advanced as early as 1948, in the United Nation's Universal Declaration of Human Rights. **Art.7** of the Declaration reads as follows:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against incitement to such discrimination.[16]

In the UN Covenant on Civil and Political Rights of 1966, nondiscrimination is viewed as a prerequisite for the effective application of the principle of equality and thus, attached to all fundamental human rights and freedoms. **Art.26** of the Covenant reads as follows:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[17]

From a different perspective, **Art. 14** of the European Convention for the protection of Human Rights and Fundamental Freedoms (European Convention/ECHR), entered into force in 1953, prohibits discrimination **only** if affecting the rights secured by the Convention:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The main argument for limiting the application of Art. 14 to the rights sanctioned by the Convention and oposing the adoption of a general prohibition clause on racial discrimination was the fear that generalizing nondiscrimination would result in a host of legal interpretations, thus introducing uncertainity in the case-law of the European Court of Human Rights.

4.2. The adoption of the 12th Protocol to the European Convention on Human Rights.

In view of these "limits" set by Art.14 of the ECHR for the application of the nondiscrimination clause, insistent calls were registered from some quarters within the Council of Europe for the scope of

[16] UN General Assembly Resolution 217 A (III),adopted December 10th 1948.

[17] See UN General Assembly Resolution 2200 A (XXI) adopted December 16th 1966; the Covenant on Civil and Political Rights entered into force on March 23th 1976.

nondiscrimination to be extended, in order to cover **all forms of discrimination**. For that purpose the Parliamentary Assembly of the Council of Europe put forward repeated Recommendations asking the Committee of Ministers of the organization to widen the scope of the prohibition of discrimination by means of a new Protocol to the European Convention.[18]

Thus, in 1995 the newly created body of the Council of Europe, the **European Commission against Racism and Intolerance** (**ECRI**) drafted a document entitled "*Reasoned report on the reinforcement of the nondiscrimination clause of the European Convention of Human Rights".* ECRI's document pointed out that, in prohibiting discrimination, **Art. 14** of the European Convention of Human Rights did not go as far as other international instruments for human rights.[19]

Subsequently during 1994-2000, laborious negotiations were opened for drafting and adopting the text of a new Protocol to the ECHR. During all those stages, the activity within the newly created European Commission against Racism and Intolerance was closely linked to that endeavor.[20] The reason for ECRIs focus on the adoption of a new Protocol was mainly its concern for **effectiveness**: a normative instrument of that kind was urgently needed to combat new forms of racism and racial discrimination, of which there had been a noticeable upsurge in Europe in that period[21]. In ECRIs vew, the establishment of a general clause against discrimination on the ground of race, colour, language, religion or national or ethnic origin, conceived as **a fundamental human right**, would be a significant step towards effectively combating manifest violations of human rights which result from racism and xenophobia.

Eventually, on the 4th of November 2000, the 12th Protocol was signed in Rome. The Protocol entered into force on April 1st 2005, after ten ratifications. As of 2014, it has 18 Member States and 19 signatories.[22]

Art. 1 of the Protocol 12 to the European Convention reads as follows:

„General prohibition of discrimination.

1 .*The enjoyment of* ***any right set forth by the law*** *should be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

2*. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."*

Unlike Article 14 of the Convention, Protocol 12 extends the ECtHR jurisdiction to "any right secured by law". Thus, the Court can rule on cases of discrimination even in respect to rights not explicitly mentioned in the Convention, such as access to services, employment, housing, healthcare and also in relations with private parties.

5. Legal status of ECRI's documents as Council of Europe s*oft law* in human rights.

The ***specific recommendations*** in each Country Report and, in particular, the content of the **General Policy Recommendations** drafted by ECRI experts represent part of the Council of Europe *soft law* on human rights[23].

They *are not legally binding*, do not impose legal obligations on member States; their implementation resides in the Governments willingness to enact them on national level. The system is based entirely on the principle of cooperation and dialogue. Thus ECRI is not a mechanism competent to apply international "sanctions" against those Member States who do not implement the measures suggested.

In accordance with the international legal principle of national sovereignty, ECRI cannot itself change laws, policies and practices in Council of Europe Member States. The methods available to fulfill its mandate, being specific for the Council of Europe as an international organization of cooperation, include: awareness-rising, dialogue, persuasion and, at some extent, horizontal political *peer-pressure*, mainly by means of dialogue between the representatives of the Member States, *within the Committee of Ministers* and the *Parliamentary Assembly* of the Council of Europe.

One example of ECRIs *soft law* document which has a particular contribution in defining the concepts in the fields of racism and discrimination is the ***GPR No.7 on national legislation to combat racism and racial discrimination.***[24] In order to effectively combat discrimination, **GPR No. 7** sets out a number of key elements for which it offers *legal definitions.* Thus, for the most important concepts within the remit of ECRIs mandate, GPR No. 7 recommends that those definitions should feature, uniformly, in all comprehensive national legislations.

In the process of drafting GPR no.7, the core concept of **„race"** received a particular attention. On the one side, the use of the term was challenged, considering that it could suggest recognition of the

[18] See, *J.Schokkenbroek,"*A new European Standard Against discrimination:Negotiating Protocole No.12 to the European Convention on Human Rights",in J.Niessen,Isabelle Chopin, *The Development of Legal Instruments to Combat Racism in a Diverse Europe*,Koninklije Brill NV, The Netherlands,2004, p.61.

[19] See, *L.Hollo,* "The European Commission against Rassism and Intolerence.Its first 15 years", Council of Europe Publishing,2009,p119-121.

[20] See, e.g., *M.Kelly*,"ECRI.10 years of Combating Racism", Cedex,2004,p.97-98.

[21] See, *M.Head*,"The Genesis of Protocole No.12",in *Non-discrimination:A human Right*,Coucil of Europe Publishing,2006, p.35-49.

[22] Romania ratified the 12th Protocol to the ECHR by Law no.103/3.05.

[23] See *Compilation of ECRI General Policy Recommandations*- www.coe.org/ecri

[24] See *G.Cardinale*,"The preparation of ECRI's General Policy Recommendation n°7 on National Legislation to Combat Racism and Racial Discrimination", in Revue du Droit Europeen relatif a la non-discrimination, Edition 5/2003.

existence of *different human races,* which is an inacceptable postulate of racist doctrines. On the other side, it was considered that the concept of race should be maintained on the ground that, in everyday life, victims of *racism* and *racial discrimination* are often erroneously perceived as belonging to 'another race'. Eventually, as an important clarification,the following foot note is accompaning the use of the term: „*Since all human beings belong to the same species, ECRI rejects theories based on the existence of different « races ». However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to « another race » are not excluded from the protection provided for by the legislation"*.

Thus, ***racism*** is conceived in a very broad sense, covering not only "traditional" criteria, such as race, color, national or ethnic origin, but also other grounds as *language, religion or nationality:*

*"**Racism** ...shall mean the belief that a ground such as race,colour,language, religion, nationality or national or ethnic origin **justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons."***

The importance of a clear distinction between **direct** and **indirect racism** should also be uniformly applied at national level, when dealing with racist manifestations: **"*Direct racial discrimination*** *shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised".*

" *Indirect racial discrimination* *... shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied withby, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised."*

"*Racially motivated offences* - *„The law should penalize the following acts when committed intentionally: a) public incitement to violence, hatred or discrimination b) public insults and defamation or c) threats against a person or a grouping of persons on the grounds of their race, color, language, religion, nationality, a national or ethnic origin; d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, color, language, religion, nationality, or national or ethnic origin;"*

GPR No. 7 has also ***a wide scope****:* these uniform **legal concepts** and **definitions** are recommended to be adopted and applied in *all branches of national law* (constitutional, criminal, civil and administrative)**.**

The GPR No. 7 also points out the fact that *modern-day racism* includes not only manifestations aimed at *individuals* but also at *groups* and that it might be based on *one* or on *several of the grounds* above mentioned.

6. Contribution of ECRI to the development of the case-law of the European Court of Human Rights (ECtHR) on matters of racial discrimination.

Lately, more and more often**,** the decisions of the European Court of Human Rights make express references to ECRI's Country Reports and also to its GPRs, in cases involving, for instance, ***freedom of association and assembly*** (art.11 of the European Convention on Human Rights), ***freedom of speech*** (art. 10), ***racist violence and racial discriminations*** (art. 14).

In a case before the Court, brought by 16 Czech nationals of Roma origin (*D.H. and others v. Czech Republic)*, the applicants proved that, between 1996 and 1999, they were placed in special schools for children with serious learning difficulties. They complained that, on account of their Roma origin, they suffered discrimination in the enjoyment of their right to education, in violation of Article 14 of the European Convention on Human Rights. The Court decision, endorsing their complaints, referred in particular to the work of ECRI: Three Country Reports on the Czech Republic, in which such segregation practices were condemned; adoption of ECRI **GPR No. 3** on ***Combating racism and intolerance against Roma/Gypsies****;* the definitions of *racism* and *direct and indirect discrimination* contained in ECRI **GPR No. 7** on National legislation to combat racism and racial discrimination.[25]

In another case, brought before the Court by two Turkish citizens (*Hasan and Eylem Zengin v. Turkey)*, the Court found that religious culture and ethics lessons in Turkey could not be considered to meet the criteria of objectivity and pluralism necessary for education in a democratic society, because, favoring Islamism and the study of Koran, prevented the pupils to develop a critical mind towards religion. In its judgment, the Court quoted the analysis and specific recommendations made by ECRI in its third Report on Turkey, as well as ECRIs **GPR No. 5** on Combating intolerance and discrimination against Muslims[26].

In the case - *Nachova and others v. Bulgaria*, the Court, applying for the first time Article 14 of the

[25] See http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83258
[26] See http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82579

European Convention on Human Rights prohibiting discrimination, quoted extensively passages of ECRI Second and Third Reports on Bulgaria, in which discriminations against Roma were reported as violations of democracy; specific recommendation were also formulated[27].

7. Conclusion

Since its beginnings in 1993, ECRI has come a long way. Being a non-conventional mechanism of the Council of Europe, has allowed ECRI to expand its area of monitoring and to consider manifestations of racism and discriminations that were not foreseeable in the early 90, such as immigrants, asylum-seekers and refugees. In the aftermath of the terrorist attack of 9/11, Muslims in Europe also became the subject of increased surveillance, hate speech and even violence. The context in which ECRI functions has changed over the years, and some new trends have appeared, while other phenomena remain a constant concern on the European scene, as for instance, persistence of racial discrimination, which is closely linked to the rather precarious implementation of the anti-discrimination legislation in Member States.

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[27] See http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69631

EU ACQUIS ON E-COMMERCE

Larisa Antonia CAPISIZU[*]

Abstract

The discovery of a new form of communication between people, the Internet, was a premise of commerce development. The emergence of a new form of economic relation manifestation, e-commerce, led to important changes in the sphere of legal regulation. The need for these changes derives from the global and complex nature of the Internet.

Keywords: *e-commerce, Internet, computer crime.*

1. Conceptual delimitations

The advent of the Internet and the continuous development of information and communication technologies has led to a new type of trade, e-commerce, which is a separate entity with its own rules different from those of the traditional commerce.

The traditional commerce, based on written documents, rests on three pillars: promoting credit, speed of trade and security of trade, its legal certainty.[1]

The electronic commerce meets all these demands of the traditional commerce, being the most dynamic sector of the electronic exchange of data and information system.

The term e-commerce came from the other side of the Atlantic, in a project of "Federal Electronic Commerce Acquisition Team" in 29th of April 1994. According to this project, the electronic commerce represents "the combined and optimal use of all available communication technologies to develop trade enterprise". It covers the exchange of computerized data, but also e-mails, in line databases, electronic payment transfer.

The electronic commerce, as seen by the Organization for Economic Cooperation and Development, represents doing business via the Internet and refers to all types of transactions related to trading activities, conducted at the firm level or other buyers and is based on the processing and transmission of information in digital form, including text, sound and images.

The European Commission defines e-commerce as trading activities done electronically. It comprises various activities including electronic trading of goods and services, network delivery of goods, electronic transfer of capital, electronic submission of dispatch sheets, direct marketing and warranty and post-warranty service. The electronic commerce involves both traditional activities in areas such as health, education and new activities, such as virtual malls. It involves both products and services.

The Romanian doctrine defines e-commerce as "the entire use of electronic resources and technologies for trade and for other economic activities (meaning the use of electronic communication as a transmission medium throughout you can create, produce, advertise, catalog, inventory, purchase or sell goods, services and programs with economic value or that will adjust accounts)".[2]

A more comprehensive definition presents electronic commerce as consisting of all payments in which the transaction data are transmitted electronically, the person who pays and the person paid are directly involved in the transaction, and all the necessary information for authorizing for payment are exchanged electronically between the two sides.[3]

2. History of e-commerce

Although it is known that the emergence of e-commerce is linked to Internet development, in fact, first forms of electronic commerce have emerged much earlier, in the first half of the 20th century, when American Airlines has adopted a control system of sold, canceled and free seats at the flights that they provided. The first Home Banking system using the PCs was adopted in 1980 by First Interstate Bank, USA, and the first travel reservation system, easySABRE, was introduced in 1985 by Sabre Travel Network.[4]

Since the Internet can brings together people from different corners of the world, elaborating and adopting unitary rules at the international level regulating ecommerce is imperative. At the national level, it is necessary to adopt internal rules which are consistent with the global ones and that can adapt to the economic realities for each state.

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[1] Adrian Cristian Moise, *Metodologia infracţiunilor informatice săvârşite prin utilizarea frauduloasă a instrumentelor de plată electronică* (Bucureşti: Ed. Universul Juridic, 2001), 277.

[2] Madalina Săuca, *Infracţiuni privind comerţul electronic* (Timişoara: Ed Mitron, 2005), 9.

[3] Dan Vasilache, „Comerţul electronic, eComerţ", *Revista Română de Drept al Afacerilor* 1 (2005): 58.

[4] Jacques Henno, *Internetul* (Bucureşti: Ed. Prietenii Cartii, 2008), 100.

An important step towards adopting uniform regulations regarding the ecommerce is the European Agreement signed on 1st February 1993 in Brussels, which was ratified by Romania through Law no. 20/1993.

The variety of national legislation, which may lead to different regulations for similar situations, represents an obstacle to the development of electronic commerce. A solution to ensure international compatibility and consistency of legal norms is the UNCITRAL Model Law on Electronic Commerce, adopted in 1996. This law gives national legislators a set of internationally accepted rules for implementing electronic commerce. The Model Law contains 17 articles and is accompanied by a Guide to enactment.

A significant contribution to the development of e-commerce regulation comes from the International Chamber of Commerce in Paris which, in 1997, adopted the General Usage for International Digitally Ensured Commerce - GUIDEC.

In 1988, the European Commission launched TEDIS (Trade Electronic Data Interchange Systems) programme, aiming to develop an appropriate legal framework for the increased use of Electronic Data Interchange (EDI) in the Member States of the European Community.

The intensification of legislative activity in several Member States of the European Union has highlighted the need for a harmonized legal framework at the European level in order to prevent the national regulations to become an obstacle in the functioning of the Internal Market.[5]

According to Title XV of the Treaty on European Union, called Research and Technological Development, the European legislation for the program implementation consists of various directives, decisions, recommendations and communications[6].

The most important directives of the European Parliament and of the Council on electronic commerce are Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures and Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Another important legislative act is the Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment.

In 2001 the Model Law on Electronic Signatures was adopted by the United Nations General Assembly Resolution no. 56/80. This law was adopted at the 37th session of UNCITRAL, held in Vienna from 18 to 29 September 2000. The Model Law on Electronic Signatures contains 12 articles and is accompanied, just like the UNCITRAL Model Law on Electronic Commerce, by a guide to enactment.

In Romania, online trade started in 2004, much later than in Western countries. For this reason, online trade has grown more slowly in our country compared to countries like the UK where over 80% of all purchases are made online. This form of trading is on an upward trend in Romania, even if its growth is slower than the online trade of other European countries. Romania, compared to other countries with a long tradition in computer science, does not have a historical institutional tradition. The first steps in this direction were made by the National Institute for Research and Development in Informatics.

3. The European legal framework on e-commerce

The electronic commerce is an important source of revenue for providers opting for an electronic market. Therefore, in order to develop its huge potential in a safe environment in which all participants have confidence, certain standards and regulations ought to be imposed.

The legal framework for trade, which traditionally relies on procedures and requirements tailored for documents on paper, is adapting to new technologies. Electronic commerce is a separation of the traditional trade based on documents.[7]

According to the provisions of Title XIX of the Treaty on the Functioning of the European Union, called Research and technological development and space, European legislation consists of secondary legislation such as directives, decisions, opinions and recommendations, as well as complementary measures, such as communications.

EU acquis consists of common rights and obligations applicable to all Member States. EU acquis covers all the legal rules governing the work of EU institutions, actions and policies, consisting in[8]:

- the content, the principles and the political objectives contained in the original Treaties of the European Communities (Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community) and in the subsequent Treaties (Single European Act, the Maastricht Treaty, the Treaty of Amsterdam, the Treaty of Nice, the Treaty of Lisbon);
- the legislation adopted by the EU institutions to implement the provisions of the Treaties (regulations, directives, decisions, opinions and recommendations);
- the jurisprudence of the Court of Justice of the European Union;
- declarations and resolutions adopted within the European Union;
- joint actions, common positions, conventions,

[5] Ioan Schiau, „Cadrul juridic al comerţului electornic", *Revista de drept comercial* 1 (2002): 56-72.
[6] Carmen Todica, *Statutul juridic si puterile administratorului în societatea comercială* (Bucureşti: Ed. Universul juridic, 2011), 18.
[7] Schiau, „Cadrul juridic al comerţului electornic": 56-72.
[8] Zoltán Horváth, *Manuel sur l'Union Européenne* (Assemblée nationale hongroise, deuxième édition en français, 2007), 231.

resolutions, declarations and other acts adopted by the Common Foreign and Security Policy (CFSP) and in Cooperation in the field of Justice and Home Affairs (JHA);

- international agreements in which the European Union is a party, and those signed between the Member States of the European Union with regard to its work.

The most important directives of the European Parliament and of the Council on electronic commerce are Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures and Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

The aim of the Directive 1999/93/EC stated in its first article is to make electronic signatures easier to use and help them become legally recognized within the Member States. This Directive establishes the legal framework for electronic signatures and certification services at European level in order to ensure the proper functioning of the internal market of the Community. The Directive aims to build confidence in the process of certification of the origin and integrity of electronic messages in IT era.

The Electronic Signature Directive does not cover those aspects relevant to the formation and validity of contracts or other legal obligations, when there are certain legal requirements, national or European, regarding the form of the act. It also does not affect rules and limitations prescribed in national or European legislation for the use of documents.

The Directive 1999/93/EC defines the conditions applicable to the use of electronic signatures, reaffirms the principles of the Internal Market, establishes the legal effects of electronic signatures and the security measures to protect the electronic information.

The Directive 2000/31/EC on electronic commerce contributes to the proper functioning of the electronic commerce in the Internal Market, ensuring the free movement of information society services between Member States. This Directive establishes the framework for the national legislation regarding the information services for the Internal Market, it establishes the conditions for setting up the certification bodies and it regulates the commercial transmissions and the electronic contracts, the liability of intermediaries, the rules of conduct applicable, the judicial and extra-judicial settlement of disputes, as well as the cooperation between Member States.

The Directive also defines "the coordinated field" as the requirements contained in the Member States legislation, applicable to the information society services and that the providers of such services must comply. These requirements may relate to professional qualifications, authorization or notification of the information service provider, his behavior, quality of services and liability of service provider.

Directive 2000/31/EC defines the principles governing the information society services provided in the Internal Market[9]:

- The principle of free access to information: Member States cannot, on matters falling within the coordinated field, restrict the freedom to provide information;
- The principle of excluding prior authorization: Member States shall take the necessary measures so that the set up and the continuation of the activity of IT service provider shall not be subject to any prior authorization or other conditions having equivalent effect;
- Member States shall impose on service providers the obligation to facilitate the free, simple and direct access of service users to information that identifies the supplier and its authorization, when the law stipulates the necessity of an authorization;
- Member States shall ensure that any commercial communication which is an information society service will identify the commercial nature of communication and the conditions which must be met in order to participate in any promotional offer;
- Member States shall ensure that legal regulations applicable to the process of forming and to the execution of the contracts do not create obstacles for the use of electronic contracts and do not to lack these contracts of their legal effects motivated by the fact that they were created by electronic means;
- The principle of "simple behavior": Member States shall ensure that the service provider is not held responsible for the information transmitted, as long as the provider does not interfere with the electronic message.

Another important normative act at EU level in the field of electronic commerce is the Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment. This Framework Decision defines the specific facts of fraud involving the use of other means of payment than liquidity. Under this framework decision, fraud involving any form of non-cash means of payment will be recognized as a criminal offence and should be incriminated in all Member States, regardless of the person who committed it, natural or legal person, and should be punished by effective, proportionate and dissuasive penalties, without necessarily involving deprivation of liberty, except in the most serious cases.[10] The framework decision lists the various types of behavior that should be incriminated and also establishes a series of criteria to determine the jurisdiction of the national judicial authorities in respect of the offences referred to in the framework decision.[11]

[9] Schiau, „Cadrul juridic al comerţului electornic": 56-72.
[10] Adrian-Milutin Truichici, *Lupta împotriva fraudei şi falsificării mijloacelor de plată, altele decât lichidităţile la nivelul Uniunii*. *Europene*, Revista de drept comercial 2 (2008): 8.
[11] Moise, *Metodologia infracţiunilor informatice,* 277.

The decisions of the European Parliament and those of the Council, the communications from the Commission to the Council and to the European Parliament and the Commission's recommendations are enforcement instruments for the existing directives.

In conclusion, the characteristic of EU regulation is that the directives, the decisions, the recommendations and the communications do not replace the existing regulations in Member States on electronic commerce, but aim to harmonize these national legislations in order to attain international compatibility and development of electronic commerce in the information society.

4. The implementation of European rules on e-commerce in Romania

In the context of the emergence and the development of electronic commerce, the Romanian society has suffered social, economic and legal transformations. From a legal perspective, Romania has adopted regulations that have outlined a legal framework for the sustainable development of electronic commerce, regulations consistent with international obligations.

In this respect, Law no. 20/1993 ratifying the European Agreement of 1 February 1993 in Brussels must be mentioned.

Among the objectives set by Romania with the European Union are:

- promoting and developing trade, as well as harmonious economic relations between the parties;
- providing a basis for economic, social, financial and cultural cooperation;
- supporting the efforts of our country's economic development;
- providing a framework for the gradual integration into the European Union.

Romania has complied with the obligations and, therefore, began creating a framework composed of a series of regulations governing every component of this complex system of transactions, the electronic commerce.

In this regard, the provisions of Law no. 365/2002 on electronic commerce, as amended, are applicable. This law transposes Directive no. 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market. This normative act is "the common law" in the field. The concept of e-commerce, although known before 2000, it wasn't enacted in Romania until the emergence of e-commerce law.

The main normative act subordinated to the Law no. 365/2002 consists of the Methodological Norms approved by Government decision no. 1308/2002.

The electronic commerce is based on the electronic signature regulated by Law no. 455/2001 and by accepted standards for data transmission security and data storage. This law transposes Directive 1999/93/EC of 13 December 1999 on a Community framework for electronic signatures.

Article 2 of Law no. 455/2001 states that the provisions of this law "shall be supplemented with the provisions concerning the conclusion, validity and effects of legal acts", art. 2 para. (3) of Law no. 365/2002 states that the provisions of this law shall be supplemented with tax laws, the laws governing the protection of individuals with regard to the processing of personal data and privacy in the telecommunications sector and the legal provisions on competition and par. (5) of the same article states that "if it does not contain derogations, this law is supplemented by legal provisions on the conclusion, validity and effects of legal acts, with other legal provisions that are intended to protect consumers and public health, as well as legal provisions regarding the regulation of private international law".

The Law no. 455/2001 establishes the legal regime of electronic signatures and of the documents in electronic form, as well as the conditions for providing the certification of electronic signatures, according to art. 1, and the Law. 365/2002 aims to establish the conditions for providing the information society services, as well as to incriminate as crimes the facts committed in connection with the domains security used in e-commerce, the issuing and the use of electronic payment instruments and the use of identification data in order to perform financial operations, providing a framework for supporting the free movement and safe development of these services.

The first steps in lawmaking in this area, in accordance with the international legal framework, were made by adopting G.O no. 130/2000 on the legal regime of distance contracts, followed by Law no. 455/2001 on electronic signature, together with G.D no. 1253/2001 on the approval of Technical and methodological rules on electronic signature law enforcement, then G.O no. 20/2002 on public procurement through electronic auctions and G.O no. 24/2002 regarding the receipt by electronic means of local taxes, Law no. 51/2003 approving G.O no. 130/2000 on the legal regime of distance contracts, G.D no. 181/2002 on the establishment of the General Inspectorate for Communications and Information Technology and G.D no. 182/2002 on the list of competent authorities that are obliged to use electronic procurement auction. The legal framework was completed by the electronic commerce Law no. 365/2002.

The internal regulations that build this legal framework are transposing the EU legislation. Many other laws are governing specific aspects of electronic commerce, for example:

- National Bank of Romania Regulation no. 4/2002 concerning transactions through electronic payment instruments and the relations between the parties to such transactions;

- Order of the Minister of Communications and Information Technology no. 16/2003 on the procedure for approval of payment instruments with remote access, such as Internet banking or home-banking applications;
- Title III of Law no. 161/2003 on certain measures to ensure transparency in exercising public dignities, public functions and in business, to prevent and to punish corruption, which aims to prevent and to combat cybercrime and which contains provisions related to crimes and offenses, procedural provisions and aspects regarding international cooperation in combating the phenomenon of cybercrime;
- Law no. 250/2003 approving Government Emergency Ordinance no. 193/2002 concerning the introduction of modern payment systems;
- O.G. no. 73/2003 amending and supplementing O.G. no. 20/2002 on public procurement through electronic auctions;
- Law no. 485 2003 amending and supplementing the Banking Law no. 58/1998;
- Norms for the application of G.O no. 20/2002 on public procurement through electronic auctions.

In conclusion, in the light of the economic integration into the European Union, it was necessary for Romania to harmonize its national legislation with the European legislation. After the accession, the EU law was automatically integrated into the national law. As regards to the alignment with EU rules on electronic commerce, Romania has adopted a set of laws transposing EU provisions, acts summarized in the section above.

5. Conclusions

In conclusion, I believe that the regulation in the EU of the Internet in general and of the electronic commerce in particular, remains a mosaic of laws, rules, standards and different practices. This situation hinders the development of online services and undermines the confidence of actual or potential users, both in terms of demand and supply. The ignorance of the rights and of the applicable rules, as well as the opportunities offered by the digital economy, increases people's reluctance. The practical difficulties related to cross-border transactions (payments, shipping, dispute settlement, risk of abuse) discourage them to take full advantage of the Internet to purchase or supply goods and services.

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PARTICULARITIES OF PARLIAMENTARY OVERSIGHT IN DIFFERENT POLITICAL REGIMES

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Abstract:

The quality and intensity of the parliamentary oversight performed over the Government are shaped by several major criteria: political regime, electoral system, structure of the Parliament (unicameral/bicameral), parliamentary culture and tradition. This paper emphasizes some distinctive elements and particular mechanisms of the control exercised over the activities of the executive power, from the point of view of the political regime established in states with modern democracies.

Keywords: *Parliament, Government, parliamentary oversight, separation of powers, state*.

1. Introduction

Ensuring the representativeness of the people in a democracy, the Parliament must exercise one of its functions – the parliamentary oversight – as a necessary balance between the powers in the state in order to prevent the seizing of the state power. Pierre Avril appreciates that it strictly represents a verification, „a material operation, framed by the law by fixing its procedure and consequences"[1].

The Dutch author, Paul Penning, defines the parliamentary oversight as „the legislature's ability to constrain executive behavior"[2], while Frederick Stapenhurst and Riccardo Pelizzo considers it of „vital importance in ensuring that governments carry out their duties efficiently, democratically, and in a fiscally responsible manner"[3].

It is well known John Stuart Mill's opinion, which can be partially applied to the contemporary era: the true mission of a Parliament is to watch and control the Government, to bring its actions to light, to ask for its presence and justification when its acts seem questionable, to blame them if they are contestable, to watch the persons from the Government when they abuse their position or fulfill their mission contrary to the peoples' will and to appoint their successors, whether express or virtually[4].

Professor Ioan Muraru emphasizes the importance of the parliamentary control and considers it as a „full one", being exercised upon the entire activities according to the laws and Constitution, a „necessary one", as the Parliament is called to establish the manner the other state authorities are fulfilling their mission and „differentially" acting[5].

The Government, the chief of state, the public administration are the main action areas, seconded by other domains as security and intelligence which no longer represent taboo fields. In this regard, we will focus on the most important factors and circumstances that influence and shape the dimension of the parliamentary control.

2. Content

2.1. Political regimes - general remarks

The political system traces significant characteristics and the presidential one states the chief of state as the head of the Government, being directly or indirectly elected, by the vote of the people. Such a pattern is described as a rigid separation of the powers, both the President and the Parliament have their own electoral legitimacy. On one hand, the President cannot be held politically accountant by the legislative body and on the other hand, the latter will not be dissolved, both parties lacking a lethal weapon.

This is the case of the United States of America, where the President is the leader of the public administration but without forming a Government to be fully responsible in front of the Congress. We are facing an incomplete parliamentary oversight, which extends to the veto right regarding some laws, the approval of public appointments and the verification of the foreign affairs policies.

The strong point in such regime is the fact that the political and criminal responsibility are separated, thus the impeachment procedure is applied. The subject of such a procedure may be any civil officer of the Government, even the President, for cases of treason, bribery or other high crimes and

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[1] **Pierre Avril**, *L'introuvable contrôle parlementaire*, *Petites affiches*, Paris, July 2009

[2] **Paul Penning**, *Parliamentary Control of the Executive in 47 Democracies*, 28th Joint Sessions of Workshops of the European Consortium for Political Research, 14-19 April, 2000, Copenhagen, p. 2

[3] **C. Stapenhurst and Riccardo Pelizzo**, "*A Bigger Role for Legislatures*", IMF, December 2002, Volume 39, Number 4, p.46.

[4] **Armel le Divellec**, *Considérations sur le gouvernement représentatif*, Guillaumin Publishing House, Paris,1877, p. 135

[5] **Ioan Muraru**, **Elena Simina Tănăsescu**, *Drept constituțional și instituții politice(Constitutional Law and Political Institutions)*, 13th edition, vol II, Ed. C.H. Beck Publishing House, Bucharest, 2009, p. 158

misdemeanors (article II of the United States Constitution, section 4). In the history of the United States of America only two procedures regarding the impeachment of a President were finalized, both of them with an acquittal: Andrew Johnson Acquitted on the 26th of May 1868 and Bill Clinton on the 12th of February 1999.

In parliamentary regimes, the President is elected, politically accountant to the legislative body and, by symmetry, dismissed by the Parliament after a vote of non-confidence.

As a part of an oversight institution, the members of the Parliament belonging to the party in power must verify the activity of the executive, based on the mandate entrusted by the people. But, at the same time, the performance of the Government influences, in a decisive manner, their political and electoral fate; this is that „paradox"[6] of the parliamentary systems, a dilemma often solved when the point of view of the political parties prevails.

There are some exceptions in the parliamentary systems as well, in Germany, for example, where the Chancellor concentrates in his hands the executive power and also has the right to request the President to dissolute the Bundestag. The President has prerogatives to appoint persons in public positions, including judges, to represent the state, to sign treaties, but he doesn't answer in front of the Parliament.

In such regimes, an important element which influences the Parliament - Government relationship is the electoral system and Philip Norton emphasizes the existence of „powerful correlation, but not total"[7] between the majority election system and the British Government model, and between the proportional representation system and the continental model. The first one facilitates the victory of one party, so a powerful government can be formed, which prefers to debate on major themes during the plenary sessions and not during the special or permanent committees, in order to avoid the oversight. On the other hand, the proportional system resides in the formation of minority governments, as no party is able to gain absolute power, the activity in the committees is very intense, and so the executive is often forced to negotiate.

Having a unicameral Parliament or one with two chambers also shapes the dimension of the parliamentary oversight. After analyzing legislative bodies of United States of America, Russia and the 28 member states of the European Union, we came to the conclusion that 16 have a bicameral parliament and 14 a unicameral one.[8]. Without making a strict rule, it is noticeable that the Parliament with one chamber is specific to unitary centralized countries, while, the decentralized federal ones[9], have two chambers.

There are states where both chambers have prerogatives to exercise the parliamentary oversight and this procedure is more efficient (especially in case of a minority Government in the superior chamber); generally, the inferior chamber plays a major role. The relationship between the two institutions is also influenced by the existence of a strong and active opposition and by its capacity to organize and put the Government in difficulty.

In semi – presidential regimes, a specific set of rules is instituted between the President, the Parliament and the Government. The new element is the accountability of the chief of state in front of the legislative body, even if both institutions are extracting their power from the direct vote of the citizens; thus, the President can be suspended or put to trial for high treason.

No matter the political regime, a certain aspect must be mentioned, the situation when the members of the Government or some of them are also members of the Parliament. In Germany and Great Britain, there is such a custom, while in Austria, generally, the ministers are not members of the legislative body.

2.2. Instruments of the parliamentary oversight

This chapter displays the means of the parliamentary oversight, the way it is reflected in national Constitutions and Rules and Regulations of the parliamentary Chambers: questions, interpellations, motions, hearings in permanent committees, committees of inquiry, messages, reports, programs, citizens' petitions, Ombudsman. In order to have a more global image, we chose to analyze the legislation in the member states of the European Union, United States and America and Russia (two states in which the administrations are only indirect responsible in front of the Parliament).

Yves Mény distinguishes three types of parliamentary oversight on the Government[10]:

- Partisan control, orchestrated by the opposition and efficient when the Government is vulnerable;
- Non-partisan control: questions, hearings, committees, etc;
- Control with a sanction: motion of no

[6] **Philip Norton**, *La nature du contrôle parlementaire(The Nature of the Parliamentary Oversight)*, Pouvoirs Magazine, 2010/3 n° 134, p 11. 5-22. DOI : 10.3917/pouv.134.0005

[7] **Philip Norton**, *op. cit.* p. 11

[8] European Union: 14 states with bicameral Parliament (Austria, Belgium, Czech Republic, Finland, France, Germany, Ireland, Italiy, Netherlands, Poland, Romania, Slovenia, Spain, UK) and 14 with unicameral parliament(Bulgary, Croatia, Cyprus, Denmark, Estonia, Hungary, Greece, Latvia, Lituania, Luxemburg, Malta, Portugal, Slovakia, Sweden)

[9] **Arend Lijphart**, *Modele ale democratiei. Forme de guvernare si functionare in treizecisisase de tari(Patters of Democracy. Government Forms and Performance in Thirty-Six Countries)*, Polirom Publishing House, Bucharest, 2000, p. 193

[10] **Yves Mény**, *France: The Institutionalization of Leadership, in Political Institutions in Europe*(edited by Josep M. Colomer), Routledge Publishing House, London, 2002

confidence, but which cannot be used very often without destabilizing the system.

2.2.1. Questions

A parliamentary question is, in principle, a request of an information which the Government has to provide, which can be made available only to the author or to all the members of the legislative body; moreover, the Government can be called to clarify if facts/data are precise or correct.

In Great Britain, this procedure is one of the oldest prerogatives, dated 1721, the House of Lords. Generally, the Parliament has a question time section in its agenda, broadcasted live on national TV stations or radios. Additional questions may be formulated, usually only on urgent matters.

Written questions are the most used instrument in the oversight activity, given the possibility of the members of the Parliament to ask for detailed explanations from the executive body. In order to prevent the agenda of the Parliament from being blocked, in some countries there are certain regulations such as: the number of persons which can sign such a question (for example five persons in Austria /Latvia or nine in Lithuania) or pre authorization from the Parliament related to the subject of the question. The areas covered by the content of the questions may address a local issue, from the constituency of the author or general ones.

Just to give some examples, in Germany, the Federal Government has to answer to 5000 questions per year, while in Romania, in 2014, the Government had to answer to 3959 questions.

This instrument is sometimes used by the members of the Parliament in order to increase their image in public or inside their political party. The Russian author, Maria Sivenkova, in a comparative study[11], appreciates that this is the case in a quarter of the questions addressed to the British Government and in a tenth in the Russian Parliament. Matti Wiberg also notices that using this mechanism represents one of the means to assume merits and have publicity.[12].

A particular situation is encountered in the United States of America, where the Congress cannot put forward questions for the executive body to answer, which is due to the fact that, as we explained above, the Government is not held politically accountant. However, article II, section 3, states that the President must give the Congress information on the "State of the Union" "from time to time" and make recommendations which he deems as "necessary and expedient".

2.2.2. Interpellations

Usually, the interpellation is a request to get information or clarify a situation regarding the Government's program. It refers to situations related to the national interest and this makes the difference in comparison to a question. For example, in Belgium, House of Representatives, it is not allowed to formulate an interpellation if it refers to local or special issues. An interpellation is initiated in written with the intention to launch a debate and in some legislative bodies it is necessary the agreement of the Parliamentary group in order to be filed.

2.2.3. Motions

The motion is the instrument used by the Parliament to initiate the procedure to partially or fully replace the Government and its radical form is the censure motion/motion of no confidence, „the supreme manifestation of the oversight exercised upon the Government"[13]. Generally, the inferior chamber is the one armed with such means, but we also found exceptions (joint session of the two chambers in Romania). The number of the necessary signatures varies from country to country, as well as the necessary number of votes to pass (two thirds, three fifths, simple majority), while in states like Germany, Spain, Slovenia, the non - confidence vote is given unless the successor is also elected with a majority.

The first motion of no confidence occurred in Great Britain in 1792 and the last one in 1979. In France in 1962, while the most recent in Eastern Europe happened in April 2012 in Romania and it became a very rare thing to be seen.

In presidential systems, the Parliament can occasionally give a no confidence vote, for example the negative vote receive by State Secretary Dean Acheson in 1950 from the Congress of the United States of America. There is also the possibility for a minister to be held accountant individually, but the Government is not in danger and it has the possibility to nominate another person for that portfolio. Latvia is a special case, as, when more than half of the members of the Cabinet have been replaced, the entire Government has to receive a confirmation vote.

2.2.4. Hearings in permanent committees

Lately, it is noticeable the increase of the role given to permanent parliamentary committees. The public hearings are often an efficient vehicle to retrieve information related to the public agenda.

2.2.5. Committees of Inquiry

The committees of inquiry represent the mean by which particular situations, considered to be unclear or critical are investigated and are specific to the inferior

[11] **Maria Sivenkova**, *Expressing Commitment When Asking Multiunit Questions in Parliamentary Debates*: *Journal of Language and Social Psychology*, 2008, p. 369

[12] **David Nayhew**, *Congress: The Electoral connection*, London, 1974, Yale University, cited by **Matti Wiberg**, *Parliamentary Questioning: Control by Communication*, published in *Parliaments and Majority Rule*, edited by **Herbert Doring**

[13] **Marian Enache**, ***Marian Enache***, *Controlul Parlamentar(Parliamentary Oversight), Polirom Publishing House, Iasi, 1998*, p. 181

chambers of the Parliament. In Slovenia, only the upper chamber can use this instrument.

The final report do not stand judicial courts, but the public opinion can be influenced by the conclusions contained by such documents and it is well known the case of the special committee in the Congress, which led to the resignation of President Richard Nixon in 1974.

The domains approached in a committee of inquiry are limited and Eric Thiers mentions the vivid debates that took place in France, in 2010, regarding the studies ordered and financed by the President of the Republic. The vote on establishing such a committee did not pass, as, according to the Constitution, the accountability of the chief of state is possible only for high treason and only in front of the High Court[14].

2.2.6. Messages, reports, programs

The chief of states/governments, certain state authorities have the constitutional obligation to present in front joint chambers/single chamber these types of documents. In the presidential system, the chief of state presents, once elected, the political program of the newly elected Government, while in parliamentary and semi – presidential systems, the Government is the one to reveal its objectives. These sessions may be followed by debates, when the members of the parliament or the parliamentary groups can ask for some aspects to be clarified.

Professor Muraru remarks that using the term *parliamentary oversight* in these situations is „conventional, marking the existence of the relations between these high public authorities"[15].

2.2.7. Citizens' petitions

The citizens are allowed to make petitions to one or both of the chambers of the Parliament in order to defend their rights and interests; this way, the Parliament is an intermediate between the citizens and the Government. There are special committees dealing with these petitions and their members have the possibility to ask oral or written references from the Ombudsman.

2.2.8. Ombudsman

Such an authority has Nordic origins, the first Ombudsman being elected in 1766 in Sweden. It has general or special competence, acting to defend the rights of the citizens in relation to the public authorities and functions under different names. In some states it was kept the original name of Ombudsman (UK, Hungary, Northern Ireland) while in others we can find names like commissary (Poland, Cyprus, Russia), chancellor (Estonia), mediator (France, Luxembourg) or lawyer (Romania, Greece). In Italy the institution has only a regional role while in the United States of America can be found the federal Ombudsman.

A special Ombudsman is appointed in areas such as minority rights (Hungary), Gender equality (Sweden), armed forces (Germany), etc.

3. Conclusions

The intensity and quality of the parliamentary oversight are shaped by many factors, which are joined by the parliamentary culture, tradition specific in each state. As a general trend, lately, the parliamentary oversight proves to be a prerogative difficult to exercise, both by the majority and opposition, in their pursue of influencing the adoption of the legislation.

In any democracy, the purposefulness of the parliamentary control has to overcome the statute of confrontation, sometimes duel, between the executive and legislative bodies, so that it becomes the equilibrium point from which the needs of the citizens are met, according to the mandate they have granted.

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THE IMPORTANCE OF THE LISBON TREATY. MAIN CHANGES AND THEIR ROLE IN THE CONSTRUCTION OF THE EUROPEAN UNION

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Abstract

Analyzing the "Europe 2020" Strategy means analyzing the concepts of intelligent, durable and social-inclusion and social-dialogue friendly growth. In this context, the Lisbon Treaty appears as the supplier of a judicial basis for the enactment of the Lisbon Strategy and the "Europe 2020" Strategy stands as an instrument for enacting the Lisbon Treaty. Furthermore, the European social model emerges not merely as a symbiosis of the different national models of the Member States, one being thus able to debate on its global uniqueness. Concerning this aspect, we place a heavy emphasis on the analysis of the possible implications the compulsory character of the Charter has, in addition to the increasing role of the social partners within the EU.

Keywords: *subsidiarity, principle of law, treaty of Lisbon, novelties of the treaty, institutions.*

TREATY OF LISBON

The Treaty of Lisbon ends a process of reform undertaken between 2000 and 2010, its content representing a reversal to the text of the Constitutional Treaty, in order to create a future Union capable of facing internal and international challenges. The main points are:

First, the Treaty of Lisbon is the result of a political process which began at Maastricht and continued at Amsterdam and Nice through which a prominent double innovation has been achieved:

- A method innovation (the constitutional process of the Convention);
- A model innovation (the political development);

Second, this process can further be divided into three parts:

- The first part, that of the proposals and the agreements – The Convention and the Constitution;
- The second part, the deadlock – the constitutional crisis;
- The final part, the relieving – The Lisbon Treaty.

One has to remark that whereas the deadlock phase has been thoroughly debated and scrutinized at European level, overtaking the differences was a process less observed by the European citizens, knowledge about these procedures being considered trivial by both the media and high-ranking officials. A possible explanation for this occurrence may lie in the double interpretation of the Lisbon Treaty, in terms of both gains and costs, and therefore of the different individual interests involved[1]. If we have already identified the great gain in maintaining the content of the Constitutional Treaty, the most important loss is the disappearance of its constitutional form, its symbolic reference and its constitutional language.

It is very important to understand the complex political, institutional and decisional reforms brought about by the Lisbon Treaty, a treaty which should ensure the legislative framework for reforms over the next 20 years.

On the 13th of December 2007, heads of state and government signed near Lisbon, the Treaty amending the Treaty on European Union and the Treaty establishing the European Community. The treaty, named the Treaty of Lisbon after the town in which it was signed underpins the end of the constitutional crisis, replacing the Constitutional Treaty whose ratification wasn't carried through. The Lisbon Treaty represents the most ambitious amendment of the founding Treaties, since the establishment of the Communities, over passing in terms of importance even the Maastricht moment. The number and scope of the reforms enacted by the Treaty were made possible because the main parts of the Constitutional Treaty were transferred with the consent of the Member States in the current Treaty. The New Treaty of Lisbon is in fact the old Constitutional Treaty losing its constitutional character[2].

For the European Union and its legal basis, the main consequences of the Lisbon Treaty are as follows:

1. The Lisbon Treaty is a classic reform treaty. As the previous Treaties of Amsterdam and Nice, the Lisbon Treaty modifies the existing Treaties, without replacing them with a new text. There is a return to the traditional amending/complementing technique, different from the innovative form underscored by the Constitutional Treaty, i.e. a legislative consolidation through the adoption of a completely new text, the Lisbon Treaty distancing itself from the radical and simplifying formula of replacing almost all existing

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[1] Bărbulescu, Iordan Gheorghe, Procesul decizional în Uniunea Europeana, Polirom, 2008.

[2] Wallace, Helen, Mark Pollack, Alasdair Young, Policy-Making in the European Union, Sixth Edition, Oxford University Press, 2010

European treaties with a single, simpler and better structured text.

2. The Treaty includes nevertheless an important innovation: the disappearance of the European Community and its replacement with the European Union, which becomes a legal entity. The disappearance of the European Community represents in itself a simplification, thus being eliminated a legal entity that has on several occasions generated confusions, the citizens being more accustomed to the political reality named the European Union and having difficulties in understanding the relation between the EC and the EU;

3. Nevertheless, the Treaty establishing the European Community does not simply go away alongside the disappearance of the European Community but, once amended, changes its name, becoming with the enactment of the Lisbon Treaty the "Treaty on the functioning of the European Union". It is not simply a change in terminology, but also a change in functions.

The Lisbon Treaty is therefore a classic treaty, which includes amendments to the two fundamental treaties, the Treaty on the European Union and the Treaty establishing a European Community. As in the case of all treaties such as these, at first sight, all the changes enacted cannot be encompassed, a process which is greatly facilitated by the consolidated texts. At the same time, the treaty includes a great number of Protocols and Declarations annexed to the two amended treaties. In addition to that, the fusion between the EC and the EU does not comprise the fusion with the European Atomic Energy Community (EURATOM), which continues to function as well as the Treaty which established it, i.e. the EAEC Treaty. Of course, the EU and the EAEC share the same institutions in their functioning. In other words, after the coming into force of the Lisbon Treaty, the primary law of the European Union will operate with two texts:

- The Treaty on the European Union;
- Treaty on the Functioning of the European Union.

The first introduces fundamental reforms in the Treaty on the European Union, including its structure. The second reforms and renames the Treaty establishing the European Community, as a result of the disappearance of the European Community, introducing at the same time prominent changes. A material distinction between the two treaties is therefore instated, the latter becoming the basic text and the former developing the meaning or the latter.

From a judicial perspective, there is no hierarchic relation between the two treaties. Moving away from the formal and structural aspects, an analysis of the amendments the Lisbon Treaty makes to the older treaties is necessary. The first aspect we must take into account is that the Lisbon Treaty develops and consolidates the European Union, born at Maastricht, developing its political model. From this perspective, in addition to the afore-mentioned disappearance of the European Community, several fundamental changes are enacted:

- The legal entity status of the European Union;
- The compulsory character of the Charter of Fundamental Rights of the European Union;
- Establishing the set of values and objectives of the Union;
- Establishing the dispositions for the democratic functioning of the Union;
- The continuation of the growing community importance of the third pillar of the EU, concerning justice and internal affairs;
- Dividing the competences;
- Establishing a procedure of controlling the subsidiarity principle;
- Enacting an ambitious institutional reform;
- Enacting major innovations in the fields of external policy, defense and security;
- The establishment of a new legal basis for the Union.

THE MAIN NOVELTIES OF THE TREATY

Examining the formal aspects of the Lisbon Treaty and the structural changes it entails must complement the analysis of its material content. We synthesize here in brief the novelties and the reforms enacted by the Lisbon Treaty and its contributions to the changes that will affect the European Union:

1. The Lisbon Treaty strengthens the political dimension of the European Union, developed in the last years. The European Community ends its existence, thus being recognized the appearance of a common political reality, that of the European Union – unlike the previous situation when two judicial realities corresponding to the two organizations, the EU and the EC, coexisted. The Union gains legal person status and, by explicitly establishing its values and objectives the political project and its nature are more strongly defined. The political character of the Union is strengthened also by the specification of its functioning principles: representative and participatory democracy. As to this latter aspect, one has to take into account the importance of introducing into the functioning framework of the Union of the legislative initiative of a million citizens. As innovative as this is the stipulation that, for the first time, a state has the possibility of voluntarily leaving the Union;

2. The Lisbon Treaty clarifies and defines the relations of the Union with the Member States through the catalogue of competences. To this extent, we must highlight the novelty of the national legislatures' participation to the activities of the Union. In addition to their traditional functions, the Lisbon Treaty gives the national parliaments the role of guarantor of the national competences in relation to the Union. Hence, the national legislatures will be able to take part in the process of "ex ante" political control of the

community's legislation accordance with the subsidiarity principle and will play an important role in the simplified revision of the treaties, through the possibilities opened by the "gangway" procedure;

3. Of utmost importance for the democracy of the Union is the compulsory character of the Charter of Fundamental Rights of the European Union, although there are some exceptions for the United Kingdom and for Poland.

4. The consolidation of fundamental rights protection mechanisms is highlighted also by the possibility of the Union's accession to the European Convention on Human Rights, a prominent document of the Council of Europe, which entails the EU's acceptance of an external control mechanism in the field of the fundamental rights;

5. In order to cope with the challenges which stem from the increase of the Member States, the Lisbon Treaty enacts an important institutional reform which strives to ensure the democratic quality of the Unions functioning as well as guaranteeing its decision and action capacities;

6. The legislative and decisional procedures are profoundly altered. In order to increase the efficiency of the community's action, the Lisbon replaces the unanimous decision of the Council with the qualified majority voting procedure for 28 new fields of action. In addition to that, the stipulations of the Lisbon Treaty entail that in 28 cases the rule of decision-making is qualified majority. In regards to the legislative procedure, the Lisbon Treaty stipulates that the rule is the old general rule of the "ordinary" procedure. This procedure is none other than a reformed version of the "co decision" rule, which entails that in order to pass a decision, both the Council and the EP must, on parity, approve it. The partnership of the European legislature is thus consolidated. As to the legislative acts of the Union, the Lisbon Treaty considerably disentangles the matters by making a clear cut difference between "legislative acts", i.e. those approved by means of a legislative procedure and "executive acts", i.e. those adopted through competence declination by the Commission. Furthermore, a clear hierarchy between these categories is established;

7. To clarify and explain the functioning of the EU, the Lisbon Treaty outlines the competences of the Union, establishing three categories: exclusive competences, common competences and complementary competences. The Treaty also lays the foundations for a catalogue of competences belonging to each of the three afore-mentioned categories. As to the exercising of these competences, the main change is the establishing of monitoring procedures over the conformity of the common action with the proportionality and subsidiarity principles. First, a political "ex ante" control is instituted, through the participation of the national legislatures in this procedure, the possibility of bringing an action in front of the Justice Court being guaranteed. As to the action competences of the European Union, the Lisbon Treaty establishes new judicial grounds for the Union's development of actions and policies in fields as diverse as humanitarian aid, space research, energy, climate change, youth, sports, civil protection and administrative cooperation;

8. In most cases, we are not talking about exclusively new competences, but more likely a thoroughness of older stipulations. The great leap forward from this perspective is the institutions of the Freedom, Justice and Security Space;

9. Significant progress is registered also in regards to the Common Foreign and Security Policy of the European Union, as an attempt to bolster the international profile of the European Union. First, a framework of values and objectives is firmly established, which corresponds to the role of increasing international responsibility the EU tries to assume at a global level and which ensures increased internal coherence. At the same time a new legal basis is established for the initiation of privileged association relations with countries in the immediate vicinity of the EU, a part of a new specific neighborhood policy. The Union's gain of the legal person status allows the Union to increase its international visibility and efficiency. Two important innovations are relevant to this matter – the newly created function of High Representative for Foreign Affairs and Security Policy of the European Union as well as the newly established European External Action Service, which will help the High Representative to carry out his activity. Both institutions seek to offer unity and coherence to the two fields of foreign policy, the intergovernmental field, specific to the CFSP and the community field, specific to the foreign relations of the EU;

10.The Common Security and Defense Policy is decisively developed through the Lisbon Treaty. On the one hand, the present line of crisis management through the Petersburg missions is continued; on the other hand progresses are made in two directions: cooperation in terms of capacities, through the creation of a European Defense Agency and through the establishment of political self-defense instruments of the Union. To this matter, the Lisbon treaty contains a clause of mutual assistance between the Member States in case of a military attack, a solidarity clause between the Member States in case of a natural disaster or terrorist threat as well as the possibility of establishing a permanent structured cooperation between the states which match a series of criteria and are able and willing to assume responsibilities in relation to these capacities. At the same time, the legal framework of the cooperation is extended through the procedure of "consolidated cooperation", which entails the elimination of the present interdiction, allowing for the creation, as in the cases of the Schengen Area or of the Euro Area the gradual creation of a veritable European Army.

11.The Lisbon treaty also entails significant changes pertaining to the procedure of treaty revision

itself, the European Parliament being several additional competences. An ordinary procedure is established, which consists, as a general rule, of the convening of a Convention, but also simplified procedures, known as "gangways" which allow the amendment of decision-making or rule-enacting procedures without a formal revision of the treaties. The first stipulation represents an important democratization of the reforming process of the Treaties, ensuring the participation to the UE reform of the national legislatures and of the European citizens especially, along the governments of the Member States and the European institutions. The second stipulation consolidates the Union's capacity to cope with new challenges eliminating the need for costly and lengthy reforms. Germany's proposal of modifying the Treaties through the simplified procedure, precisely article 125 of the TFUE, should be seen in this light.

For all these reasons, the Lisbon Treaty can be considered paramount, as it accomplishes most of the substantive European reforms, both in terms of scale and in terms of content. The Treaty is a great step forward towards the construction of political Europe to the extent to which, on the one hand, it develops the model of this unique political system, and, on the other hand, it enhances the Union's power of action in fields that normally lie within the scope of exclusive national sovereignty of the Member States[3].

THE INSTITUTIONAL REFORM. INCREASING THE EU'S EFFECTIVENESS

The new elements, true innovations in certain cases in terms of institutional development, comprised at the same time by the Constitution and by the Lisbon Treaty, represent perhaps the most important institutional architectural reform since the creation of the Communities. It is the answer of the European Union to a double challenge and necessity:

- On the one hand, the continuation of the democratization of the European decision-making procedures, strengthening the participatory character and transparency;
- On the other hand, adapting an institutional system initially devised for six states to the increasing number of members, trying at the same time to guarantee an Effective Union under these circumstances.

The general view is that there is a great deal of continuity. No new institutions were created and their major role in the decision-making procedure of the existing ones was not altered. Nevertheless, there are several changes, their importance and their capacity of affecting the general characteristics of the Union's functioning to be highlighted in the following years. As an example, one can look at the permanent President of the European Council or at the High Representative for Foreign Affairs and Security Policy of the European Union offices. We shall examine these innovations, focusing exclusively on the institutions that have a leading role in the inter-institutional dialogue, i.e. the EP, the European Council and the European Commission.

THE EUROPEAN PARLIAMENT

In regards to the European Parliament, the maximum number of MPs is set at 751, their national allotment being decided by means of a proportionally decreasing sequence. The institutional position of the European Parliament is strengthened, mainly by the provision that the co-decision procedure becomes the general norm, granting the Parliament the effective position of a co-legislator, with full authority in budgetary matters, on equal terms with the Council. The European Parliament is the great winner of the revisions brought about by the Lisbon Treaty, as it was the case in several other institutional reforms. In a way, it is a fully legitimate process that of attributing increasing powers to the EP, given its position of representing the citizens of Union. One can argue that there is a development of the Parliament's prominent role in the institutional functioning of the Union, given its position of representing the civic legitimacy. Hence, art. 14.1 of the TEU states that: "The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission".

This new legislative equal footing between the EP and the council reflects into decisional practice the Union's twofold legitimacy, as an organization of both citizens and states, in spite of its elimination from the text of the treaty. The most relevant aspect pertaining to the European Parliament is therefore its substantial increase of competences in the budgetary and legislative fields and as a constitutive power of the EU at the same time. The Lisbon Treaty continues and even caps the tendency of previous reforms of incorporating civic legitimacy into the legislative and budgetary powers, thus reflecting the leaning towards an increasing democratization of the European decisional system.

THE EUROPEAN COUNCIL

A novelty brought about by the Constitution and the Lisbon Treaty altogether is deeming the European Council an institution of the Union for the first time since its foundation and, as a consequence, subjecting it to the rules of the European system. Regulating the European Council is stipulated in article 15 of the TEU, alongside the other communitarian institutions:

[3] Carbone, Maurizio (ed.), National Politics and European Integration: From the Constitution to the Lisbon Treaty, Edward Elgar, 2010

"The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof". It is added that it will not perform a legislative function, which still corresponds to the Council.

Another novelty is represented by the creation of the President of the European Council office, whose term of office is set at two and a half years, renewable once. The attributions of the President of the European Council, as per article 15.6 of the TEU are:

- To chair and drive forward the work of the European Council;
- To ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;
- To endeavor to facilitate cohesion and consensus within the European Council.

The Treaty also stipulates the mandatory presentation of a report to the Parliament at the end of every European Council's reunion, as well as its obligation to represent the EU in the CSDP area. By the imposition of this function the framers of the treaty try to ensure the continuity, the visibility and the coherence deemed necessary for the EU's representation, both internal and domestic. The president effectively becomes "the visible face" of the Union, whom the citizens can identify with both the leadership of the European Council and the EU in its entirety. The office of permanent President of the European Council changes the nature of the institution, starting with the permanent character of the office, which will impact on the inter-institutional balance and dialogue, since a new player enters the game.

Finally, this innovation can also lead to a change in the intergovernmental character of the institution because, for the first time, we have at the fore front a leading figure that does not represent a state. His functions – leading the institution and facilitating a consensus by drawing together the common interests of the Member States - can determine a shift in the institutional dynamic. This undermining of the state that holds the presidency of the Council is also determined by the specific state's losing of the European Council Presidency and External Relations Council positions, which decreases the clout of the prime-minister and the foreign minister respectively during the time of that Presidency.

THE COUNCIL

The main modifications pertaining to the functioning of the Council regard the improvement of its effectiveness in the context of an increased number of members. It is the case of replacing the current system of rotating Presidencies of the European Council and the Foreign Affairs Council on the one hand and the adoption of a qualified majority voting system on the other hand. The same objective of increasing the effectiveness of decision-making procedures determined the decision of extending the number of categories that no longer require a unanimous vote, but a qualified majority vote. Another change refers to the improvement of the democratic functioning of the Council, and we have in mind the obligation that all Council works are made public when it acts in the prosecution of its legislative capacities.

The debate about the retaining or replacing of the rotating Presidencies of the different configurations of the Council of Ministers went along the debate about the introduction of the permanent Presidency and it ended with the following conclusions:

- Maintaining the current system for most of the configurations of the Council;
- Organizing Presidencies along a "three state team" lines (collective teams of three consecutive Presidencies which coordinate the activities for a period of eighteen months inside which each state takes up the coordination responsibilities for six months);
- Establishing two permanent Presidencies: the Foreign Affairs Council, which will be led by the Union's High Representative for Foreign Affairs and Security Policy and the Euro group, the Economic and Financial Affairs configuration of the Council (ECOFIN) which gathers the members of the Euro zone, which will designate a permanent President (for a two years and a half term) from its own ranks.

The new formula for the qualified majority voting procedure was also subject to great debate. In order to better understand the stake at play, one needs to remember that a similar problem had determined the failure of the Brussels IGC in 2003, generating negative effects in regards to the political momentum of the reform process: the European Convention had advanced a twofold type of majority, taking into account both the number of states and the population, a proposal ratified by the IGC and found in the Lisbon Treaty. Article 16.4 of the TEU states that: "a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.".

The Polish renegotiation, enacted with the occasion of the 2007 IGC led to the postponement of this provision's coming into force until 2014. In addition to that, it is stipulated that until the 31st of March 2017 any state can ask for the maintaining of the present European legislation voting system. The double majority voting system has the advantage of both efficiency and adaptability. Unlike the model of triple majority established at Nice, still functioning today, the new formula allows an easier decision-making procedure, reducing at the same time blocking possibilities. At the same time, the new formula also has the indisputable advantage of being a model much more transparent towards the European citizen, allowing him to better and easier know the manner in

which a decision was taken, which states approved it and what is their combined population. To this is added the advantage of adaptability, because by eliminating the weighting factor, there is no need for a further revision of rules every time the EU enlarges. Finally, the change adds a touch of democratization to the procedures, by recognizing indirectly in the weight of every government's vote the weight of that state's ratio in the total population of the EU.

THE COMMISSION

The Commission is on the losing side of the institutional reform, being the only institution that does not emerge strengthened out of this process. There are nevertheless two chapters that underscore a possible reform, both trying to enact the consolidation of the democratic dimension and the increase of its functional efficiency:

- Its election by the EP;
- Its composition.

The first provision will increase the influence of the EP in the election of the Commission, as the Lisbon Treaty states that: The European Council shall propose its candidate for President of the Commission in accordance to the results of the EP elections". This seems a step forward towards a more political and not only technical Commission, but not a very bold move if we consider that the right to advance proposals for the office remains a prerogative of the European Council[4]. This small step forward nevertheless allows the European political parties to move forward, in the direction of the personalization of European politics. In this way, the old proposal of Jacques Delors that the parties may nominate before the European elections a top-list leader could become reality. Evidently, the European council could not ignore such a nomination. This important element has the potential of becoming a window of opportunity for the real democratization of the Commission.

The problem of the Commission's composition was also the focus of other heated constitutional arguments:

- Efficiency dictates a Commission with fewer portfolios;
- Representativeness entails the maintaining of the "one country-one commissioner" principle.

In the end, the Constitution outlined the first line of argument, a solution maintained by the Lisbon Treaty. The number of commissioners will be 2/3 of the number of Member States, including the President and the Vice-president, who is also the High Representative for the Common Foreign and Security Policy (CFSP) and the Common Defense and Security Policy (CDSP). The reduction of the number of commissioners will come into force on the 1st of November 2014, thus ensuring that the first commission of the Lisbon Treaty maintains the "one country-one commissioner" representative principle. The new form of article 17.5 of the TEU states that through a European council Declaration a rotation system between Member States will be set, that takes into account the Union's demographic and geographic diversity. The reform strengthens the powers of the President in imposing functions on the members of the Commission. This is a fundamental change because it has the potential of leading to more homogenous and efficient Commissions unlike the current situation when, as a result of the imposing of selected commissioners by the supporting Member States we are often dealing with a very heterogeneous mix of personalities. Indirectly, the Commission's powers appear strengthened by the Lisbon Treaty, because the Commission stands to play a role in inter-institutional mediation and as a legislative initiator as a result of the extension of the qualified majority voting and co-decision procedures[5].

THE HIGH REPRESENTATIVE OF THE EU FOR FOREIGN AFFAIRS AND SECURITY POLICY

Finally, we consider it important to discuss the possible impact on the Commission's nature and functioning determined by the establishment of the High Representative of the Union for Foreign Affairs and Security Policy office. The person holding the office will be simultaneously named and mandated by the Foreign Affairs Council and the Commission. He will also hold the positions of Foreign Relations Commissioner and Vice-president of the Commission. Although the change holds important advantages in terms of coherence, efficiency and foreign action visibility, the character of Commissioner and Vice-president of the Commission, on the one hand, and the position of permanent President of the Foreign Affairs Council can modify its nature and functioning.

For the first time the institutions cease being insulated, being difficult however to estimate the impact of this change on the inter-institutional relations and balance. The same line of argument can be extended towards the European External Action Service, which will support the work of the High Representative and which, according to the treaty's provisions, will be staffed with personnel from the General Secretariat of the Council, the Commission and personnel detached from the foreign ministries of the Member States to this true "European ministry" of foreign affairs. The traditional collegiality of the Commission is affected too, because the High Representative is no longer on equal footing with the other members, but is conferred a special and enhanced legitimacy by his appointment by the Council. One must also take into account the fact that

[4] Fuerea Augustin - Manualul Uniunii Europene, Ed.4, Editura Universul Juridic, București, 2010
[5] Fuerea Augustin - Manualul Uniunii Europene, Ed.4, Editura Universul Juridic, București, 2010

the independence of the Commission, especially when it comes to Foreign Affairs, can be affected, given that one of its members must accept, if it is the case, instructions from the Member States. This risk is certain in the case of the CFSP, but reality also points to numerous instances in which it is difficult to extricate the CFSP from foreign policy. At the same time the hierarchy issue comes forth in regards to the overlapping representation competences of the President and Vice-president of the Commission.

The impact of these changes on the Commission, as well as the effects of several other changes can only be analyzed after a couple of years' time and, as in the previously analyzed case, the concrete effects will depend highly on the personalities of the High Representative and of the President of the Commission[6].

Conclusion

Given the increase in the role of the national parliaments in the decision making procedures of the EU, the modification of the national legislation is warranted, so that the Parliament becomes involved in the national system of European affairs coordination (at least concerning the major issues on the European agenda). The periodic presentation of reports to the national Parliament concerning the issues on the EU agenda could prove useful. Instituting the practice of presenting in front of the Parliament the mandate followed at the European Councils, or at least at the most important Council reunions, already upheld by several Member States would be an interesting development.

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TREATY OF LISBON AND THE MAIN CHANGES AT THE COURT OF JUSTICE OF THE EUROPEAN UNION

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Abstract

This paper analyzes the Court of Justice of the European Union after the Lisbon treaty and the changes that will be performed in order to increase the role of the Court in EU. We will discuss the Lisbon reform and the legacy of the European Constitution and the changes to the organization of the judiciary in the Union and to the appointment of its members. An important part of the paper will be dedicated to the procedure for future amendments of the Statute of the Court of Justice of the European Union and the creation of Specialized Courts. The conclusion of the paper will treat the future of the judicial structure of the Union and the challenges of the greater complexity of the decision-making process and of the binding nature of the Charter of Fundamental Rights. A new phase of judicial activism has begun in the European Court of Justice, a phase focused on the protection of fundamental rights. The European Charter of Fundamental Rights, as well as the Lisbon Treaty has strengthened the position of the Court of Justice.

Keywords: *European Court of Justice, European Union, Lisbon treaty, Charter of Fundamental Rights*.

The Lisbon reform and the legacy of the European Constitution

Lisbon operation consisted in getting through the back door what had been unable to pass through the front door. The body of the failed European Constitution signed in Rome on 29 October 2004 was maintained practically intact, although it was stripped of any constitutional status.

It is worth recalling the above so as not to consign the work of the Convention on the future of Europe to a historical footnote. This Convention gave rise to the 'Draft' European Constitution, which finally became the 'Treaty establishing a Constitution for Europe 'with hardly any significant changes, and this was signed, as I have already stated, in Rome in October 2004. In particular, the endeavors of the Convention with regard to the Court of Justice of the European Union –which scarcely underwent any changes in its transition from Rome to Lisbon – continue to be very useful; specifically, the findings of the Discussion circle on the Court of Justice, whose Final Report was approved for submission before the Convention members on 25 March 2003.

Changes to the organization of the judiciary in the Union and to the appointment of its members. The name of the 'institution 'and of the judicial 'bodies 'of the Union.

With regard to the judicial system of the Union, the Lisbon Treaty follows, as with many other aspects of the reform, the path of the European Constitution, both with regard to its detail amendments and its flaws. With regard to the former, of note is the change in terminology, with an institution that is now called the 'Court of Justice of the European Union', composed of the following bodies: 'Court of Justice', 'General Court'(Court of First Instance in the TEC), and 'Specialized Courts'.

This puts an end to the confusion caused by using the same term, 'Court of Justice', for two different things, the judicial institution and the supreme body within this institution. Under the new regulation, this term will be reserved for the supreme body of the institution representing judicial authority within the Union. This institution, furthermore, shall be deemed to refer specifically to the 'European Union', thereby putting an end to the inconsistency of a Court of Justice which, up to Lisbon, was not of the Union, but rather of 'the European Communities', when the truth is that this Court, apart from exercising its powers within the Community framework (first pillar), also acted in the area of police and judicial co-operation in criminal matters (third pillar)[1].

A similar situation occurred with the name of the 'Court of First Instance', which was wrong to the ears of Spanish lawyers prior to the Nice reform, in so far as its decisions could be appealed to the Court of Justice on points of law only. And this reform made the situation even worse by giving the Court 'of First Instance 'powers to hear appeals lodged against the decisions of the Judicial Panels. And the same might be said, then, with regard to the opposite transformation of the 'Judicial Panels 'into 'Specialized Courts'. The former name would appear to suggest on first glance that they were chambers specialized as to their subject matter within one overall jurisdictional body, which as we have seen, was not and is not the case.

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[1] Craig P. The Lisbon Treaty, Law, Politics, and Treaty Reform. Oxford University Press 2010.

National judges as judges of the Union

It is notable that there is no explicit reference to national judges as an essential part of the European judicial structure, with Lisbon having limited itself to incorporating the consolidated doctrine of the Court of Justice in U.P.A. v. the Council (2002): 'Member States'–provides paragraph two of article 19.1 TEU post Lisbon –'shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. It is also notable that the whole range of powers-duties that the Court of Justice has placed in the hands of the national judges has not been duly reflected. This is made even worse if one takes into account the fact that national constitutional texts are becoming ever more ineffective at providing legal recognition for the absorption of this range of powers-duties, which on occasion are not just remote from the exercise of jurisdictional powers in purely internal terms, but are actually contrary to it appointment of the members of the Court of Justice and General Court (the panel ex Article 255 TFEU).

With regard to the appointment of the members of the Court of Justice of the European Union – specifically of the Court of Justice (including the Advocates General) and the General Court –we may highlight the introduction of a preliminary stage (article 255 TFEU) which provides for the creation of a panel (composed of seven personalities chosen from former members of the Court of Justice and the General Court, members of the higher national jurisdictional bodies, and lawyers of renowned experience) in order to assess the suitability of the candidates for the exercise of the functions of judge and Advocate General of the Court of Justice and the General Court, prior to the Governments of the Member States proceeding to make any appointments by common accord.

The rules for the formation and functioning of the panel have been set forth in an annex to Council Decision 2010/124 of 25 February 2010. From these rules, we may highlight the following:

1) the General Secretariat of the Council is in charge of performing secretariat services for the panel, providing any necessary administrative support, of which the most important is probably the translation of documents (and the Council is also responsible for bearing the cost of refunding the expenses of panel members);

2) panel members are appointed for a term of four years, which may be renewed just once;

3) the panel shall be quorate when five of its members are in attendance;

4) upon receipt of the information on the proposed candidate (which may be amplified by the nominating Government at the request of the panel), the panel shall hear the candidate 'behind closed doors'(except in the case of renewal, in which case this hearing stage is omitted);

5) Its deliberations shall also be 'behind closed doors', culminating in a reasoned opinion as to the suitability or unsuitability of the candidate. Although these rules say nothing about the scope of the opinion, it does not bind Member States in the event that it should be negative with regard to a particular candidate. Whether it is, or ought to be, a de facto dissuasive element in their decision is another matter.

The procedure for future amendments of the Statute of the Court of Justice of the European Union and the creation of Specialized Courts.

With the Lisbon reform, the procedure to be followed for future amendments of the Statute of the Court of Justice of the European Union (which appears as Protocol no. 3 annexed to the Treaties) shall be the ordinary legislative procedure, governed by article 294 TFEU, with the innovation, provided for by article 19.2 TEU and confirmed by article 281 TFEU, that the proposal may originate not just from the Commission (after first consulting with the Court of Justice), but also from the Court of Justice (after first consulting with the Commission)[2].That is how is stands, unless the amendment refers to Title I of the Statute (concerning the 'Statute of Judges and Advocates-General') and, in what constitutes a departure from the previous régime, to article 64 (concerning the modus operandi for the purposes of governing the linguistic régime of the Court of Justice of the Union), both subject to the ordinary procedure for the reform of the Protocols, which is that of the Treaties themselves.

The third variation introduced by Lisbon refers to the creation of the 'Specialized Courts', which must also follow the ordinary legislative procedure (article 257 TFEU), like the amendment of the majority of the Statute, with the same innovation referred to above to the effect that the proposal may originate not just from the Commission (after first consulting with the Court of Justice), but also from the Court of Justice (after first consulting with the Commission).

Alterations to competences. Full submission of the Area of Freedom, Security and Justice to judicial control.

We may highlight the effort made by Lisbon towards a horizontal approach to the question of judicial protection in the European Union, reducing the variable jurisdictional geometry created by the Treaty of Amsterdam, which we should recall set up a double communitisation process with regard to the third pillar (which up to then had been dedicated to 'co-operation in the areas of justice and home affairs').

On the one hand, communitisation consisting in the transfer of part of the third pillar – that concerning visas, asylum, immigration and other policies related

[2] K. Lenaerts, 'The European Court of Justice and Process-oriented Review' College of Europe, Research Paper in Law 01/2012

to the free movement of persons and judicial co-operation in civil matters – to the TEC; communitisation which, however, was not complete, as this transfer was subject to a sui generis régime with regard to the general Community régime, which in relation to judicial control (article 68 TEC), consisted of providing for a special régime on preliminary rulings, whilst at the same time expressly excluding the jurisdiction of the Court, within the context of the progressive elimination of the controls on persons crossing internal borders, to rule on 'any measure or decision relating to the maintenance of law and order and the safeguarding of internal security'. On the other hand, 'signs 'of communitisation, but to a significantly lesser degree than the previous operation, consisting in the introduction of some features close to the Community régime in that part of the third pillar that remained as 'police and judicial co-operation in criminal matters'. With regard, specifically, to the judicial structure of the Union, a qualified opening to review by the Court of Justice took place, with a recognition of its powers to give preliminary rulings on the validity (excluding conventions between Member States) and the interpretation of the system of the third pillar, although these powers were subject to being accepted by each State (in which it was furthermore necessary to specify which jurisdictional bodies of the State in question were entitled to go to the Court of Justice, i.e. whether it was all of them or only those against whose decisions there was not judicial remedy under national law). It was also admitted that the Court had jurisdiction to consider the lawfulness of the decisions and the framework decisions by way of proceedings for annulment, although this was limited to being initiated by the States or the Commission, as well as to rule on any dispute between Member States, or between a Member State and the Commission.

However, its jurisdiction 'to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'(article 35.5 TEU) was expressly excluded. Lisbon will see a reunification in systematic terms of the policies concerning border controls, asylum, and immigration, and in co-operation in civil, criminal, and police matters, as they are all envisaged within the 'Area of Freedom, Security and Justice' (Title V TFEU), which has become one more policy to be added to the traditional ones of the Community, and in this respect, fully subject to the general judicial régime of the Union, with the sole peculiarity of article 276 TFEU, which took over from article35.5 TEU (in its pre-Lisbon version) transcribed above[3]. To this peculiarity might be added the provisions of article 10 of Protocol no. 36 on transitional provisions, which excludes (for a maximum period of five years as from the date of the entry into force of Lisbon, i.e. 1 December 2009) the use by the Commission of the infringement procedure, and maintains the powers of the Court of Justice unaltered (especially those linked to preliminary rulings) in relation to the acts of the Union in the field of police and judicial co-operation in criminal matters which have been adopted, and not amended since then, prior to the entry into force of the Lisbon Treaty.

The special régime of the Common Foreign and Security Policy.

Within the framework of the CFSP, the starting point in terms of its judicial régime can be found in paragraph one of article 275 TFEU, which is a product of Lisbon. This precept, which implements the provisions of article 24.1 TFEU, provides that 'the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions'. Notwithstanding the foregoing, the following paragraph states that the Court shall have jurisdiction as follows:

1. To control that the measures and procedures of the CFSP do not encroach on the non-CFSP competences of the Union (along the lines laid down by the Court of Justice prior to the Lisbon reform, which had already allowed in 1998, in Commission v. Council, its jurisdiction over measures and procedures of the third pillar –which at the time, prior to Amsterdam, was excluded from the jurisdiction of the Court – that infringed powers pertaining to the European Community). This should be realized through the classical channels of control of the lawfulness/constitutionality over the European Institutions; indeed, not just direct control through actions for annulment (article 263 TFEU), but also indirect control, through preliminary rulings on validity (article 267 TFEU) and pleas of illegality (article 277 TFEU).

2. To decide on actions for annulment lodged by individuals, for any of the reasons listed at article 263 and under the conditions envisaged in paragraph four of the same precept (which I shall set forth below) against CFSP decisions in which restrictive measures are imposed against them. To these competences it would be necessary to add that held by the Court to control measures which are likewise restrictive imposed within the framework of the general régime of the Union in the enforcement of decisions adopted in turn within the framework of the CFSP. It would also be necessary to add, finally and as a consequence of Lisbon, the jurisdiction of the Court of Justice to exercise prior control over any international agreement (including, therefore, those envisaged within the scope

[3] K. Lenaerts, 'The European Court of Justice and Process-oriented Review' College of Europe, Research Paper in Law 01/2012.

of CFSP), to test its compatibility with the Treaties within the framework of article 218.11 TFEU.

The changes to procedure. Proceedings for annulment.

The new regulations governing proceedings for annulment include, first of all, the extension of those activities of the Union that are open to being challenged, covering the actions of the European Council and of those bodies or organisms of the Union that are 'intended to produce legal effects vis-à-vis third parties'(paragraph one of article 263 TFEU; paragraph five, meanwhile, qualifies this by providing that 'acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them).

With regard to the capacity to bring actions, the reform concerning the role of national Parliaments and of the Committee of the Regions for the purposes of challenging the actions of the Union on the grounds of infringement of the principle of subsidiarity may be highlighted, taking the form of an annexed Protocol (Protocol no. 2 on the application of the principles of subsidiarity and proportionality). With regard to this Committee its new powers to bring proceedings for annulment with the aim of safeguarding its prerogatives (paragraph three of article 263 TFEU) is now extended with the aim of safeguarding the principle of subsidiarity in relation, we should note, to 'legislative acts for which the Treaty on the Functioning of the European Union requires consultation in order to be approved'. Within the framework of the Convention on the future of Europe, the Final Report by Working Group I 'Subsidiarity' proposed 'an innovation, by also allowing the Committee of the Regions, the competent consultative body representing all the regional and local authorities in the Union at European level, the right to refer a matter to the Court of Justice for violation of the principle of subsidiarity. This referral would relate to proposals which had been submitted to the Committee of the Regions for an opinion and about which, in that opinion, it had expressed objections as regards compliance with subsidiarity'. The absence of any reference to this last point, both in the European Constitution and subsequently in the Lisbon Treaty, would seem to lead to the discarding of the condition consisting in requiring the Committee to have issued prior and express objections to subsidiarity on the occasion of the opinion compulsorily requested. With regard to national Parliaments, the possibility that they might challenge 'legislative acts' ('non-legislative acts 'are thus also excluded) refers to national legal orders, in the sense that the right continues to vest with the Governments of the Member States, which shall 'transfer 'the corresponding proceedings, where appropriate and inconformity with their respective legal systems, 'on behalf of the national Parliament or one of its chambers'. In similar manner to the situation affecting the initiative powers of the Committee of the Regions, the proposal of the Final Report of Working Group I to the effect that the initiative powers of national Parliaments were to be conditional on the fact of having delivered a reasoned opinion under the early warning system, was not expressly embraced either by the European Constitution (first), or (subsequently) by the Lisbon Treaty, and so it would appear that no such condition exists. With regard, finally, to the locus stand of individuals (paragraph four of article 263 TFEU), we may highlight its extension for the purpose of challenging 'a regulatory act which is of direct concern to them and does not entail implementing measures', making use of the invitation formulated by the Court of Justice in the aforementioned case U.P.A. v. Council (2002).

In effect, focused on a literal reading of the former article 230 TEC (which referred to the 'direct and individual 'concern of the private applicant) that was odd, not just, in a general sense, in view of the flexibility of interpretation to which we were accustomed, but also, in particular, in view of the flexibility that Plaumann v. Council (1963) seemed to enshrine on the side of openness, in the specific context of proceedings for annulment ('the provisions of the treaty regarding the right of interested parties to bring an action must not be interpreted restrictively), the Court of Justice excluded, as a rule (i.e. except in one-off cases involving very specific circumstances, such as in Codorniu v. Council, 199443), individuals 'rights to directly appeal general provisions.

This restriction, criticized not just by learned opinion but also, in their personal capacity, by Judges and Advocates General of Luxembourg, led to the Court of Justice, in its Report on certain aspects of the application of the Treaty on European Union (1995), to ask itself whether proceedings for annulment, 'which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions'. Despite this, the Court upheld its case-law on this matter in U.P.A. v. Council.

Prior to the Lisbon Treaty, and in view of the uncertainty surrounding the term 'legislative activity', the problem was not so much the restrictions arising from the case law of the Court of Justice with regard to judicial review (familiar to those affecting the national legal systems themselves and which allow in any event indirect channels for judicial review, in the European system by way of a plea of illegality and a preliminary ruling on validity), but rather in its extension to activities which it would appear could not be strictly considered as being 'legislative', but rather 'executive', in the sense of either complementary thereto, or of the exclusive intervention (implemented

following legislative activity, or through the Treaty itself) of a Commission that did not have the same status as the European Parliament and the Council. In other words, the national legal systems did not so much ban the direct judicial review of norms in absolute terms, but rather placed intense restrictions on *locus standi* for such judicial review in the case of Parliamentary Acts46, in terms which recall the restriction traditionally operated by the Court of Justice –and this is where the problem lies –in general terms, i.e. an abstraction made from the legislative or executive nature of the provision in question.

Following the Lisbon reform, paragraph four of article 263 TFEU provides as follows: 'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'(such as, for example, a European measure banning the use of certain fishing nets, or the use of certain substances in the manufacture of certain products). The main problem raised by this new version of article 263 consists in determining the exact scope of the words 'regulatory acts 'contained at the end of the paragraph that has just been transcribed. Against those who argue that these words ought to be interpreted so as to cover directly applicable general provisions, irrespective of their nature (i.e. legislative, autonomous non-legislative, delegated, or implementing measures), I for my part consider that this is no more than a simple error, and that the real intention of the 'drafters 'of Lisbon was not to confer powers on individuals to start proceedings for judicial review of 'legislative acts', but rather to limit this to 'non-legislative acts 'approved under the form of 'delegated acts 'or 'implementing acts'(or even resulting from 'autonomous 'on-legislative activity'), irrespective of the typology chosen (therefore including 'decisions 'that are generally applicable); and within these acts, limited to those that concern them directly and do not entail implementing measures. In effect, it should not be forgotten that with the drafting of the European Constitution, the terms of this opening to the private applicants of the action for annulment were the subject of intense debate within the Discussion circle on the Court of Justice. These terms in the end were limited to 'regulatory acts 'in contrast to the 'legislative acts', with regard to which the traditional restrictive approach was maintained in the sense of 'direct and individual concern'. And Lisbon saw the disappearance of the distinction created by the European Constitution (Part I) between 'laws 'and 'regulations'(at articles I-36 and I-37); the error had consisted in maintaining the expression 'regulatory acts 'in the Lisbon Treaty, included in the provisions dedicated by the European Constitution (Part III) to the Court of Justice (at article III-365)53.

Finally, linking paragraph four of article 263 TFEU with article 275 TFEU mentioned above (which refers to the former for the purpose of conferring individuals with the power to challenge restrictive measures imposed within the framework of the CFSP), one would have to conclude by noting the coincidence, for the purpose of bringing actions for annulment by individuals, between challenging any exclusively-CFSP restrictive measure (which by definition cannot be deemed to be 'legislative acts', as article 24 TEU expressly denies this nature to all acts approved within this framework), and any restrictive measure imposed on the basis of article 215 TFEU (which likewise by definition cannot be deemed to be 'legislative acts 'under any circumstances, as they are adopted by the Council, and the simple 'information 'thereof served subsequently on the European Parliament is not classified as a 'special legislative procedure').

Infringement procedure and procedure for the enforcement of judgements.

With regard to the infringement procedure, the wording of articles 226 and 227 TEC is maintained, with amendments being introduced into the procedure for the enforcement of judgements ex article 228 (260 TFEU post Lisbon). This procedure is first of all simplified: the Commission, having offered the offending Member State the possibility of filing allegations on the charges it has drawn up, may apply to the Court of Justice for the imposition of a lump sum and/or penalty payment without any need to first issue, as under the TEC, a reasoned decision offering a fresh and last chance to the Member State to properly enforce the judgement that declared it to be in breach (the non-enforcement of which judgement is part of the origin of the application for the imposition of the monetary penalty). To this is added, as a second innovation, the possibility that the infringement procedure brought by the Commission (not, therefore, by the Member States), may be accompanied simultaneously (in the same proceedings), 'where appropriate', by an application for the imposition of a lump sum and/or penalty payment in situations where the infringement refers specifically to the breach of 'the duty to report on the transposition measures for a directive adopted in accordance with a legislative procedure'. On the other hand, Lisbon states, with regard to the moment as from which the lump sum/penalty payment would be applicable if imposed within the framework of a simultaneous declaration of infringement, that if the Court of Justice were to accept the application filed by the Commission, 'the payment duty would take effect on the date prescribed by the Court in the judgement'; a confusing wording which, if we follow the clarifications supplied by the debate on the European Constitution, ought to be interpreted to mean that 'the sanction would apply after a certain period had elapsed from the date the judgement was delivered'.

Preliminary Rulings

In order to complete the innovations in the traditional jurisdictional system of the Union, we may also highlight the refinement introduced by Lisbon, within the framework of preliminary rulings, in article 267 in fine TFEU. This refinement reads as follows: 'If such a question [on interpretation or validity of European Union Law] 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.' It should be noted in this regard that, in anticipation of the Lisbon reform, the Council amended the Statute of the Court of Justice towards the end of 200762, by adding article 23 a, pursuant to which the Rules of Procedure 'may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the Area of Freedom, Security and Justice, an urgent procedure. 'This latter possibility would be realized by the Court shortly afterwards64, by including in these Rules the urgent preliminary ruling procedure (PPU) regulated in detail at article 104 b, the main characteristics of which are:

1. a distinction is made, for the purposes of greater speed, between parties who may participate in the written stage of the procedure (which may be omitted altogether in cases of 'extreme urgency'), and those who may do so at the hearing stage, which is limited to the parties to the main proceedings, the Member State to which the originating jurisdictional body belongs, the European Commission, and where appropriate, the Council and the European Parliament where one of its acts is involved (other interested parties, and in particular the Member States other than that to which the originating jurisdictional body belongs, do not have this power, but are invited to the hearing);

2. there is considerable speeding-up of the internal processing of cases, given that as from their arrival at the Court of Justice, all those relating to the Area of Freedom, Security, and Justice are attributed to a Chamber of five Judges specifically appointed for this purpose for a one-year period, which has the task of approving the application for the urgent procedure, and must reach its decision, after hearing the Advocate General, in a short space of time;

3. in order to ensure the desired speed, proceedings take place, basically, in practice, by electronic means.

The future of the judicial structure of the Union.

The challenge of the greater complexity of the decision-making process and of the binding nature of the Charter of Fundamental Rights ('typically 'constitutional issues). By way of a final reflection, it could be argued that the balance of the innovations introduced by the Lisbon reform into the judicial process does not seem to be aimed at overcoming the moderation frontier. This moderation is otherwise emphasized if we confine ourselves to the discourse which underlies the European Constitution in constitutional terms, and which was not reflected in the judicial structure, which is traditionally uncomfortable about differences or even qualifications within itself when it comes to tackling the control of a legality that is always understood in accordance with the widest sense of the term (i.e. without distinguishing control of legality in the strict sense of control of constitutionality), with a Court of Justice that has for years been simultaneously exercising controls pertaining to both a contentious and a constitutional court. This would not have any further consequences were it not for the fact that the increase of the European jurisdiction, in quantitative terms (with the avalanche of new Member States still to be finalized) and qualitative terms (with the elimination by Lisbon, on the one hand, of the procedural and substantive restrictions that arose under the special régimes ex articles 35 TEU and 68 TEC, and the moderate opening, on the other hand, of the CFSP to judicial control) will entail a risk that it will be more difficult for the Court of Justice to dedicate, in suitable manner, to the resolution of typically constitutional disputes, such as those concerning the distribution of public powers (both horizontally and vertically), or with due respect for fundamental rights; and incidentally, the complexity of such disputes will be amplified with the Lisbon reform. In effect, with regard to the distribution of powers amongst the various Institutions of the Union, and between the Union and the Member States, Lisbon contains, behind an apparent simplification (arising both from the non-legislative norms / legislative norms pairing, which in turn result from the ordinary legislative procedure / special legislative procedure pairing, and from the detailed cataloguing of the competences of the Union), numerous questions of major constitutional significance which the Court of Justice will be required to tackle judgement by judgement. This is not the place to dwell on such questions in detail. But we can, at least, mention some of them:

The ordinary legislative procedure / special legislative procedure pairing, each one in the singular, is not accurate, for the simple reason that there are numerous special legislative procedures (some of a semi-constitutional nature, as they are subject to being subsequently approved by the Member States). Having accepted this, one must descend into the detail of the articles of all primary Law of the Union, including the Protocols, in order to uncover possible refinements to the consequences which lead the proceedings towards one procedure or the other (for example, in the different treatment of the early-warning system linked to the principle of subsidiarity), or questions raised by the choice of one procedure or the other; or clarifying the precise scope of the exercise of the delegation

envisaged in article 290 TFEU, which, by being linked to legislative acts adopted by way of a special procedure, can notably strengthen, through its control, the practically irrelevant role by hypothesis performed by the European Parliament in the drafting of the delegating act.

In the context of the principle of subsidiarity referred to above, not only would it be necessary to go deeper into questions linked to the exercise of control over it in formal terms, but also in substantive terms, especially in view of the reinforced presence, with Lisbon, of the national Parliaments in the drafting stage of Union Law (which would in turn require an assessment of its effect on the constitutional system itself, both for the Union and for the Member States).

The non-legislative activity of the Union also raises important questions, not just with regard to the boundary (which has yet to be defined) between delegated acts and implementing acts (i.e. whether recourse to one or to the other depends on the discretion of the European legislator, or whether, on the contrary, each one has its own constitutionally-defined territory), but also to the legal nature of the 'autonomous 'on-legislative activity' (which, for example and as I stated above, may give rise to doubts as to whether or not it may be challenged directly before the Court of Justice by individuals).

The traditional problems that have surrounded the choice of the legal basis may intensify after Lisbon, in the context, for example, of the definition of the boundaries between the CFSP and all the other powers attributed to the Union. Thus, for example, in 2008 the Court of Justice annulled an exclusively CFSP decision in Commission v. Council87, which had been approved in execution of a common action, also CFSP, on the contribution of the European Union to combat the destabilizing accumulation and proliferation of small arms and light weapons, arguing that 'taking account of its aim and its content, the contested decision contains two components, neither of which can be considered to be incidental to the other, one falling within Community development co-operation policy and the other within the CFSP'; and as such, according to the Court, 'since Article 47 EU precludes the Union from adopting, on the basis of the EU Treaty, a measure which could properly be adopted on the basis of the TEC, the Union cannot have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the TEC on the Community'(we should recall that this precept provided that no provision of the Union Treaty would affect the Treaties constituting the European Community or the Treaties and subsequent acts that have amended or completed them). In all likelihood, the same case would pose greater complexity in the post Lisbon age, taking into account the fact that article 40 TEU (which, we should recall replaces and reforms the former article 47) creates a balance between the general régime of the Union and the special régime constituted by the CFSP, precluding the effect of 'the application of the procedures and the extent of the powers of the institutions 'in both directions.

With regard to the effect that the incorporation of the Charter of Fundamental Rights of the European Union into the Treaties may have on the work of the Court of Justice, it is sufficient to note that:

1. It shall be called upon to provide certainty in the land of legal uncertainty caused by the special characteristics of the United Kingdom and Poland;

2. It will have to tackle a foreseeable proliferation in the invocation and application of the Charter in an area that is as sensitive and susceptible to this as the Area of Freedom, Security and Justice, which following Lisbon is now subject to its complete judicial) It will have to pay close attention to the evolution of the constitutional traditions of the Member States (which have grown in number and sensitivities), not just as a hermeneutic tool when it comes to interpreting the Charter, but also as a source of inspiration for completing it, where appropriate, by way of the general principles of Union Law.

Conclusion

The Lisbon Treaty made significant challenges for the newly named Court of Justice of the European Union (ECJ). These changes include: the removal of the three pillar structure of the Treaty on the European Union, changes to the composition of the ECJ, the establishment of an advisory panel to review proposed nominations to the Union Courts, exclusions of competence of the Court by the Treaty on the Functioning of the European Union, the enlargement of the reference procedure from national courts, the Charter of Fundamental Rights, accession of the EU to the European Convention on the Protection of Human Rights and Fundamental Freedoms, changes to *locus standi* and increases in the Courts' case load.

The Lisbon Treaty provisions strengthen ECJ role in the construction of Union and also clarifies the role of the national parliaments. It may also constitute a substantial breakthrough for regional parliaments with legislative powers if they become truly conscious of the importance of adequate scrutiny of legislative proposals.

These novelties are the result of the political will to stimulate participation of national parliaments in EU matters and to bring Europe closer to its citizens. Moreover, regional and local authorities across Europe will witness important progress as a result of the Lisbon Treaty, towards the recognition of multi-governance in the European Union. A more inclusive Europe seems too favored: better involvement of regional and local expertise in the quest for a more cohesive Europe together with a reinforced principle of subsidiarity and an increasing role granted to the national parliaments. Many concrete novelties ensure that EU governance will evolve into more advanced multi-level forms; the most general ones are of utmost

interest to local and regional authorities as they could change the way of working and cooperating with the other levels of government participating in the European decision-making process.

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STATE VERSUS STATE: WHO APPLIES BETTER EU LAW?

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Abstract

Each Member State is responsible for the implementation of EU Law within its own legal system. Non-compliance means failure by a Member State to fulfil its obligations under EU Law. An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under European Union law may be brought by the Commission or by another Member State. In the history of European integration only six times one Member State has directly brought infringement proceedings against another State. Of the six cases, only four proceeded to judgment. The European Institutions and the Member States should continue to develop their work to ensure that EU law is correctly applied and implemented.

Keywords: *infringement procedure, member states, european commision, article 259 TFEU.*

1. Introduction

To ensure the application of EU law by Member States there were created mechanisms to enforce obligations of States under the Treaties. As stated in the Treaty on European Union, one of these mechanisms is the so-called infringement procedure.

Although the procedure is implemented mainly through art. 258 TFEU with the European Commission having an essential role, also the Member States may bring an action before the Court of Justice for a declaration that another Member State has failed to fulfil its obligations under EU law.

However, in the history of the European Union there were only 6 cases when a Member State has brought an action before the Court of Justice against another Member State. The aim, in both types of proceedings, is the correct application of EU law in order to ensure the functioning and sustainability of the European Union.

As we shall see in the following analysis, the procedure has some specific features, but also some important limitations. Both the Commission and ultimately the Court of Justice will decide wherever one state has failed to fulfil its obligations - *the defendant State* either one state had misinterpreted EU law - *the applicant State*.

2. The principle of sincere cooperation

European Union and the Member States have *mutual obligations*. 'In the EU the Council was established as an institution representing the interests of Member States in this international organization. Mutually, in the Member States, a duty of loyalty and good faith to fulfil the obligations arising from treaties was also established'.[1]

'The principle of sincere cooperation', as it is regulated in the article 4 (3) TEU, was considered by some authors *the international law principle of good faith in the execution of treaties*, established in article 26 of the Vienna Convention.[2]

Correlative to international law, in the European Union law Member States culpable behaviour may constitute in the following: *an action* (when European rules instituted obligation not to do) or *inaction or omission* (when European rules have instituted obligation to do).[3]

As it is appreciated in the literature 'the principle (*of sincere cooperation*) cannot be invoked autonomously, but only if the provisions of primary or secondary EU law had already established clearly defined obligations for Member States'.[4]

In an attempt to define what 'obligations' means, let it suffice to say that the breach must be in respect of a 'pre-existence, specific and precise' obligation and that, in essence it will refer to a breach of a Treaty provision, or a breach of binding secondary legislation or of a general principle of Union law.[5]

In these circumstances *the obligation of sincere cooperation* becomes a general obligation, incidental to others. The term *duty of loyalty* does not appear in the text of the treaty, but it is a creation of literature. Court of Justice is speaking of 'duty of solidarity', 'principle of loyal cooperation', 'duty of loyal cooperation and support'.[6]

This principle has a correspondent between the principles of international law, namely the 'duty of

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[1] Ioana E. Rusu, Gilbert Gornig, *Dreptul Uniunii Europene*, 3rd ed., Ed. C.H. Beck, București, 2009, p. 54.

[2] Claude Blumann, Louis Dubouis, *Droit institutionnel de l'Union européenne*, p. 65 apud Raluca Bercea, *Drept comunitar. Principii*, Ed. C.H. Beck, București, 2007, p. 84. According to article 26 (*Pacta sunt servanda*) of Vienna Convention on the Law of Treaties: '*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*'.

[3] Nicoleta Diaconu, *Acțiunea în neîndeplinirea obligațiilor comunitare de către statele membre*, Revista Română de Drept Comunitar no. 2/2008, p. 55.

[4] Raluca Bercea, *Drept comunitar. Principii*, Ed. C.H. Beck, București, 2007, p. 86.

[5] On this matter see also Alina Kaczorowska, *European Union Law*, 2nd edition, 2010, Abingdon: Routledge, p. 390.

[6] Ioana E. Rusu, Gilbert Gornig, *Dreptul Uniunii Europene*, 3rd ed., Ed. C.H. Beck, București, 2009, p. 55 and case-law cited there.

states to cooperate' or 'principle of international cooperation'. In this respect, UNO Charter provided in article 1 paragraph 3, for a purpose 'achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.

By contrast with the general rule under international law, EU law provides for an effective enforcement regime against Member State in breach of its Treaty obligations. The principal enforcement actions brought before the European Court are actions brought by either the Commission on behalf of EU, or by another Member State against a Member State that has failed to fulfil its Treaty obligations.

The question arises here about the moment when the Member States better respect the obligation of sincere cooperation: when they bring an action to the Court of Justice against another Member State in order to respect the EU Law or when they settle the dispute amicably? Regarding this question, we can argue that the principle of sincere cooperation under EU law may apply on three levels:

- 'sincere cooperation with European Union' (as an organization) in order to respect the EU law;
- 'sincere cooperation with the State that failed to fulfil its obligations'.
- 'sincere cooperation with the other Member States beside the State in breach'.

3. The evolution of the proceedings under articles 258 and 259 TFEU

Since the onset of the first European community (European Coal and Steel Community) the Member States wanted to create a supranational institution – the High Authority – to watch and to highlight the interests of the Community. To carry out its tasks, the authors of the original Treaties have established that the institutions created under the Treaties have own authority, thus guaranteeing their independence from Member States.[7]

Article 88 of the ECSC Treaty gave exclusive jurisdiction to the High Authority to initiate the action. High Authority was empowered to declare a failure by a State's obligations incumbent without prior recourse to the Court. Subsequently the state could bring the matter to the attention of the Court, that according to the wording of the treaty, 'shall have unlimited jurisdiction in such cases'.[8]

Later, The Rome Treaties introduced the possibility for the Member States, that in addition to the Commission, to initiate an action for failure to fulfil the obligations.[9] Adjustments to the Treaties till the present time did not affect the procedure itself as regulated for the first time in the ECSC Treaty. Small differences, as can be seen in the table below, are purely terminological and do not affect the procedure itself, especially as these occur only after the Lisbon Treaty.[10]

[7] See in this respect articles 8-19 of ESCS Treaty (Paris, 1951), articles 124-135 of EAEC Treaty and articles 155-163 of ECC Treaty (Rome, 1957).

[8] See also Nicoleta Diaconu, *Dreptul Uniunii Europene. Partea Generală*, Ed. Lumina Lex, Bucureşti, 2007, p. 300.

[9] Referral right was recognized also to the individuals that can lodge complaints to the Court. The Maastricht Treaty has introduced the possibility of initiating an action also for the European Central Bank against national central banks.

[10] **Article 170 of the EEC Treaty**: A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 227 of the EC Treaty (former article 170 EEC): A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 259 TFEU (former article 227 EC): A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

4. State versus state: article 259 TFEU

A Member State may bring an action against another Member State if considers that the latter has not fulfilled obligations assumed under this Treaty.

The procedure provided by article 259 TFEU is complementary to that of article 258 TFEU, proving certain particularities but also similarities. If the procedure based on article 258 TFEU provides exclusive competence to initiate action to the European Commission, the provision of article 259 reserve this competence only to Member States (any of the 28 EU Member States).

Member States cannot directly address the Court, but must first notify the Commission. The Commission then delivers a reasoned opinion after having heard the arguments of the Member States concerned, thus ensuring *the adversarial principle*.[11]

Delivering the reasoned opinion is not mandatory but requires the applicant Member State to wait three months before applying to the Court of Justice.[12] This period of three months has the nature of a *dilatory term*, within the Treaty stops the State to address to the Court.[13]

In terms of initiating the action, some authors[14] consider the infringement procedure from two perspectives: *bilateral* and *multilateral*.

- Article 258 TFEU: bilateral perspective
  Commission is exclusively competent to initiate
- Article 259 TFEU: bilateral perspective
  The initiative is solely up to the Member State
- Article 259 TFEU: multilateral perspective
  Member States must first bring the matter before the Commission

Sometimes, the Commission decides to take over the action and bring it before the Court of Justice of the European Communities.[15]

There are cases when the Commission encouraged the two States to resolve the dispute amicably and declined to issue a reasoned opinion 'given the sensibility of the underlying bilateral issue', but the Court ultimately upheld the conduct of the UK and found against Spain.[16]

In these circumstances it can be assumed that the multilateral perspective implies either closing the procedure laid down in article 259 TFEU by the Commission taking over the action,[17] either to hinder or even inhibit the initiation of the Member States.

The conditions required for an action to be admissible are:

1. must be based on an alleged breach of obligations deriving from the treaties;

2. conduct (action or inaction) be attributed to a Member State;

3. be brought to the Court over 3 months from the notification of the Commission.

As the Member States have *locus standi* in the procedure laid down in article 259 TFEU, they should not demonstrate an interest in initiating an action. However, Member States that have initiated an action so far have shown particular interest in each case.

Contentious procedure is similar for both situations, the proceedings before ECJ scrolling down in 2 phases: written (written pleadings) and oral (oral pleadings).

1. Written stage

a. *Application initiating proceedings* – procedural document initiating proceedings;

b. *Defence* – reply of defendant state to the application;

c. *Reply* – reply of applicant state to the defence;

d. *Rejoinder* – reply of defendant state to the reply;

e. *Application for leave to intervene* – if the case.

2. Oral stage

ECJ may decide to hold an oral stage to hear the parties about the pleadings lodged in the written stage. The main purpose of the hearing is to allow the parties and other interested persons to reply to the arguments put forward by other participants in their written pleadings. The oral phase can be held also by request of any interested party.

5. Limitations of the procedure provided by art. 259 TFEU

As regulated in the international law, Member States are entitled to invoke the responsibility of

[11] Given the sensitivity of the subject, the Commission may refrain from delivering a reasoned opinion within the meaning of article 259 TFEU, and may invite the parties to find an amicable solution (see, in this regard, case Gibraltar, C-145/04, *Spain v. United Kingdom*). Sometimes Commission decides to take over the action, as it did in case C-232/78, *Commission v. France* (action brought by Ireland against France) and C-1/00, *Commission v. France* (action brought by the United Kingdon against France).

[12] See case C-388/95, *Belgium v. Spain*, where Commission didn't delivered a reasoned opinion in time.

[13] Notes for the guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities (http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt9_2008-09-25_17-37-52_275.pdf).

[14] Hans Smit, Peter Hherzog, Christian Campbell, Gudrun Zagel, Smit & Herzog on The Law of the European Union, Lexis Nexis, 2011, 259-2.

[15] See for example Case C-1/00, *Commission v. France*, judgement of 1 December 2001.

[16] Case C-145/04, *Spain v United Kingdom*, paragraph 32: 'The Commission considers, following an in-depth analysis of the Spanish complaint and an oral hearing held on 1 October, that the UK has organised the extension of voting rights to residents in Gibraltar within the margin of discretion presently given to Member States by EU law. However, given the sensitivity of the underlying bilateral issue, the Commission at this stage refrains from adopting a reasoned opinion within the meaning of Article 227 [EC] and invites the parties to find an amicable solution'.

[17] In this regard we mention the action brought by the Commission in response to France's complaint against the Netherlands, case 169-84, *Cofaz c. Comisia*. See also case C-1/00, *Commission v. France*, judgement of 1 December 2001.

another Member State pursuant to article 259.[18] Even if the mechanism provided by article 258 TFEU is considered more advanced than the existing system in international law because of two specific elements: **1.** existence of a particular institution - European Commission - designated to protect and promote the interests of the European Union; and **2.** recognition by Member States of the compulsory jurisdiction of the Court of Justice of the European Union, as provided in the EU accession process (there is no need for an explicit recognition[19]), the action for failure to fulfil an obligation is much limited in case of the procedure provided by article 259 TFEU. This limitation is obvious taking into consideration the infringement procedure purpose, namely to compel the State who breached its obligation to comply and to stop the infringement. If a Member State may, in addition, claim for damages or compensation remains an open question.[20] The literature argued that the lack of such interstate repair mechanism constitute a gap in the European legal order, which could be covered by other methods of enforcing state liability as provided for by the Treaty or by recourse to State responsibility in international law.[21]

Proceedings for failure to fulfil an obligation initiated under article 259 have been very rarely used because of the preference of the Member States, for political reasons, to ask the Commission to act under article 258, and only after to intervene before the Court by the side of the Commission, than to assume the role of applicant.[22] This draws our attention to other limitation caused by the discretionary power of the Commission to initiate proceedings, issue long discussed for the application of article 258 TFEU.[23]

There is no text in the treaties that prevent Member States to resolve disputes through political negotiations or 'political deals' outside the legal framework of the European Union. However, if a judicial determination of the inconsistency of a Member State's conduct with the EU law is sought, the procedure under article 259 constitutes the only solution available to Member States. This conclusion follows from the interpretation of article 344 TFEU, which forbids Member States to submit 'any dispute concerning the interpretation or application of the Treaties to any method of dispute settlement not provided for in the Treaty'.[24]

Yet, even if the procedure laid down in article 259 remains the only mechanism available for the Member States to enforce EU law, it doesn't mean that the European legal order is completely separated from the international law of state responsibility.[25]

6. Case-law under art. 259 TFEU

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 ECJ against another State. Of the sixth cases, only four proceeded to judgment, the other two were settled amicably.

6.1. Cases that proceeded to judgement

A. Case 141/78, France v United Kingdom

This is the first case of interstate infringement proceedings and the action was brought on 14 June 1978 by France against the United Kingdom with respect to sea fisheries.

The applicant claims for a declaration that by adopting on 9 March 1977 and by bringing into force on 1 April 1977, 'Sea Fisheries, Boats and Methods of Fishing, the Fishing Nets (North-East Atlantic) Order 1977', the United Kingdom has failed, in the sea fisheries sector, to fulfil its obligations under the EEC Treaty.

In 1977, Britain unilaterally adopted an order (Order no. 440) pursuant to which all trawlers were required to use a particular type of fishing net so as to reduce the proportion of by-catches and preserve the fish stock. In the same year, the master of a French fishing vessel was arrested and convicted of infringing order or having used nets of a mesh smaller than the minimum authorised by the order. France challenged the consistency of the UK order with Community law on the grounds that the area of sea fisheries was an exclusive Community competence.

Commission refrained from initiating parallel infringement proceedings. Instead, it intervened on the side of France. The Court sided with France and decided that United Kingdom has failed to fulfil its obligation under the Treaty (judgement of the Court from 4 October 1979). The provision of the Treaty relating to agriculture covered all questions relating to the protection of maritime biological resources.

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[18] An interesting study on the corresponding procedure before the ECJ and EFTA Court can be found in Thorbjorn Bjornsson, Report 2/12 on the Effectiveness of the EFTA Court: Usage Rate, p. 40 (http://www.effective-intl-adjudication.org/admin/Reports/4f46f789be89ecee489aed37ae262f50EFTA-second%20report-toby-final.pdf).

[19] Alan Dashwood, Robin White, Enforcement Actions under Articles 169 and 170 EEC, European Law Review, vol. 14/1989, no. 6, p. 389.

[20] Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, *cited supra*, 259-2.

[21] Simma Pulkowski, Of Planets and the Universe: Self-Contained Regimes in International Law, 17 EJIL (2006) 483.

[22] See, for egz., case C-195/90, *Commission v. Germany*, where Belgium, Denmark, France, Luxemburg and Netherlands had intervened sided the Commission.

[23] Also see Paul Craig, Grainne de Burca, Dreptul Uniunii Europene, 4th ed., Ed. Hamangiu, București, 2009, p. 545-549.

[24] For a more detailed commentary on article 344 TFEU, see Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, *cited supra*, 259-3. The authors cited case Iron Rhine, *Belgium v. Netherlands*, where it was suggested that not every reference to Community law triggers an obligation on the Member States to refer a case to the Court of Justice. We mention also case C-459/03, *Commission v. Ireland*, where ECJ decided that Ireland failed to fulfil its obligation to respect exclusive jurisdiction in this matter.

[25] Hans Smit, Peter Herzog, Christian Campbell, Gudrun Zagel, *cited supra*, 259-3.

Therefore, a Member State could not adopt any unilateral measures in the area. Thus, the United Kingdom has failed to fulfil its obligations under article 5 of the EEC Treaty, Annex VI to the Hague Resolution and articles 2 and 3 of Regulation no. 101/76.

B. Case C-388/95, *Belgium v Spain*

This second case was brought on 13 December 1995 by Belgium against Spain concerned a Spanish law that made the use of the name of the production region conditional upon bottling in that region.

The applicant claims for a declaration that, by maintaining in Royal Decree no. 157/88 laying down the rules governing designations of origin and controlled designations of origin for wines and regulations implementing it and in particular Article 19(1)(b) thereof, the Kingdom of Spain has failed to fulfil its obligations under Article 34 of the EC Treaty (now, after amendment, Article 29 EC), as interpreted by the Court of Justice of the European Communities in its judgment of 9 June 1992 in Case C-47/90 *Delhaize v Promalvin* [1992] and Article 5 of the EC Treaty (now Article 10 EC).

Belgium was supported by other four Member States that intervened (Denmark, the Netherlands, Finland and the United Kingdom). This coalition of non-wine producing countries led by Belgium challenged the consistency of the law with Community law. On the other side, Italy, Portugal and the Commission intervened in support of Spain.

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.[26] Spain contended that its rules conformed with Community law. The Court sided the defendant, reasoning that while the law constituted a measure having an effect equivalent to quantitative restrictions on exports, it was justified since it constituted a necessary and proportionate means of protecting a designation of origin (judgement of the Court from 16 May 2000).

C. Case C-145/04, Spain v United Kingdom

A third complaint, brought on 18 March 2004 by Spain against United Kingdom, was of symbolic rather than economic importance.

By its action Spain seeks a declaration that, by enacting the European Parliament (Representation) Act 2003 ('the EPRA 2003'), the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Articles 189 EC, 190 EC, 17 EC and 19 EC, and under the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, as amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002.

Case C-145/04 is unusual because it is the sequel to a judgment of the European Court of Human Rights *Matthews v. United Kingdom* in which that Court found that the United Kingdom had failed to organize European Parliament elections in Gibraltar contrary to Article 3 of Protocol No. 1 to the European Convention on Human Rights. To comply with that judgment, the United Kingdom Parliament passed the European Parliament (Representation) Act 2003 which contains a Section 9 combing Gibraltar with an existing electoral region in England and Wales to form a new electoral region.

As a consequence, voters in Gibraltar were represented in the European Parliament as of 2004. Spain objected to the extension of a British voting district to include 'qualifying Commonwealth citizens' who are not UK citizens on two grounds: First because its Section 16 extends the right to vote in Euro elections in Gibraltar to 'qualifying Commonwealth citizens' who are not United Kingdom Citizens. Second, because the Act includes Gibraltar in an existing electoral district in England. The Advocate General sided (on this ground) with Spain[27] and suggested that the Court should find against the United Kingdom and uphold Spain's claim about the extension of the right to vote in Gibraltar to 'qualifying Commonwealth citizens' who are not United Kingdom citizens. But he suggests that the rest of Spain's claim should be dismissed.

The European Commission, by contrast, considered the UK act of Parliament to be consistent with Community law since it was 'within the margin of of discretion presently given to Member Stated by EU law'. In light of the 'sensibility' of the territorial conflict on Gibraltar, however, Commission deliberately refrained from adopting a reasoned opinion but intervened on the side of the defendant before the Court.

The Court of Justice agreed with Spanish position that Community law did not forbid the extension of voting rights to non-citizens (judgement of the Court from 12 September 2000). In particular, the term 'peoples of the Stated brought together in the Community' need not to be interpreted as synonymous of 'nationals of the Member States' (as Spain contended). Hence, 'in the current state of Community law, the definition of the persons entitled to vote and to stand as a candidate in elections for the European Parliament falls within the competence of each Member State'.

[26] Belgium considered that the incompatibility of the Spanish rules had already been established by the Court in its judgment of 9 June 1992 in the Delhaize case (Case C-47/90). Spain considered that the Delhaize judgment did not affect it specifically and that other wine-producing Member States had adopted similar provisions.

[27] The Advocate General in case C-145/04 was A. Tizzano.

D. Case C-364/10, *Hungary v Slovakia*

This is the newest inter-state case brought on 8 July 2010 by Hungary against Slovakia for refusing the Hungarian President entry into Slovakian territory.

Hungary has argued that Slovakia infringed the free movement of EU-Citizens - Article 21(1) TFEU and Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Taking the view that the entry of its President into Slovak territory could not be refused on the basis of that directive, Hungary asked the Commission to bring infringement proceedings before the Court of Justice against Slovakia. The Commission, however, expressed the view that EU law did not apply to visits made by the head of one Member State to the territory of another Member State and that, in those circumstances, the alleged infringement was unfounded.

Hungary subsequently decided to introduce, of its own motion, infringement proceedings before the Court against Slovakia. The Commission decided to intervene in the proceedings in support of Slovakia.

The Court finds that, as the Hungary head of state is of Hungarian nationality, he enjoys the status of EU citizen, which confers on him the right to move and reside freely within the territory of the Member States. However, the Court observes that EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the EU legal order and is thus binding on the European institutions.

The Court decides that EU law did not oblige Slovakia to guarantee access to its territory to the President of Hungary. Similarly, while Slovakia was wrong to rely on Directive 2004/38 as a legal basis for refusing the President of Hungary access to its territory, the fact that it did so does not constitute an abuse of rights within the meaning of the Court's case-law. In those circumstances, the Court dismisses Hungary's action in its entirety.

6.2. Cases that were settled amicably

A. Case 58/77, *Ireland v France*

The action was brought on 10 May 1977 by Ireland against the French Republic[28] and the applicant claims that the Court should declare that the prohibition imposed by the French Republic on imports of mutton and lamb coming from Ireland when the domestic price of mutton and lamb in France is lower than a given threshold price constitutes a quantitative restriction on imports or a measure having equivalent effect and amounts to a failure to fulfil its obligations under articles 30, 31 and 32 of the EEC Treaty and under the Act annexed to the Treaty concerning the accession to the EEC and the EAEC of the Kingdom of Denmark, Ireland and the United Kingdom concluded at Brussels on 22 January.

By order of 15 February 1978 the Court of Justice of the European Communities ordered the removal of the case from the register. In this case the Commission was intervening.[29]

B. Case C-349/92, Spain v United Kingdom

The action was brought on 4 September 1992 by Spain against the United Kingdom[30] and the applicant claims that the Court should declare that, by maintaining tax legislation in force which assesses Sherry and British Sherry in differentiated form, the United Kingdom has failed to fulfil its obligations under article 95 and 30 of the EEC Treaty and of the Spanish Act of Accession to the European Community.

By order of 27 November 1992 The President of the Court of Justice of the European Communities ordered the removal from Register of the case.[31]

The orders of the President of the Court of Justice are not public and cannot be consulted in order to see the motivation of the removal from the register of the two above mentioned cases.

7. Conclusion

Finally we conclude over some interesting issues concerning the procedure as provided for Member States by the Treaties.

Interpretation of the Member States action should be achieved in relation to art. 344 TFEU[32] under which Member States have pledged not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein, Court of Justice of the European Union being the only jurisdiction to settle any dispute which opposes two Member States concerning the interpretation of EU law.[33] However, there are situations that challenge the application of this article: (i) EU accession to the European Convention on Human Rights; (ii) bilateral agreements between Member States on the promotion and protection of investments.[34]

Case-law examination reveals that Commission's role is not limited in this procedure only to the status of intermediary institution between Member States and the Court, but it has various roles, ensuring compliance

[28] OJ No C 142, 16.06.1977.
[29] OJ No C 78, 30.03.1978.
[30] OJ No C 256, 3.10.1992.
[31] OJ No C 340, 23.12.1992.
[32] For an interesting analyses on article 344 TFEU (ex-article292 TCE), see Gerard Conway, Breaches of EC Law and the International Responsability fo Member States, EJIL (2002), Vol. 13 No. 3, 679-695.
[33] This was also argued by the Commission in C-364/10, *Hungary v. Slovakia*, pct. 23.
[34] Ion Gâlea, Tratatele Uniunii Europene. Comentarii și explicații, Ed. C.H. Beck, București, 2012, p. 520-521.

with treaties, whether it's under art. 258 or 259 TFEU. The Court of Justice has repeatedly stated that the goal of the infringement procedure is 'to give the member state an opportunity, on the one hand, of remedying the position before the matter is brought before the court and, on the other hand, of putting forward its defence to the Commission's complaints'.[35]

European Commission acts as a mediator. In the case of *Hungary v. Slovakia*, Commission Vice-President emphasised that 'everything possible had to be undertaken in order to avoid any repetition of such situations and stated that he was confident that a constructive bilateral dialogue between the two Member States could resolve the dispute.'

European Commission can intervene and support one of the states before the Court, as it did in all 4 cases settled by pronouncing a judgment. Although there are not sufficient cases, the conclusion is simple: *Commission has never lost by the side of one State.*

Recourse to the procedure lay down in Art. 259 TFEU is clearly a rarity in the European system; actions were brought at intervals of 17, 9 and 6 years. Member States, pursuant to the obligation imposed by art. 4 TEU on the principle of sincere cooperation, either decide to resolve any disputes between them (by negotiation) or turn to Commission to take complaints by virtue of its role as guardian of the Treaties.

Although proving an interest is not required by the Treaties, practice has proved that its existence is decisive. We can say that a dilemma arises in terms of establishing who better applies EU law. On the one hand, compliance with art. 4 TEU divert Member States from the procedure lay down in art. 259 TFEU, but promote one of the basic principles of European construction. On the other hand, refraining from art. 259 TFEU procedure and accordingly ignoring a breach of EU law by another Member State may lead to the interpretation that an indirect violation of the EU law may happen.

We conclude by emphasizing that recourse to the procedure established by art. 259 TFEU was concurrent to other types of disputes, usually political, and the purpose of the procedure was to gain a strategic advantage in international relations at the expense of a correct application of European law. In the present international context the struggle for an important economic position is at its high levels and on the verge of a conflict outbreak. Thus, Member States prefer to leave to the Commission the enforcement of EU law.

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[35] *Commission v. Ireland*, C-74/82; *Commission v. Belgium*, C-293/85; *Commission v. Netherlands*, C-152/98.

BUILDING A BANKING UNION IN THE EUROPEAN UNION – A SOLUTION TO THE FINANCIAL CRISIS?

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Abstract:

The financial crisis of 2008 highlighted the need for a deeper integration of the banking system, as a warranty to support long-term financial stability. It was argued that the grounds of the crisis lie also in an uncoordinated national response to the failure of banks, in a fragmentation of the Single Market in lending and funding and, therefore, a better regulation and supervision of the financial sector can ensure financial stability and growth in the European Union.

In order to restore the proper functioning of the internal market and to avoid future crisis, the European Commission launched a set of initiatives, in order to assure a safer and sounder financial sector for the single market; are included here: stronger prudential requirements for banks, improved depositor protection and rules for managing failing banks and a single rulebook for all the 28 Member States of the European Union. The single rule book is the step towards the Banking Union sits.

The banking union consists of three pillars: a Single Supervisory Mechanism, a Single Resolution Mechanism and a joint deposit-insurance scheme.

As on 4 November 2014 the European Central Bank assumed responsibility for euro area banking supervision, the Banking Union is still under construction.

In this framework, the purpose of my paper is to analyse the process of building a Banking Union in Europe. Therefore, the objectives of my paper are to explore the steps to fulfilling a real integration of the European banking system, as a solution to the financial crisis.

Keywords: *Banking Union, European Central Bank, financial crisis, euro area, integration*.

1. Introduction:

As we well know, the financial crisis started at the end of 2009 as a banking crisis in the United States of America, but it spread quickly and evolved as a debt crisis in the Eurozone and, afterword, in Europe as a whole. The questions about the future of the Euro and also of the European Union increased, while many voices criticized and argued the measures taken by the European leaders in order to respond to and prevent any negative effects and, in the end, to prevent the collapse of the banking system.

A problem to one credit institution can spread quickly to other financial actors, while affecting depositors, investments and even the entire economy, a fact which represent a real threat to the stability of the financial system in European Union. Actually, this threat was frequently explained by the use of the *"too big to fail"* theory[1].

Therefore, having in mind that European Union's banking system is vulnerable to shocks, in response, the European Union and its member states have been focusing on strengthening financial sector supervision. In this context, given the economic interdependence within the member states, which was accentuated by the crisis, the issue of a deeper integration was launched.

Consequently, my paper covers the process of building a Banking Union in Europe, as a potential solution, meant to prevent any future crisis and to strengthen the Euro zone.

The importance of my study lies in the fact that it covers a highly topical issue, which is now of real relevance for the integration of the European Union, in the banking sector, being a subject of interest not only for specialists, but also for any citizen of the member states.

In this highlight, the objectives of my paper are: to explore the steps towards a real integration of the European banking system, by building a Banking Union for the Euro area; to understand why the Economic and Monetary Union needs a Banking Union, and, finally, to analyse this project, seen as potential solution to the financial crisis.

To answer at these objectives, I will start by dividing my paper in two sections: The steps towards a Banking Union (A), Banking Union as a potential solution to the financial crisis (B).

The topic is of recent development, but, given its great importance, the existent specialized literature has debated this subject. This paper will try to make an

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[1] For further details on *"too big to fail theory"* see George G. Kaufman, *Too Big to Fail in Banking: what does it mean?*, special paper 222, LSE Financial Market Group Special Paper Series, at Loyola University Chicago and Federal Reserve Bank of Chicago, June 2013, ISSN 1359-9151-222.

According to Kaufman, "A TBTF firm is generally a large complex firm that is perceived to require either or both special regulation to discourage failure while alive and/or a special resolution regime when dead in which governments can intervene and not have the insolvent firm resolved through the usual resolution (bankruptcy) processes that apply to other firms in the same industry, at least with respect to allocating losses.".

objective and understandable analysis of an issue on which we can argue, without exaggerating, that changes the face of the European Union.

2. Content

A. The steps towards a Banking Union

Looking back in the history of the European Union, we can say that Banking Union is indeed the most important European project undertaken, as a form of deeper integration, since the building of the Economic and Monetary Union and the introduction of euro as a common currency of the member states.

The project was launched in the summer of 2012, but evolved surprisingly quickly. The idea was to fight against financial fragmentation problem, which was seen as one of the euro crisis causes.

Even if last year European Central Bank assumed the responsibility for euro area banking supervision[2], moment considered to be of great importance, the project is still under construction. It is built on several legislative acts, by which is meant to ensure the stability of the financial system and to prevent triggering in the future one of the crisis realities – meaning to ensure that banks and their shareholders and no longer taxpayers, will carry the risks and will pay for eventual losses.

It is important to point out that banking union is designed for the countries in the Euro Zone, which are *de jure* involved in the project. But, according to the SSM Regulation, the European member states which have not adopted the euro as national currency may opt in, but on a voluntary basis.

The project is based on a concept of common financial market regulation, the so-called Single Rulebook. It consists on horizontal sets of rules, which apply to all member states of the European Union, namely capital requirements for banks[3] (CRD IV package) and provisions of the Bank Recovery and Resolution Directive (BRRD)[4].

The Banking Union project is built on three pillars:

- a European system for banking supervision - Single Supervisory Mechanism (SSM), by which European Central Bank (ECB) is in charge;
- a European mechanism for the resolution of insolvent banks - Single Resolution Mechanism (SRM), which implies a European Resolution Authority and a European Resolution Fund to finance resolution measures; and
- a joint deposit-insurance scheme – which implies common standards for deposit guarantee schemes of member states.

Hereinafter some basic information about the three pillars of the European Banking Union project:

Regarding the first pillar, the legal framework at EU level for Single Supervisory Mechanism is based, at this moment, on following acts:

- Council Regulation No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (known as SSM Regulation);
- Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (known as SSM Framework Regulation);
- Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5);
- Regulation (EU) No 1163/2014 of the European Central Bank of 22 October 2014 on supervisory fees (ECB/2014/41).

Under the SSM Regulation, European Central Bank is responsible for the direct supervision of the credit institutions considered to be significant in the euro area, while national supervisors will continue to carry out the supervision for the other credit institutions, considered to be less significant, but under its ultimate responsibility. According to the first article of the regulation, its scope is to contribute to the safety and soundness of credit institutions, to the stability of the European financial system and to ensure consistent supervision.

In order to prevent a potential conflict of interests, there were established clear rules to assure the organizational and operational separation of the European Central Bank competences in the area of supervision and of monetary policy.

November 4, 2014 marked the ending of the preparatory phase for the SSM, which included an in-depth examination of the resilience and balance sheets of the biggest banks in the euro area: European Central Bank assumed responsibility for euro area banking

[2] ECB assumed responsibility for Euro Area supervision on November 4, 2014.

[3] The main legislative texts are:

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (CRD IV);

Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

[4] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (BRR Directive).

supervision, which meant a clear and important step towards Banking Union.

SSM Regulation established the ground rules for the functioning of the Single Supervisory Mechanism. The operational arrangements needed for the implementation of the tasks conferred upon ECB by the Regulation are contained in the Framework Regulation, which further develops and specifies the cooperation procedures established in the SSM Regulation between European Central Bank and the national competent authorities within the Single Supervisory Mechanism and ensures the effective and consistent functioning of the SSM.

As for the Member States whose currency is not the euro, ECB decision of 31 January 2014 establishes the procedure to be followed in order to enter in a close cooperation with the European Central Bank.

As for the second pillar, the legal framework at EU level for Single Resolution Mechanism is based, at this moment, on following acts:

- Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (known as BRR Directive);
- Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (known as SRM Regulation);
- Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund;
- Intergovernmental Agreement (IGA) on the Single Resolution Fund;
- Communication from the Commission on the application, from 1 August 2013, of the state aid rules to support measures in favour of banks in the context of the financial crisis;

The Bank Recovery and Resolution Directive entered into force on 2 July 2014 and had to be transposed into national law by the Member States by December 31, 2014.

It establishes a common framework for the recovery and resolution of banks and investment firms across the European Union and provides the ways in which the credit institutions in difficulty can be rescued without requiring taxpayer bailouts.

The BRRD sets out the rules for the resolution of banks and large investment firms in all European Union Member States. Banks are required to prepare recovery plans to overcome financial distress. Authorities have also a set of powers to intervene in the operations of banks to avoid them failing or to restructure them, allocating losses to shareholders and creditors, by following a clearly defined hierarchy. There are also provided powers to implement plans to resolve failed banks in a way that preserves their most critical functions and avoids taxpayers having to bail them out.

As for the financing, member states are required, to set up ex-ante resolution funds to ensure that the resolution tools can be applied effectively. In the case of euro area Member States, from 2016, these funds will be replaced by the Single Resolution Fund.

The Single Resolution Mechanism is designed for the euro area. The main purpose of the Single Resolution Mechanism is to ensure that eventual future bank failures in the banking union are managed efficiently, with minimal costs to taxpayers and the real economy. The manner of implementation is similar to the Single Supervisory Mechanism, meaning that European Central Bank will have the ultimate responsibility for the resolution of all banking cases in the euro area, but the tasks will be divided between the Single Resolution Mechanism and the national authorities; similar to the first pillar, the Single Resolution Mechanism will be directly responsible for the significant banks and cross-border cases.

Without prejudice to the main purpose - that any resolution is first financed by a bank and its shareholders, and if necessary also partly by a bank's creditors - there will also be another funding source available to appeal to, if neither the contributions of shareholders nor those of a bank's creditors are sufficient. To this end, the Single Resolution Fund (SRF) was established through an Intergovernmental Agreement, which contains the provisions relating to the transfer of contributions and mutualisation of the SRF.

The Single Resolution Fund together with European Stability Mechanism (ESM) facility and the Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (DGS) represents the third pillar of the Banking Union.

The objective of Directive 2014/49/EU is to ensure a quick compensation of bank account holders in case of a bank failure. The current deadline for compensation of 20 working days is reduced to seven working days. The DGS sets the threshold of 100 000 euro for depositor protection. It requires higher amounts to be protected if they are temporarily high balances arising from, from example house sales. Also, the directive provides a funding mechanism in several steps and restrictions on investment of the financial means, with the scope to ensure that the deposit guarantee schemes dispose of financial means that are proportionate to their liabilities and that these financial means are safeguarded against potential losses.

B. Banking Union as a potential solution to the financial crisis

The project of Banking Union was promoted and presented by the European leaders as a viable solution to the financial crisis. But, first of all, before trying to understand the reasons why it can be a real solution and if it is indeed a solution and not a disguised form of centralising power and decisions at the European Union level, we have to answer at one important question: *why Economic and Monetary Union needs a Banking Union?*

With a euro crisis as a premises, Banking Union was designed as a fundamental complement to the Economic and Monetary Union (EMU) and to the internal market; if EMU had the purpose to promote a single currency in the European Union, Banking Union is to align responsibility for supervision, resolution and funding at a centralized – European Union level and to harmonize the rules across the euro area.

The Report of the Four Presidents *"Towards a genuine Economic and Monetary Union" (EU, 2012)*[5] argues that the euro area needs stronger mechanisms to ensure sound national policies so that Member States can reap the full benefits of the EMU. This is essential to ensure trust in the effectiveness of European and national policies, to fulfil vital public functions, such as stabilization of economies and banking systems, to protect citizens from the effects of unsound economic and fiscal policies, and to ensure high level of growth and social welfare.

Its conclusion is that the EMU requires an integrated financial framework or a Banking Union built on three pillars: a single supervisory mechanism, a single resolution mechanism and a single deposit guarantee scheme. President Van Rompuy also adds that there is a crucial need for a Single Rule Book and for an harmonized application of EU rules.

Indeed, despite of the critics launched by the Euro sceptics, the EMU and the single European currency attracted obvious advantages and benefits to individuals, to business and to the whole economies of the member states, like: stable prices for consumers and citizens; the exclusion of the currency risk between euro area countries has been eliminated, which contributed to foster growth and maintain stability; greater security and more opportunities for businesses and markets; more integrated financial markets; moreover the trade and the labour mobility were stimulated.

However, all this advantages were not sufficient for the euro member states to avoid the sovereign debt crisis, which had great negative impact on them and threatened also the survival of the single currency.

The crisis brought important lessons, but one of the most important was that the monetary union was incomplete and the fragmentation of the banking system was one of its causes.

This is why how banking union fully completes the EMU and European leaders believed that its achievement is to create a "genuine" EMU. The EMU needs a Banking Union, because a stable financial system is necessary to safeguard the stability of the euro area and ensure the effective transmission of a single monetary policy.

Christian Noyer in *"Why the Economic and Monetary Union need a banking union"*[6] argued the importance of the project for the euro in an objective and conclusively manner. He said that the key to banking union can be summed up as follows: the aim is to find a way to ensure that banks in the euro area are considered precisely as that, as "euro area banks", and not as "Irish", "German" or "Italian" banks. In other words, the goal is to ensure that credit conditions in the euro area will not depend on *where* you are but on *who* you are, which is what should be expected of an efficient financial market.

Crisis management process in European Union implied a set of important measures meant not only to solve the problem in the near future, but to create a stable system, no more vulnerable to shocks. The EU response to crisis is not the topic of this paper, but, in order to create a full view of the context, the package of measures implied important actions like: the implementation of adjustments programs, the creation of the European Financial Stability Facility (EFSF) and European Stability Mechanism (ESM), the adoption of the "six-pack" and the Treaty on Stability, Coordination and Governance (TSCG)[7], the adoption of the Single Rule-Book, the ECB framework for Outright Monetary Transactions etc.

Banking Union project is one of these measures, advanced as a major potential solution to the financial crisis, but a measure which involves much more than the foregoing ones, first of all because it represents a transfer of sovereignty from national to European level and the enhancement of the European Central Bank's role and importance.

First of all, by the implementation of this project, as part of crisis management programme, it can reduce fragmentation of European banking markets, because an integrated system would involve uniform means of enforcement and would annihilate national distortions

[5] Towards a genuine Economic and Monetary Union, 5 December 2012, Herman Van Rompuy, President of the European Council in close collaboration with: José Manuel Barroso, President of the European Commission, Jean-Claude Juncker, President of the Eurogroup, Mario Draghi, President of the European Central Bank, accessed February 15, 2015, at:
http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf.

[6] Christian Noyer: "Why the Economic and Monetary Union needs a banking union", address by Mr Christian Noyer, Governor of the Bank of France and Chairman of the Board of Directors of the Bank for International Settlements, at the Lamfalussy Lectures Conference "The euro dilemma: inside or outside?", Budapest, 31 January 2014, accessed February 15, 2015, at:
http://www.bis.org/review/r140205e.htm;

[7] It is formed by Five Regulations and one Directive (that is why it is called six-pack) and covers not only fiscal surveillance, but also macroeconomic surveillance under the new Macroeconomic Imbalance Procedure;

of actions which are to affect the stability of the financial system. In this line, the responsibility for the banking supervision and for the financial support is transferred at a centralised level.

While Single Supervision Mechanism helps to uniform the supervision practices and the risk management in the participating member states, the Single Resolution Mechanism enables intervention in a timely manner to address weak banks and prevent contagion across the system.

The main reason it is necessary to create a banking union with a supervisory mechanism at the EU level has to do with the importance of financial stability and market integration, which are not occurring at the same time at the national level. This is what Shoenmaker calls 'the financial trilemma.' This theory suggests that policymakers can choose only two of the three following objectives: financial stability, financial integration and national financial policies (such as bank supervision and resolution). This is because 'national financial policies usually fail to recognize the externality generated by cross-border banks in difficulty.' In fact, financial integration at the EU level gives rise to the supranational interdependence of financial agents.

Regulating these supranational relations requires extra information about the activities of institutions located outside the jurisdiction of the national authorities. No national central bank or parliament has access to all the required information about financial institutions located outside of its territory. However, the activities of these banks influence the banking sector and they cannot exercise authority over the cross-border financial institution. At the same time, the national supervisory institution does not have enough information about the financial institutions that are established in its territory, and whose activities go beyond national boundaries. Monitoring these institutions is difficult for the national mechanisms.

Therefore, the national authorities are not able to extend robust supervisory mechanisms to these cross-border entities, and may provide troubled banks across the border with capital flow while having no control over the capital injection's effects. Another possibility is that the national authorities may not provide enough funds to troubled institutions due to a lack of information and control, which in turn leads to financial instability.

Moreover, national supervisors are more vulnerable to regulatory capture. Both of these elements undermine financial stability, and therefore, combining these three objectives is not possible at the national level. In this regard, Benoît Cœuré, member of the ECB's executive board stated that: "by setting the incentives correctly, a fully-fledged banking union permits an internalization of this externality, making sure that banks strengthen their capital and liquidity on sunny days and can continue to lend on rainy days".

Additionally, in a highly integrated financial system such as the European Union, reducing moral hazard and excessive risk-taking requires a consistent set of regulatory incentives, based not only on common rules but also on integrated supranational powers in banking supervision. Therefore, integration in the banking sector that underlies the financial integrated market is necessary to stop reckless risk-taking by banks in the internal market[8].

The question if a banking union would have prevented the sovereign debt crisis was addressed in a paper of the International Monetary Fund, entitled *"Would a banking union have prevented this crisis?"*. The conclusion was that, arguably, it would not have halted the sovereign debt crisis in some countries. But a well-functioning banking union could have substantially weakened, if not broken, the adverse sovereign-bank-growth spirals, maintained depositor confidence, and attenuated the liquidity and funding freezes that followed.

The rate cuts of the European Central Bank would more likely have fed through to lower borrowing costs for the private sector. A strong banking union would also have limited the concentrated exposures of banks to certain risks. For example, euro-area-wide supervisors would arguably not have allowed size, structure and concentration risks to grow as they did in countries such as Spain, Ireland, or Cyprus, or for general banking weaknesses to have accumulated in some other places. That said, as the United States and other recent experiences suggest, supervision would have had to strive to be of a high standard. Merely reorganizing supervisory structures would not of itself have addressed the buildup of systemic risk or the too-big-to-fail problem[9].

3. Conclusions

As a conclusion, the study focused on the European Banking Union a project, a long debated subject nowadays, a topic of high interest which is believed to be a solution to the financial crisis.

In the first part, there were covered the steps towards a Banking Union, mainly from the legal point of view, steps which were passed by the European leaders in a fast manner, given its importance in crisis context and for the architecture of the European Union.

Second part, tried reveal to why Economic and Monetary Union needs a Banking Union and why it is

[8] European Union Towards the Banking Union, Single Supervisory Mechanism and Challenges on the Road Ahead, Mandana Niknejad, European Journal of Legal Studies, (2014) 7(1) EJLS 92, accessed February 15, 2015, http://www.ejls.eu/15/186UK.htm..

[9] A Banking Union for the Euro Area, International Monetary Fund, prepared by Rishi Goyal, Petya Koeva Brooks, Mahmood Pradhan, Thierry Tressel, Giovanni Dell'Ariccia, Ross Leckow, Ceyla Pazarbasioglu, and an IMF Staff Team 1, authorized for distribution by Reza Moghadam, February 13, 2013, pg. 8.

seen as a potential solution for the financial crisis. Is it real solution and not a disguised form of centralising power and decisions at the European Union level? Like the debate on euro currency, there is not a single answer, because there will always be Euro sceptics to deny and question the decision taken at European level. And this project is natural to be questioned having in mind, first of all, that in implies a transfer of sovereignty from national to European level.

My opinion is that the arguments for the first view, that Banking Union is a real solution to the financial crisis, are strong and, in the same time, relevant. But, their authenticity is to be confirmed in practice. What is for sure is that this new architecture is to reduce the negative effects of a future crisis, if it doesn't succeed in preventing it at all.

As a suggestion for future researches, I believe that an interesting paper would consist into analysing the "pros" and the "cons" for a non-euro member state to enter in a close cooperation with the European Central Bank before adopting the euro currency.

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THE TRAINING OF LAWYERS - A CONSTANT IN EU'S OBJECTIVES, IN A SOCIETY OF KNOWLEDGE

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Abstract:

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. Also, the Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.

Keywords: *Union European, training policy, education, law practitioners.*

Introduction

It is very well known that today's international society is marked by very profound changes which are happening very fast, being often placed at strategic interferences. Increasingly more, economic accumulations are based on information and innovation, both turning into essential development resources, in general. The same society of information that is a source of wealth for some people, represents at the same time, a potential factor of exclusion for others. A careful analysis of realities highlight the fact that the main goal pursued by those who founded the European Union (in 1992, with the signing of the Maastricht Treaty) was and still is to make from this European area, not only a space economically competitive, but equally, a social space, close to citizens and their problems. In this context, lifelong learning becomes crucial. Its stake is to provide economic competitiveness and social cohesion, development, favouring thus the exercise of active European citizenship. For lifelong learning to become reality, it is essential that the role of professional training is grounded on new bases, including in contemporary Romania, which as far as integration concerns, is related to requirements specific to a new future.

Successive European political structures revealed common themes, offering national strategies, a new element called lifelong learning, reference element for any natural evolution, providing the context for practical cooperation, such as, for example, mutual exchanges and pilot projects.

Obviously, the pace of economic and social development has accelerated. In Europe, more than ever, enterprises need a qualified and thoroughly informed staff. Employers choose, more rarely, unskilled workforce, seeking for capabilities endowed with performant reasoning, including in the field of technical competence. The evolution has merely reinforced the role of lifelong learning, which has become crucial for developing a professional career.

2. The right to education[1]

Article 165 of the Treaty on the Functioning of the European Union (TFEU) is the legal basis of actions undertaken, both at EU and Member State level, in order to continue training throughout life, for all professional categories, including lawyers, meaning those who, „although representing an autonomous profession, are an integral and necessary part of the judicial activity, fulfilling a central role in the implementation of EU legislation"[2]. The Commission considers that, „in order to foster a genuine European culture in the judicial and law enforcement field, is essential to speed up training on Union-related issues, and this should become systematically accessible for all professions involved in the implementation of the area of freedom, security and justice"[3]. The Union's action in the fields of education and professional training aims at[4]:

- developing the European dimension in education, particularly through the learning and dissemination of Member States' languages;
- favouring the mobility of students and teachers, by encouraging the academic recognition of diplomas and periods of study;
- promoting cooperation between educational institutions;
- developing exchanges of information and

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[1] For details, see Fuerea Augustin, *Un sistem educaţional continuu, articol de autor*, in Revue „Tribuna învăţământului", no. 680 (2561)/2003, pp. 1–2.

[2] COM (2011) 551 final, p. 4

[3] The Stockholm Programme - An open and secure Europe serving and protecting the citizens (2010 / C 115/01), p. 6.

[4] According to art. 165 TFEU para. (2).

experience on issues common to educational systems in the Member States;

− encouraging the development of youth exchanges and exchanges of socio-educational trainers and supporting youth participation to the democratic life of Europe;

− encouraging the development of distance education,

− developing the European dimension of sport, by promoting fair-play and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially of the youngest.

To achieve these objectives, the European Parliament and the Council shall adopt incentive measures, excluding any harmonization of laws, regulations and administrative provisions of the Member States, deciding in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions. The Council also adopted recommendations[5] to the Commission's proposal[6].

The European Union and Member States are making considerable efforts to continuously raise the level of competence in all areas. The efforts that our country should also pragmatically report to, are made in order to reduce the number of young people leaving school without a qualification. Also, solutions are sought for those who drop out of school, to be offered an alternative in the sense of finding a training opportunity in order to subsequently find a job.

The principle increasingly common in the Member States of the European Union is that according to which each person must have also the right to learn throughout his life: it concerns a lifelong learning, based on the reality of our times. The process of knowledge and lifelong learning requires considerable force. First, it tends to blur traditional distinctions between initial education and continuing education, formal and informal requirements and, not least, general and professional education. Secondly, it is useful to know, now when Europe opens its doors for our country in terms of rights and obligations, that establishing a continuous education system leads to a profound review of the role of vocational training, which includes its modes of transmission, financing and insurance so that education could remain accessible to a larger number of people.

Whatever differences may exist between their systems of continuing education, all EU Member States are working towards the same purpose, more important than any other: to bring this change to an end. The European labour market needs skilled and flexible people because, only in this way, the European Union will become one of the biggest competitors in the field of global competition. Lifelong learning is the source of this success, is the factor that can provide continuous updating of requirements and optimal exploitation of the potential of information. Therefore, now more than ever, vocational training systems in the Member and associated States need to be integrated into a common European strategy.

Retrospectively, we see that, in this area too, the Member States have set common goals. Initially, there was an exchange of ideas concerning the objectives to be achieved and the joint actions they will develop in order to achieve them. Thus, the Union played an important role in the development of national policies and cooperation. The conjunct views of the social partners served at European level, to develop a common strategy, by aligning first, the national legislation in the very important field of continuing education.

Subsequently, it was concluded that, at European level, a clearly defined policy framework was required for Member States to be able, through efforts both individual and common, to reorganize their national education systems. Such a framework would allow, obviously, to better highlight issues of common interest and the connections between lifelong learning and the European strategy, in favour of the employee. Also, the achieved political framework stimulates the debate on the means used to achieve lifelong learning and contributes to building consensus throughout the Union on training objectives and measures to be taken in order to achieve them. It was also demonstrated, theoretically and practically, that the institutionalized political framework favoured the application of an effective system for the exchange of information and experience at European level, on the one hand, and created the necessary conditions to achieve a forum for examining and analysing the ways in which the decision-making process could be improved.

The European policy framework is not, however, the only solution; it is necessary, but not sufficient. Issues, such as the content and organization of continuing education, are incumbent upon Member (and the associated) States, meaning that they have the freedom to choose how they will develop and implement the policy in the field. The continuing education reform occurs as a result of the fight against the lack of qualification, and also in response to the specific needs of adults who, most often, didn't get the initial education. Thus, for example, the UK and Ireland are trying to achieve greater flexibility to meet these needs, through networking and learning centres funded by private enterprises, especially created for this purpose. In Finland and the Netherlands, emphasis is placed respectively on long-term planning and cooperation of all partners involved, and Germany tries to make all young people benefit of vocational training through a well-developed and thoroughly organized system. Denmark also attaches to this

[5] About the legal status of recommendations, see Roxana-Mariana Popescu, *Introducere în dreptul Uniunii Europene,* Universul Juridic Publishing House, Bucharest, 2011, p. 49.

[6] Art. 165 TFEU para. (4).

reform by expanding higher education programs of short duration, with professional vocation.

The future of the European Union is closely linked to economic performance, and more. To this end, the EU launched a genuine structured cooperation framework („Rolling agenda") consisting of an initiative that allowed the materialization of the role that Community cooperation has in education. The aforementioned structured cooperation framework is not placed in a purely „pragmatic" perspective meant to simplify or relaunch actions already existing, but in this way, it can be considered that the European Union set a new strategic goal, with the purpose of education reform, in general and continuing education, in particular. And that, especially since the development of a society which meets the requirements of the XXI century (of knowledge and innovation) is essential to launch a genuine process of economic and social renewal of Europe. Innovation and knowledge are key factors for the competitiveness of the Union and for Europe's ability to fight, including against unemployment, so harmful to the entire international society. The investment in human resources is a prerequisite for successful economic and social development.

The Lisbon Treaty has given the European Union competence[7] to „support the vocational training of magistrates and judicial staff[8]" in the field of judicial cooperation in civil and criminal matters. The entry into force of the Lisbon Treaty enables the Union „to show more ambition in responding to the daily concerns and aspirations of European citizens"[9]. And this is due to the strengthening of the role of the European Parliament, as co-legislator and to a greater involvement of national parliaments, and also to the introduction of qualified majority voting in the Council, in most policy areas[10].

3. The initial and continuing vocational training of lawyers according to provisions of the European Union.

According to a press release from the European Commission[11], its target is to train 700,000 specialists in EU law by 2020. This happens in the context in which „there are about 1.4 million law practitioners in the European Union (...). The Commission wishes to create conditions for at least half of these legal practitioners to participate to European judicial training at local, national or European level by 2020"[12]. It has also been established as additional objective that „all legal practitioners should benefit during their careers of at least one week training in EU law"[13].

The objective is not new. In 2006, the European Commission stated in its *Communication on judicial training in the European Union*, the need to develop vocational training for lawyers and to make more effective and visible the progress recorded in creating an area of freedom, security and justice.

To this end, the Commission itself emphasizes the need to train legal practitioners in the field of European Union law, by inviting „national governments, high Councils for the Judiciary, professional organizations and educational institutions in the field, both at EU and national level"[14], by asking them „to commit in order to integrate EU law into their training programs and to increase the number of classes and participants"[15].

The Commission shall facilitate access to EU funding to support quality training projects, including the e-learning type modules. Under EU multiannual financial framework, the Commission proposed that the European judicial training should become a top priority in order to prepare more than 20,000 legal practitioners per year, by 2020. Training half of the legal practitioners of the European Union until 2020 is a shared challenge.

It is very important to remember that „in order to help creating a European judicial culture based on mutual trust, the Commission has launched since 2014, an exchange program for new judges and prosecutors, lasting two weeks. The Commission supports the training through the European e-Justice portal - which is the „single window of the EU" for legislation and access to justice in all EU countries - and by sharing practical guidelines on training methodologies and evaluation"[16].

We cannot ignore the fact that, as determined by the Commission in its Communication, „the European judicial training can take place either during the initial training or in the permanent training. This training concerns the following aspects: EU law, including substantive and procedural law, together with the

[7] For details on the division of powers, see Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015, p. 183-190.

[8] See Elena Ștefan *Brief considerations on the disciplinary liability of the magistrates*, Lex et Scientia International Journal nr.2/2013, p.109-114.

[9] Commission Communication *Delivering an area of freedom, security and justice for Europe's citizens. Action Plan for implementing the Stockholm Programme*, COM (2010) 171 final, 20 April 2010, p. 3.

[10] On these issues, see widely Augustina-Mihaela Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia,* Universul Juridic Publishing House, Bucharest, 2013, p. 61.

[11] IP / 11/1021.

[12] *Id.*

[13] According to press release IP / 11/1021.

[14] *Id.*

[15] *Id.*

[16] *Id.*

related case law of the Court of Justice of the European Union and knowledge of national judicial systems".

The primary legal basis of vocational training is the Treaty on the Functioning of the European Union which, in Article 81 paragraph (2), section (h) and Article 82, paragraph (1), section (c) invites the EU to „support the vocational training of magistrates and judicial staff in both civil and criminal field".

The judicial training is, essentially, a national responsibility, as outlined in the Council Resolution on the training of judges, prosecutors and judicial staff in the European Union[17].

A similar significance has the report of 9 May 2010 of the former European Commissioner Mario Monti, entitled „A New Strategy for the Single Market"[18] which required European leaders to eliminate remaining bottlenecks affecting innovation, and hampering the growth potential of the EU.

The Stockholm Programme[19] adopted by national governments in December 2009, sets out measures aimed at creating a single area of justice in the EU and requires effective action at European level to support training efforts and to develop training mechanisms at EU level. In turn, the European Parliament has consistently emphasized that a qualitative judicial training contributed significantly to improving the functioning of the internal market and facilitated the exercise of rights by citizens.

In late 2010, the Commission consulted the Member States, members of the Justice Forum, the European Judicial Training Network and its members[20].

Currently, we are in the third development phase of EU programs of education, training and youth (Lifelong Learning and Youth in Action), of which also institutions of vocational training in the legal field can benefit[21].

On 13 September 2011, the European Commission presented the Communication entitled *the Establishment of a climate of confidence in justice at EU level. A new dimension of European judicial training*[22]. From the first pages, the Commission recalls one of its objectives, namely to allow half of European Union lawyers to participate in European judicial training activities by 2020, by using all available resources at local, national and European level in accordance with the objectives of the Stockholm Programme. To achieve this objective, the participation and cooperation of all stakeholders, at national and European level, are required.

According to the European Commission, „the European judicial training in the field of the EU acquis, both at national and at European level, is still modest"[23]. For example, in May 2011, 51% of judges and prosecutors declared that they had not participated before to judicial training activities in the field of Union law or of the law of another Member State, while 74% declared that the number of cases involving the Union law increased over the years. 24% of judges and prosecutors have never participated in training courses on EU law because such courses have not been at their disposal. Activities vary greatly from one Member State to another, the annual number of trained judges or prosecutors ranging from 240 to 13 000. The Commission funded or co-funded 162 projects involving almost 26 000 participants from 2007 to 2010[24].

Regarding the training of lawyers, it must include initial and continuing training. „Every new lawyer should know right from the start EU law. The initial training, organized before the employment or when getting the job, must be complemented by lifelong learning, to help legal practitioners have knowledge up to date and to know where and how to acquire new skills and information „[25].

In order to achieve these goals, each Member State should take all possible measures to ensure that its national bodies responsible for training lawyers, disseminate information on legal systems, develop and stimulate direct exchanges between lawyers in different Member States, including by taking an active role in the Exchange Program of the Judiciary, by promoting projects of „twinning" and by any other appropriate means[26].

Only by pursuing such training programs in Romania, as is the case of all Member States of the European Union, we can talk about recognition of diplomas and professional qualifications under the existing acquis in the field (Directive 2005/36 / EC of the European Parliament and the Council on the recognition of professional qualifications).

3. Conclusions

At EU level, it is considered that for the construction of a European area of justice for citizens and businesses, it is necessary to improve European judicial training. The European training of lawyers

[17] 2008/C 299/01 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:299:0001:0004:RO:PDF)
[18] http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_ro.pdf
[19] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:RO:PDF
[20] According to the press release, *cited above*.
[21] The Commission's Decision of 26 April 2007 on the responsibility of Member States, the Commission and the National Agencies for the implementation of the Lifelong Learning Programme (2007-2013), C (2007) 1807 final, not published.
[22] COM (2011) 551 final.
[23] COM (2011) 551 final, p. 4.
[24] Id.
[25] Id., p.8.
[26] Resolution of the Council and of Representatives of the Governments of Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union (2008 / C 299/01), pt. 3.

must be based on joint actions of: Member States; European partners and the European Commission.

We conclude by showing that lifelong learning is the starting point to promote active European citizenship and of a society based on social inclusion, not exclusion, leading to fulfilling a wish difficult to accomplish, but not impossible, namely that of a finality corresponding to efforts made so far. This finality will be translated through a united Europe, a Europe of all people, from which, in no case, Romania and Romanians, with all their potential, often confirmed, shall miss.

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POLITICAL MIGRATION, THE ROMANIAN POLITICIANS' "DISEASE". COMMENTS ON CONSTITUTIONAL COURT DECISION NO. 761/2015

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Abstract

After 1989, the Romanian society has been in a continuous constitutional, legislative, and political effervescence. Building a democratic state, a state of the rule of law, based on fundamental values, such as human dignity, freedom, fundamental rights and freedoms, political pluralism, is a long process. Democratic, fair, free and regular elections are a crucial element for the proper functioning of the political institutions. But are they sufficient to ensure a functional and representative democracy? Our answer is no. There are many other elements that are needed in order to achieve such an important goal to a functioning society. One of these elements which we would like mention is, in our opinion, important to progress and representative democracy of any state: the legitimacy and political stability of the bodies exercising power at all levels. In our study, we address a number of issues concerning a phenomenon that grinds the foundation of the representative democracy, namely political migration. In our opinion, this phenomenon, that has invaded the political life in Romania, is one of the serious "diseases" of both the political class, and the Romanian society. Obtaining power at any price seems to justify any political treason, metaphorically called "political migration". In our study, the phenomenon of the political migration will be analyzed mostly under Constitutional Court Decision no. 761 of 17 December 2014 concerning the unconstitutionality of the Law on the approval of Government Emergency Ordinance no. 55/2014 regulating measures concerning the local public administration. By Ordinance no. 55/2014, Pandora's Box has been opened once again within the local public administration as, for a period of 45 days, the local elected were provided the permission to express in writing, only once, their option of either becoming members of a certain political party or national minority organization, or becoming independent without losing their mandate. In our opinion, the above-mentioned ordinance has done nothing else but regulate a situation that actually exists among all the elected representatives of the local public administration in Romania. Regardless of the reasons that the Government or the Parliament gave, the enactment of the political migration is doing nothing else but infecting politicians with an incurable virus which will only lead to a malformed democracy.

In our opinion, the lawmakers should regulate the ways in which the elected officials, who ignored the citizens' choice of voting, can be penalized (one of the penalties would be, in our opinion, the loss of their mandate). Although we analyze the effects of an action of the elected officials – party-switching – however, we should find out which are the elements leading to an action which is abnormal in a society where the will of the people must be sovereign.

Keywords: *representative democracy, political migration, political parties, citizens, elections.*

Introduction

By being anchored in a sphere of public interest, the topic of this study covers multidisciplinary issues, because it addresses both elements of local public administration in Romania, and of representative democracy.

An approach to the theme of the political migration, whether in relation to parliament or local public administration, is very important for a country's political and administrative "health", and also for the rules and principles of representative democracy and of elective democracy.

Therefore, we believe it is necessary to analyze the effects that the enactment of Government Emergency Ordinance no. 55/2014 produced, the solutions the Constitutional Court proposed, and the impact of this phenomenon on society and political life of Romania. By the research we performed, we draw attention to the issues of political decisions defeating the citizens' decisions, while the principles and values of democracy and the rule of law are put between brackets, so that the governing bodies can satisfy political party interests.

To perform a thorough research of the proposed objectives, we studied the specific legislation on local public administration in relation to the topic in analysis, the jurisprudence of the Constitutional Court, documents issued by international organizations, politicians' viewpoints.

Since Law no. 393/2004 ceased political migration in local local public administration in Romania, the enactment of Government Emergency Ordinance no. 55/2014 brought back to debate this negative phenomenon. The theme of our research is a topical issue; the Romanian Parliament failed to give a legislative solution to this problem which was considered by the Constitutional Court. Almost all studies in this field have focused on political migration phenomenon within the Romanian Parliament, but not within local public administration, which is why our

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study is one of the few at the moment, dealing with the subject.

2. Study background and Constitutional Court's position

The object of the unconstitutionality exception occured from the provisions of the Law approving Government Emergency Ordinance no. 55/2014 on measures in local public administration[1].

The initiators[2] of th unconstitutionality objection presented a number of arguments to indicate the Court that the emergency ordinance issued by the Government is unconstitutional.

2.1. Government breached Article 115 paragraph (4) of the Constitution

Government breached Article 115 paragraph (4) of the Constitution, as the Ordinance was adopted although there was no extraordinary or emergency situation, whose regulation could not be postponed.

From the explanatory memorandum of the emergency ordinance it results that it was issued for 2 main reasons, namely that local public administration authorities encounter difficulties in establishing political majorities to ensure political stability after the reorganization of some of the political parties, political alliances, and electoral alliances, and that it is necessary to remove the blocking of the alternate members' right to be validated, following the dissolution of the political or electoral alliances whose candidates they were.

With regard to these arguments, the authors of the unconstitutionality objection showed that "as long as the deliberative bodies of the local public administration meet and discuss projects, a majority inevitably forms either in favour or against the project under discussion; the fact that the Government intends its decisions to have a certain direction cannot be a reason for enacting an emergency ordinance, otherwise Article 121 of the Constitution is violated". In the notification it was also included the following provision: "there is no connection between alternate members and local elected officials in place at the date of issuing of the emergency ordinance under review, moreover it is unconstitutional to introduce a new category of elected members, namely the alternate members, into the law regulating the election of the local public administration officials, since the electoral rights cannot be established by the means of an emergency ordinance".

In relation with this point of the objection of unconstitutionality, the Romanian Government sent the Constitutional Court the following reply: "In its analysis on constitutionality, the Constitutional Court must consider - *politically* and *legally* - the existing facts at the time of issuing Government Emergency Ordinance no. 55/2014". This refers to the fact that some local elected officials left factually and legally "the construction which, by means of the citizens' vote, allowed them to have access to public function, that is the Social Liberal Union. By adopting this emergency ordinance, the Government claims that the local elected officials were allowed to return to the normal legal framework without being "threatened" that they would lose their mandate. Thus, the negative impact on the functioning of the local public authorities, which was generated particularly by the changes in the political majority resulting from 2012 election, was removed".

In the Government's view, "the dissolution of the alliance created the need to regulate the following phenomenon: some of the local elected officials, who were part of the alliance that obtained mandates by assuming the common political program and the commitment to the electorate, found themselves in the totally unreasonable situation that, after the splitting, they would become opponents of the obligations they had electorally assumed, as they were forced to breach the mandate they had obtained". The Government believes that *"it was absolutely necessary either to enable the elected ones choose between implementing the political program they assumed by the time of the elections, or remain in the party in which they are formally enrolled (that leading to the abandonment of the political program which was originally assumed), or act as independents"*.

The Government also claimed that: "in order to ensure the freedom of association, the freedom of expression and the freedom of conscience to the local elected officials who are being in the above mentioned hypothesis, it was necessary to enact such an ordinance, and the loss of the mandate, for reasons of internal regulations and discipline of a political party, has no reason under Article 53 of the Constitution".

The President of the Chamber of Deputies[3] submitted the Constitutional Court a letter[4] indicating that the criticized emergency ordinance does not contradict Article 115 paragraph (4), of the Constitution, *as it promotes solutions to improve the efficiency of the local public authorities*, and emergency *refers both to the need of removing the*

[1] Published in the Official Gazette of Romania, no. 646, Part I, 2 September 2014.

[2] The notification was made by senators and deputies of the National Liberal Party. Additional information is to be found information here: *http://www.senat.ro/legis/PDF%5C2014%5C14L617SC.pdf*

The Expert Forum Report, "Political Errors in 2014. What to do?", states that out of the 3,180 mayors, a number of 552 mayors migrated (17.4%), out of the 40,022 local councillors, a number of 4,607 local councillors migrated (13.8%), and out of the total of 1,338 county councillors, a number of 184 county councillors (11.5%) left the party on whose lists they were included as candidates. The main party beneficiary of political migration was the Social Democratic Party. For details: *http://expertforum.ro/wp-content/uploads/2015/01/Raport-EFOR_Erorile-politice-din-2014.pdf*

[3] We need to note that the President of the Senate did not submit the Constitutional Court any position on the issue.

[4] Letter 2/5786, 15 December 2014

blockages in meeting the legal conditions required to validate the decisions, which are meant to ensure political stability following the reorganization of some of the political parties, political or electoral alliances, and removing the blockage of the alternates' right to be validated following the dissolution of the political or electoral alliances whose candidates they were[5].

By analyzing the objections of the initiators, and Government and the President of the Chamber of Deputies' viewpoints, the Constitutional Court concludes, in relation to the breach of Article 115 paragraph (4) of the Constitution, that: *"the whole explanatory memorandum of the emergency ordinance under analysis focuses on the existence of some "political rupture" that occurred during mandate of local authorities, and on the need to remedy the adverse effects thereof. In other words, it is about the necessity of issuing an emergency ordinance to create the needed framework so that political majorities, within local public authorities other than those resulting from the elections, can coagulate. Such a reason, no matter how it is expressed, cannot be considered an extraordinary situation which may require the adoption of an emergency ordinance. Setting up or breaking political alliances belong to the normal democratic exercise and they cannot justify measures which, directly and brutally, change the political configuration of the local public authorities and alter the voters' will. The fact that the majorities initially established, by the means of the political alliances, are now subject to change is not an extraordinary situation within the meaning of Article 115 paragraph (4) of the Constitution. Also, the need for a political advantage so that certain decisions of local public administration authorities can be adopted, regardless of political party benefiting from this political advantage, is not an extraordinary situation within the meaning of Article 115 paragraph (4) of the Constitution"*.

Also, according to the Constitutional Court judges, *"the fact that a political alliance, which presented itself in elections with joint lists of candidates, ceases its existence does not mean that the local elected officials or the alternates, who stood on its lists, lose their political affiliation - they remain members of political parties that made up the alliance. (...) It is obvious that the real purpose of the emergency ordinance is to guide the local elected officials in a certain policy direction and to enable the creation, in this way, of a new political majority, which, of course, cannot be considered an extraordinary situation in the meaning of Article 115 paragraph (4) of the Constitution"*.

2.2. The emergency ordinance contradicts Article 115 paragraph (6) of the Constitution

According to the authors of the notification, the ordinance contradicts Article 115 paragraph (6) of the Constitution as it affects the fundamental institutions of the state, reference being made, in this respect, to Articles 121 and 122 of the Constitution. They said that "the emergency ordinance affects the legal status of the political parties and induces instability in local public administration, all these elements "affecting" the proper functioning of these fundamental institutions".

In relation to this count, the Government stated that the purpose of the ordinance was to not affect the fundamental institutions of the state, so that they can "function in accordance with the political program which the electors assumed and voted when they voted a political alliance, but to avoid disruption in local public administration authorities". In the view he expressed, the President of the Chamber of Deputies consideres that none of the provisions of Article 115 paragraph (6) of the Constitution are being violated, given that the criticized emergency ordinance establishes a suspension, for a period of 45 days, of the legal effects under Article 9 paragraph (2) letter h^1) and Article 15 paragraph (2) letter g^1) of Law no. 393/2004 concerning the Statute of the local elected officials, while local and county councillors, and candidates who were declared alternates, could express only once their written option on whether they wished to become members of a certain political party or national minority organization, or to become independents, without them losing the status they acquired following the elections. Such a legislative solution does not contradict Article 16 of the Constitution, as it is an expression of the right to free association, under the Constitution, and under the Universal Declaration of Human Rights, and the Charter of Fundamental Rights of the European Union.

The Court noted that the mayor, city council and county council, which are regulated by Articles 121 and 122 of the Constitution, are fundamental institutions of the state within the meaning of Article 115 paragraph (6) of the Constitution, though the normative act under analysis does not make provisions concerning their constitutional status. According to the Constitutional Court, "the emergency ordinance does not make provisions in relation to the status of these institutions, but it makes provisions on the possibility

[5] It is interesting, however, the opinion that the President of the Chamber of Deputies, Valeriu Zgonea, expressed in an interview, a few months ago: *"I personally, as President of the Chamber of Deputies and as vice-president of Social Democratic Party, think that the debate and adoption of the ordinance was a mistake, a mistake for Romania of 2014, a democratic state, and that it was mandatory and urgent by means of an ordinance, because of the tense situation we had in councils. Today, we must make a law to reject that ordinancer, as requested by the Constitutional Court, but by being fair and observe the provisions of the Constitution. I think that the people who opted in that period of 45 days, should not lose their mandates."- http://www.mediafax.ro/politic/interviu-zgonea-psd-sustine-alegerea-primarilor-intr-un-tur-ordonanta-55-a-fost-o-mare-greseala-video-13784679.*

which mayors, presidents of county councils, local councillors, county councillors, and candidates, who were declared alternates, have as to express only once their written option on whether they wished to become members of a certain political party or national minority organization, or to become independents, without them losing the status acquired following the elections, and the political configuration of these institutions will not be regarded as being part of their constitutional status".

At this issue of the notification, the Court did not find that Article 115 paragraph (6) of the Constitution was breached.

2.3. Breach of Article 147 paragraph (4) of the Constitution

The authors of the notification noted in their request to the Constitutional Court that the emergency ordinance *breaches Article 147 paragraph (4) of the Constitution in what concerns the binding character of the Constitutional Court's decisions, since it does not comply with its jurisprudence*.

In the Government's view, the Constitutional Court is not able, by itself, to show the absolute and final constitutionality of a legal text, so that the use of the *per contrario* argument has no legal power.

The Court stated that, since the time of introduction of Article 9 paragraph (2) letter h^1, and of Article 15 paragraph (2) letter g^1 of Law no. 393/2004, these were subject of constitutional review. In the case under review, the Constitutional Court stated the following issues:

- Concerning Article 9 paragraph (2) letter h^1)[6], its objective is "to prevent the political migration of the local elected officials from one political party to another, and to ensure stability in the local public administration so that it can express the political configuration as it resulted from the voters' will.

Under its jurisprudence[7], the Court reiterated that "the electorate votes a person to perform a public function in local public administration, considering the political program of the party whose candidate he is at the time of the elections and which he will promote during his mandate as local or county councillor. *However, since a local elected official is no longer a member of the party on whose list he was elected, it means that he no longer meets the requirements of representativeness and legitimacy needed to fulfill the political program for which the voters opted. Therefore, to keep him in the public function is no longer justified."* As the Court noted on another occasion: *"Preserving the position as a local or county councillor in the event that he no longer belongs to the party on whose list he was first elected would mean to convert his mandate in a mandate as an independent or possibly belonging to another political party which the councillor joined later. However, under the current electoral system that makes provisions for voting a list of candidates for municipal and county councillors, this hypothesis cannot be accepted because the running mandate, which is being continued in this way, no longer meets to the original will of the electorate, which gave its vote to a candidate by taking in consideration the party that, at that time, he represented*"[8].

- Concerning Article 15 paragraph (2) letter g^1 of Law no. 393/2004[9], the Court stated in its previous decisions that the reasoning of this (*article – our note*) was the fact that, following his resignation from the political party whose candidate he was, "the mayor lose consecutively also the voters' endorsement, that was initially gained by virtue of his candidacy on a candidate list supported by a certain political party during election campaign and which finally the electors voted." The lawmaker opted for such a regulation aiming to reduce the political migration and the political opportunism, phenomena whose existence has been proved by the reality of the past few years. *"The change during the mayor's mandate of his political affiliation might affect the interests of the community itself, on the one hand by disturbances and instability which it could generate in the local public administrative structure through which he exercises the powers the law vested him with and which may affect the effectiveness of his actions in performing his powers and, on the other hand, by the lack of certainty regarding the fulfillment of the objectives promoted during the election campaign, by whose virtue the electors voted him."*[10]

We need to note that Law no. 393/2004 concerning status of local elected officials includes an oversight, namely it states that "*termination of position as a mayor, before the expiry of the normal mandate, may also occur by losing, after his resignation, of his membership of political party or national minority organization on whose list he was chosen*", although elections, by means of which mayors and presidents of county councils are elected, is uninominal voting. Regardless of the used voting system, candidates are nominated by political parties. According to electoral regulations, the candidacies may be submitted by the political parties, individually or united into a political or electoral alliance. At the time of the elections, regardless of how they were proposed, candidates present the voters a political program that they wish to implement in their communities. These programs consequently reflect the political party and the candidate's vision for the future in relation to the

[6] Article 9 (2) h^1 provides: " *The position as a local or county councillor ceases normally before the expiry of the normal duration of his mandate in the following cases: (...) loss of membership of political party or national minority organization on whose list he was elected*".

[7] Decision no. 1167 on 11 December 2007, published in the Official Gazette of Romania, Part I, no. 4, 3 January 2008.

[8] Decision no. 280 on 23 May 2013, published in Official Gazette of Romania, no. 431, Part I, on 16 July 2013.

[9] Article 15 paragraph (2) letter g^1 states that: "Position as a mayor terminates before the expiry of the normal mandate, under the following circumstances: (...) *losing, after his resignation, of his membership of political party or national minority organization on whose list he was chosen".*

[10] Decision no. 153 on 12 March 2013, published in Official Gazette of Romania, no. 352, Part I, on 14 June 2013.

problems and practical solutions to tackle the community issues.

In the case under review, the Court argues that *the penalty of mandate losing*, regardless of how membership of a political party is lost (by resignation or exclusion), refers to "*only local and county councillors*, who are elected within *an election list*. Therefore the votes by the electors were for the political party, namely for the list it supported, and not for the individual candidates, which lead to the political configuration of the local council / county council reflected in the number of seats obtained by the political parties. Thus, the legislative solution provided by Article 9 paragraph (2) letter h[1]) of Law no. 393/2004 is a requirement arising directly from the provisions of Article 8 paragraph (2) of the Constitution, a contrary legislative solution - which should not tie the termination of local or county councillor mandate with the loss of membership of a party or national minority organization on whose list he was elected – that being acceptable only in case the local and county councillors' election system changes".

The Court also stated that: "due to the lack of regulations for another election system, the Court can only find, in the present case, a violation of Article 147 paragraph (4) of the Constitution. However, the situation is different in terms of mayors and presidents of county councils, for which uninominal voting is provided, as the Court reasoning has considered the constitutionality of a way of mandate loss (resignation from the political party), without though drawing the conclusion that the lawmaker could not remove or modify provisions concerning this way of mandate loss. Thus, concerning the local or county councillor, termination of mandate, following the loss of membership of the political party on whose list he was elected, is a direct and implicit requirement of Article 8 paragraph (2) of the Constitution. Not the same conclusion can be drawn in relation to mayors and presidents of county councils, for which the lawmaker opted for the loss of mandate in case of resignation from the political party, such an option not arising (due to the uninominal voting by means of which they are elected), implicitly or directly from Article 8 paragraph (2) of the Constitution".

According to most constitutional judges, "the constitutional text does not necessarily require a legislative solution", leaving the lawmaker the possibility to tie or not the keeping of mandate of the elected ones by uninominal voting with the loss of membership of the political party by resignation. The Constitutional Court finds that the emergency ordinance breaches Article 147 paragraph (4) of the Constitution only in relation to local and county councillors.

In a separate opinion that two of the judges of the Constitutional Court expressed about the electoral lists which the Social Liberal Union presented in 2012 local elections, it says: "Candidates, although were nominated also by specifying the political party to whom they belonged, their candidacies belonged to the Social Liberal Union's election list".

The previous jurisprudence of the Constitutional Court strengthens the arguments the two judges expressed:

- *Decision no. 273 on 24 February 2009* - "citizens, through their votes, express choices between different political programs of the parties participating in the elections and less choises about the candidates, in relation to their features, merits or promises for which they have no limits in making them during the election campaign"[11];
- *Decision no. 280 on 23 May 2013* - "the elector's vote expresses his option for a political party program and not for a particular candidate";
- *Decision no. 915 on 18 October 2007* - "ensuring stability within the local public administration to express the political configuration, as it resulted from the will of the electorate".

The Constitutional Court thus expresses regarding the loss of mandate by local and county councillors who left the political party which proposed them and allows the lawmaker to decide in respect of mayors and presidents of county councils. However, the Constitutional Court did not take into consideration that both mayors and presidents of county councils were nominated by a political party or an electoral alliance or a political alliance and presented the voters a particular political program that reflected their vision on the community.

On the other hand though, we must not forget that the local elected officials, who left the political formations which proposed them as candidates, did that based on a legal document issued by a Romanian state authority, namely the Romanian Government, who invoked the blockages in the lawmaker and local executive bodies, which prevented local elected officials to implement the political programs they presented the citizens in 2012 elections.

Perhaps those local elected officials preferred to "abandon" the parties which supported them in order not to "abandon" the goals which they proposed the citizens of their communities.

Political and administrative life from Romania is highly tumultuous, and the political parties have always tried to come to power through setting up electoral and political alliances that defied political logics or ideology, but which met the parties' interests. In support of our statements, we give a few examples: Liberal Democratic Party + Social Democratic Party (December 2008 - October 2009) and Social Democratic Party + National Liberal Party + Romanian Popular National Union + Conservative Party (February 2011 - February 2014).

[11] Decision no. 273 on 24 February 2009, published in Official Gazette of Romania, no. 243, Part I, on 13 April 2009.

In our opinion, regardless of the solutions to be found by the lawmaker, major issues for Romanian politics and administration remain: *political instability, inconsistency in implementation of projects for local communities, lack of a solid political culture, lack of dignity and honour, a governing system supporting political parties or groups' interests, a legislation that both allows the manifestation of harmful phenomena such as political migration and, at the same time, is unable to address the society evolution and the changing demands of democracy and the rule of law.*

And in this tumult, the following question remains: *what happens to Romanian citizens' votes, to their aspirations which they expressed at the time of the voting, which were hijacked by changing the political "switch" at a given time?*

The solution to all these problems should coagulate efforts of many forces in society: *The political parties* are those ones who, through their elected representatives, create different structures of power, *the parliament* is the one that makes regulations to govern the state, and last but not least *the citizens*, because they are the recipients of the government decisions, and those ones who, by their votes, determine the configuration of the public authorities.

Unfortunately, the ordinance opened again, although for only 45 days, Pandora's Box. If, by issuing the ordinance, they wanted to solve the real problems of the Romanian administration, this thing did not happen though.

But both those who came to power and the opposition have addressed this issue from the viewpoint of the moment interests. The speeches and solutions are still demagogic for both political camps. The core problem remains, because it is determined by the quality of the political class.

Putting parentheses to the provisions of Article 9 paragraph (2) letter h^1 and of Article 15 paragraph (2) letter g^1 of Law no. 393/2004, for 45 days, even for a noble purpose - the proper administration of state affairs - did nothing else but hijacked the will the electors expressed in 2012.

3. Conclusions

By the research we performed, we analyzed the Constitutional Court decision with regard to a negative phenomenon that affected the smooth conduct of the public affairs, namely the possibility given to local elected officials to move to a different political party than the one whose candidates they were at 2012 local elections.

When year of this study, the issue under review has not found legal regulation. Political transits issue has always been a topic of particular interest to the public.

When writing this study, the problem under review was still not solved by means of a legal solution. Political migration has always been an interesting subject mainly to public opinion. Although the political class disagrees with this phenomenon, when it comes to taking constitutional[12] or legislative[13] actions in this sense, everything remains suspended in time. Citizens are tired of seeing how the will they expressed in national elections is changed by the elected officials' will. The citizens' sovereign will, which was expressed at the time of voting, is negotiated during mandates and, unfortunately, negotiation does not aim at the citizens' welfare, but at the elected officials' welfare.

The phenomenon of political migration dishonors the politicians and demobilizes the electorate, who wonders: What is the point of voting if my vote does not count? I wonder whom to choose, if

[12] In 2013, in a proposal to revise the Constitution, the Parliamentary Committee proposed a formula to stop political migration in case of parliament members, as follows: "Article 70 is amended and it will have the following content: "The mandate of Senators and Deputies: (1) Senators and Deputies shall begin their mandate on the date of the Assembly of the Chamber to which they belong, provided that their election is validated and their oath is taken. The oath shall be established by organic law. (2) The Deputy or Senator function shall cease: a) on the date of the assemblies of the newly elected Chambers; b) in case of resignation; c) in the case of disenfranchisement; d) in case of incompatibility of political function; e) on the date of resignation from the political party or political group from which he was elected or *on the date of its enrolling at another political party or a political formation*; g) in case of death."

In the Constitutional Court Decision no. 80/2014 (Official Gazette no. 246/04.07.2014), the Court declared, however, that the amendment of the provisions of Article 70 paragraph (2) letter e) "suppresses a guarantee of fundamental rights and freedoms - representative mandate stated through Article 69 of the Constitution, by violating the review limits set by art 152 paragraph (2) of the Constitution. The Court arguments were as follows: *"(...) under this constitutional Article, responsibility for a particular policy option, evidenced by resignation from the political party from which he was elected, or by enrolling at another political party can only be a political one, at most moral, but under no circumstances legal. Therefore, the sanction of losing a parliamentary mandate affects significantly the interests of the voters they represent and ignores one of the parliamentary democracy foundations – the representative mandate. The provisions of the proposed law are designed to restrict the freedom of parliament member to join a parliamentary group or another, or to become independent in relation to all parliamentary groups. However, this freedom of choice should act according to one's own political affinities, and according to the possibilities that different parliamentary groups offer, in order to make use of the electorate's interests, as representative mandate is a guarantee of promoting and respecting citizens' fundamental freedoms and rights of in parliamentary democracy.*"

In support of its decision, the Court also presented the provisions of the Report on the imperative mandate and similar practices by the Venice Commission, at its 79th plenary session, on 12 to 13 June 2009. According to the report, *"One of the problems in modern democracies, from the point of view of parliamentary stability and fidelity to voters' choices is the practice of elected representatives abandoning parties in whose lists they were elected. [...] Once elected, deputies should be accountable primarily to the voters who elected them, not to their political party. This flows from the fact that they hold a mandate from the people, not from their party. The fact that a deputy has resigned from or has been expelled from the party should therefore not entail their expulsion from parliament."*

(For details, please visit: *http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282009%29027-f*)

[13] Law no. 393/2004.

the one I choose says that today he is from a right-wing party, but tomorrow he would claim that he is from a left-wing party, or vice versa?

In our view, not even the Constitutional Court succeeded in giving a solution to stop this phenomenon. In our opinion, the Court judges have even suggested a differentiated approach, an unequal treatment, to the issue of political migration when political migration focused on local and county councillors, and when it focused on mayors or presidents of county councils.

This study is in the line the authors followed in conducting their previous research of disapproving this harmful phenomenon for the political class in Romania and extremely harmful to any democracy.

We expect this study to be one more warning, which we bring to the attention of the policy makers to enact regulations that take into account firstly the causes, and secondly the effects of this phenomenon.

Also, through this study, we would like to remind the Romanian citizens that thay are part of the equation of power, by the votes the give, at various times, to political parties and their candidates at elections, therefore, deeper and more radical response to these phenomena which destroy the idea of representation, is required.

In the face of such malformations of democracy, the voice of demos in Romania is too weak, and memory too short.

As a conclusion of the research study, a reflection of Winston Churchill's words: "*Some people change party for the sake of their principles, other change their principles for the sake of a party*."

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THE RIGHT TO A CLEAN ENVIRONMENT. INTERNATIONAL RECOGNITION OF A HUMAN RIGHT TO A CLEAN ENVIRONEMENT BY ECTHR JURISPRUDENCE

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Abstract

European Convention on Human Rights (ECHR) does not specifically recognize a right to a clean environment, nor speaks specifically about environmental issues. However, there are many cases in the ECtHR jurisprudence which indirectly have a linkage with environmental protection.

Often, throughout its decisions, ECtHR considers a positive obligation of States to take all necessary measures to protect human life and thus to provide a suitable environment for human living.

The paper analyses the linkage between human rights and the international environment law and the role of ECtHR jurisprudence in enshrining an international human right in the field of environmental protection.

Keywords: *right to a clean environment, environmental protection, positive obligation of States, ECHR, international human right.*

1. Introduction

In recent years the issue of environmental protection has become of international interest. We must say that at international level and also at European level environment is of general interest. This development of international environment issues led to an increase in environmental cases in the national courts and international courts.

The first attempts to give individuals a human right to a clean environment and to enforce it in courts came in the 1070s, when the Council of Europe draft a Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, dealing with the individual right to a clean environment and unimpaired environment. The efforts failed because this elaboration was not politically acceptable. In 1985, after various debatesat academic and political level, European Union adopted a directive which provided for an environment impact assessment for public or private projects which were likely to have a significant impact on the environment[1]. Later the directive was replaced by a new directive[2] which established public access to information on environment as compulsory.

On this background, it has been suggested by the doctrine that we already can speack about an international human right to a clean environment[3].

Recently, the three regional Human Rights Courts[4] had been involved in environmental protection cases as a consequence of the environmental issues that affect more and more humans.

This paper will focus on the jurisprudence of the European Court of Human Rights (ECtHR) which, although does not specifically recognize a right to a clean environment, nor deals specifically with environmental issues, solved many cases indirectly linked to environmental protection. The increase in the ECtHR environmental case law is due to the fact that the exercise of certain Convention rights may be hampered by the existence of damage to the environment and exposure to environmental risks.

Due to the degree of flexibility in interpreting the admissibility requirements set out in Article 34 and Article 35 of the Convention, the Court case law indirectly supports international recognition of a human right to a clean environment.

The essential admissibility requirements concern the status of victim and he exhaustion of domestic remedies, that is within a period of six months from the date on which the final decision was taken. Above all, the case law submitted to the Court must be in regard to human rights violations.

The Convention had been interpreted by the Court in a very dynamic and evolving way[5], so that the linkage between human rights and the environmental protection determine in an indirect way the qualification of many cases.

2.The admissibility requirements before the ECtHR

According to Article 34 the applications must be submitted by a person, a nongovernmental

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[1] Directive 85/335 on the assessment of the effects of certain public and private projects on the environment

[2] Directive 2003/4 on public access to environmental information.

[3] Malcom Shaw, International law, Fifth Edition, Cambridge University Press, Cambridge, 2003, p.756

[4] Inter-American Court of Human Rights, European Court of Human Rights, African Court of Human and People Rights.

[5] Harris, O Boyle& Warbrick, Law of the European Convention on Human Rights, Third Edition, Oxford University Press, 2014, p. 8.

organization or a group of individuals. The essential condition is that the claimant should be a victim of a violation by one of the High Contracting Parties of rights set forth in the Convention or in the Protocols thereto.

Article 35 (1) of the Convention establishes the admissibility criteria, most of them being procedural, like, the six month[6] and the exhaustion of all domestic remedies.

Article 35 (3) gives more admissibility criteria such as, manifestly ill-founded applications[7], and no significant disadvantage[8], criteria that *require the Court to assess the merits of the case at this preliminary stage*[9].

Regarding the rules of admissibility, the Court spelt out in many decisions that, those rules must be applied with some degree of flexibility and without excessive formalism[10].

As the Court stated in the decision in Georgia v. Russia (II), the latter criteria apply only to individual applications , not to inter-state cases.

The former European Commission of Human Rights pointed out that the applicant cannot complain as a representative for people in general, because the Convention does not permit such an *action popularis*[11]. There are though exceptions in this matter,[12] and in some decisions the Court stated that an NGO might act in certain circumstances as a representative for actual victims.

Paragraphs (2) and (3) of the Article 35 of the Convention stated that apart from the conditions from paragraph (1) the admissibility criteria required for the admission of an application are the conditions *ratione: materiae, personae, loci and temporis*.

The compentence *rationae personae* for an application has to be brought against a High Contracting Partie and that the claimant to have the so called victim status. This is a *sine qua non* condition. The Court established that in order that the Convention to be more effective, the application can be submitted not only by the direct victim, but also by the indirect victim.

The compentence *rationae materiae* refers to the fact that the Court will examine only those application that are concerning the rights and the freedoms contained in the ECHR and its Protocols. An exception in this case is when a particular right which is not contained in the Convention is still protected by the Convention conditions, when this right is affecting in an indirect way rights covered by it. It is the case of environmental rights, which even if there are no setteled by the Convention, the breaking of this rights affect human rights.

The competence *rationae loci* means that the applicant must be within the jurisdiction of a contracting state in respect of Article 1 of the Convention.

The last compentence, *rationae temporis* is in accordance with general principle of international law, principle of non-retroactivity of treaties, for this purpose the Court does not has the competence to examine complaints that took place before the entry into force or the ratification of the Convention by a High Contracting Partie.

3. International recongnition of a human right to a clean environment by ECtHR jurisprudence

European Court of Human Right had recognized by her case-law the relationship between the protection of human rights law and the environment and that in an indirect way environmental degradation affects human rights. This relationship became a concern of the international community, which realized that environment degradation affects the wholl community and as a consequence their rights to a clean environment.

The ECHR is not meant to cover and guarantee the right to a clean environment. However, the Convention and her Protocols indirectly ensure a protection of environmental matters, in this respect the numerous cases before ECtHR creates a real and effective environmental jurisprudence.

The doctrine had stated that individual′s right to a clean environment has not a conventional guarantee other than by attraction by another right and under its support[13].

The Court stated in Loizidou v. Turkey, paragraph 71, *that the Convention is a living instrument which must be interpreted in the light of present-day conditions is firmly rooted in the Court's case-law.*

Even if the violation of the right to a clean environment is not protected by the Convention, because it cannot be invoked directly to the Convention, can be the cause of violation of other rights that are guaranteed by it[14].

In recent years, the Court has examined an impressive number of complaints in which individuals have spelt out that a breach of one of their Convention

[6] According to Protocol 15 of the Convention, when it will be ratified the period of si months will be reduced to four.
[7] Preliminary examinationof the merit of an application decides if the applicant has failed or not to substantiate his allegation.
[8] The Court has stated that the violation of a right must attain a minimum level of severity to be addimited by an international court.
[9] Harris, O Boyle& Warbrick, Law of the European Convention on Human Rights, Third Edition, Oxford University Press, 2014, p. 43.
[10] Ilhan v. Turkey 2000, ECHR, para.51.
[11] X Association v. Sweden 1982, EctHR.
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[14] Mircea Dutu, Dreptul international al mediului, Ed. Economica, Bucharest, 2010, p. 159.

rights has resulted from adverse environmental factors[15].

There are a number of human rights that have relevance in the field of environmental protection, and the ECtHR jurisprudence had guaranteed the protection of environment in case-law matters that related to the environment which could affect the right to life, ,the right to respect for private and family life as well as the home, the right to an effective remedy, the right to property and the right to the peaceful enjoyment of one's possessions.

3.1. Right to life and the environment

The right to life contained in Article 2 confers a positive obligation on States to take all the necessary measures to safeguard human life.

The positive obligation on States may apply in the context of dangerous activities, such as the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites[16].

In the case of Oneryıldız v. Turkey the Court found the violation of Article 2 of the Convention. The facts that determinate such decision were that a methane explosion occurred at the municipal rubbish tip in April 1993, killing thirty-nine people who had illegally built their dwellings around it. Nine members of the applicant's family died in the accident. The applicant complained in particular that no measures had been taken to prevent an explosion despite an expert report having drawn the authorities attention to the need to act preventively as such an explosion was not unlikely.

The Court found that there had been a violation of Article 2 of the Convention *in its substantive aspect, on account of the lack of appropriate steps to prevent the accidental death of nine of the applicant's close relatives*. Regarding its procedural aspect, the Court held that *had been a violation of Article 2 on account of the lack of adequate protection by law safeguarding the right to life.*

On the other hand, in L.C.B. v. the United Kingdom, the applicant's father had been exposed to radiation while serving as a catering assistant in Royal Air Force at Christmas Island during four nuclear tests in 1950s. The applicant was born in 1966 and in 1970 was diagnosed with leukaemia. Her medical records suggest a possible cause - „ Father Radiation".The applicant alleged that the State failed in warning and advise parents about the impact of nuclear test on their future children and also for the State failure to monitor her health. The Court considered that there is no violation of Article 2 on the basis that the applicant had not established a causal link between the exposure of her father to radiation and her own suffering from leukaemia.

3.2. The Right to respect for private and family life, for home and environment.

Althought environment degradation does not involve a violation of Article 8 of the Convention, in an indirect way environmental factors can directly and seriously affect private and family life.

Article 8 of the Convention protects the ,,right to respect" various interests and implies an extensive right to environmental matters. The State has the positive obligation to adopt measures the protection of the rights in this article.

In Kyrtatos v. Greece case the applicants denounce an illegal act of urban planning that destroyed a swamp protected under the Greek Constitution. Court found that there was no violation of Article 8 on the consideration that assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' houses, a situation which could have affected more directly the applicants' own well-being.In consideration of the second limb of the complaint, the Court found that the disturbances coming from the applicants' neighborhood as a result of the urban development of the area (noises, night-lights, etc.) have not reached a sufficient degree of seriousness to be taken into account for the purposes of Article 8.

In Tătar v. Romania, the applicants, father and son, complain that the technological process used by a company in their gold mining activity put their lives in danger because an important part of company activity was located close to their homes. In January 2000 an environmental accident occurred at the company. A United Nation report showed that a dam had breached, releasing an important quantity of sodium cyanide and contaminated tailings water into the environment. The applicants also alleged that the authorities did not take any action even if one of the applicants, lodged numerous complaints about that their lives were threatened (in particular the health of his asthmatic son). In this case the Court held that there had been a violation of Article 8 of the Convention, on the consideration that the Romanian authorities had failed in their duty to assess, to a satisfactory degree, the risks that the activity of the company operating the mine might entail, and to take the necessary measures in order to protect the rights of those concerned, to respect their private lives and homes, and more generally their right to enjoy a healthy and protected environment. The Court pointed out that pollution

[15] Manual on Human Rights and the Environment, Council of Europe Publishing, Strasbourg, 2012, p.8.
[16] Oneryıldız v. Turkey [ECHR], paragraph 71.

could interfere with a person's private and family life by harming his or her well-being, and that the State had a duty to ensure the protection of its citizens by regulating authorizing, setting-up, operating, safety and monitoring of industrial activities, especially activities that were dangerous for the environment and human health.

3.3. The Right to an effective remedy and the environment

Article 13 of the Convention speaks about the cooperative relationship between the Convention and national legal system. Article 13 establishes the States obligation to protect human rights and gives to individuals the guarantee of effective remedy if the human rights shall be violated.

In Kolyadenko and Others v. Russia, the applicants lived near the Pionerskaya river and water reservoir. They were affected by a heavy flash flood in the town Vladivostok because the authorities had released the water without any prior warning and failed to maintain the river channel. They also complained that their homes and property had been severely damaged. The Court held that there had been a violation of Article 2 of the Convention in its substantive aspect and in his procedural aspect, because Russia had failed in its positive obligation to protect the relevant applicants live and that there was not a judicial response to this event for the accountability of the authorities in charge. The Court held that there was a violation of Article 8 of the Convention and of article 1 of Protocol no. 1 (protection of property) of the Convention finding that the responsible authorities had failed to do everything in their power to protect the applicant's rights. About Article 13 of the Convention the Court held that there had been no violation on the fact that the outcome of the proceedings provided by Russian law had been unfavorable for the applicants, and they could not demonstrated that the available remedies had been insufficient for the purpose of Article 13.

3.4. Protection of property and the environment

Article 1 of Protocol No. 1 to the Convention guarantees the right to the peaceful enjoyment of one's possessions. The Court has found that the provisions of Article 1 of Protocol No. 1 apply in cases concerning environmental issues based on the premise that the protection of one's possession needs to be practical and effective.The general interest in the protection of the environment can justify certain restrictions by public authorities on the individual right tothe peaceful enjoyment of one's possessions[17].

It is the case of N.A. and Ors. V. Turkey were the Court held that had been a violation of Article 1 of Protocol no. 1 to the Convection on the consideration that the applicants, even if they had acquired the disputed plot of land in good faith, had not received any compensation for the transfer of their property to the Public Treasury or for the demolition of the hotel

4. Conclusion

Environmental protection is in a close relationship with human rights protection and this was recognized by human rights jurisprudence.

Through the jurisprudence of ECtHR has been recognized an individual right to a clean environment, derived from the circumstances in which Articles 2, 8, 13 of the Convention and Article 1 of Protocol no. 1 to the Convention have been applied.

The developing environmental issues had given reason for ECtHR to expand her jurisprudence in this sense with the condition that the violation of the rule of law should be held only if the applicant is sufficient affected and there is a direct link between the alleged victim and the violation. Also the applicant should have a legitimate interest, meaning that the environmental damage should have a direct impact on him.

The environment protection cannot be separated by the concept of human rights. It was demonstrated that environmental damage has a great impact on humankind, especially in connection with the right to life, right to health, the right of property.

The challenges of the future in protecting the environment and the more and more obvious fact that environmental problems affect in a direct way human rights will determine an intensification of environmental jurisprudence and more evident international recognition of the human right to a clean environment not only by ECtHR but also by others international courts.

Considering this facts it is necessary that the States and international organisations be more receptive to an enforcement of the right to a clean environment, considering the possibility of a new Protocol to the ECHR that regulates directly a human right to a clean environment.

As the Supreme Court of Costa Rica said, any doubt about the interpretation or application of a law should be resolved in favour of nature protection – *in dubio pro natura*[**].

[17]Pine Valley Developments Ltd and Others v. Ireland, judgment of 29 November 1991, paragraph 57.

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THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS IN CREATING STANDARDS IN INTERNATIONAL ENVIRONMENTAL LAW

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Abstract

The participation and influence of non-governmental actors in areas of international environmental governance has increased tremendously over the last decades.

Some of these non-governmental organization (NGOs), like International Union for Conservation of Nature, World Wide Fund for Nature or Greenpeace, have a global character and an intense activity in promoting environmental protection. Of great importance is the fact that some NGOs have gained a consultative status in international and regional organizations influencing the process of drafting and adopting norms of international environmental law.

The study analyses the contribution of NGOs in international environmental field and their essential role as ,,guardians of the environment" in promoting and respecting the provisions of international environmental agreements, in particular of Aarhus Convention.

Keywords: *non-governmental organisations, international environmental governance, guardians of the environment, Aarhus Convention, NGOs consultative status.*

1. Introduction

Non-governmental organizations (NGOs) had a very important influence on environmental international law. NGOs are not formed by governments initiative, and there are not governments representatives either., nor an organization formed for a profit purpose..

Antonio Donini wrote about United Nations that ,, The Temple of States would be a rather dull place without NGO."[1] His observations expressed the reality that NGOs existence is vital for today international society.

The history of NGOs is dating for more than 100 years. One of the first NGOs that acted in environmental matters was The Society for Protection of Birds (now the Royal Society) founded in United Kingdom in 1889. The next environmental organization that was a pioneer in this field was Sierra Club, founded in the United States on May 28, 1892.

In 1903 was created in United Kingdom the world's first international conservation organisation, the Society for the Preservation of the Wild Fauna of the Empire. In the following years the number of environmental NGO had increased significantly.

Among the most relevant international organisations in environmental field are World Wide Fund for Nature(WWF)[2], International Union for the Conservation of Nature (IUCN)[3], Friends of the Earth (FoE)[4] and Greenpeace.

The important role of NGOs was shaped by their high presence at Stockholm conference (1972) and Rio conference(1992). At Stockholm conference more than 400 intergovernmental and nongovernmental organizations attended and at Rio conferences over 8000 NGO. This huge presence of international NGOs drew public and political attention to their work on environment protection and environment justice. At Rio Conference NGOs got involved in an active manner, by preparing the hearings, lobbing at the meatings and influencing the members of national delegations in matters of environment. Their positive influence was felt also at Johannesburg Conference works from 2002. Of great importance is the fact that some NGOs have gained a consultative status in international and regional organizations influencing the process of drafting and adopting norms of international environmental law.

Sometimes the weakness of States and the lack of political action in environmental issues, in this case, determined private individuals grouped in NGOs, to create a pressure for change on international organizations and multinational corporations or to take actions themselves by lobbing in environmental issues and research on environment.

The aim of this study is to focus on the influence of NGOs in drafting and adopting standards in international environmental law. It is widely recognised the importance of NGOs in protection of the environment and of human rights. Their value was recognized also by Aarhus Convention which gives

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[1] Antonio Donini, The Bureaucracy and the Free Spirits: Stangnation and inovation in the Relationship Between the United Nations and NGOs, 16 THIRD WORLS Q.421 (1995).

[2] WWF was founded on April 29, 1961 based in Morges and from 1979 at Gland (Switzerland).

[3] IUCN was founded in 1948 in Marges (Switzerland)

[4] FoE was founded in 1969. It became the international network Friends of the Earth International (FoEI) founded in 1971 by four organizations from France, Sweden, England and the USA.

them the right of taking part in the compliance mechanism or to bring matters into court by themselves.

2. Legal status of NGOs and their influence in environmental matters

NGOs definition had been given by Article 2 of Suzanne Bastid's resolution[5] which stated that the international associations are groups of persons or of societies, freely created by private initiative, which are engaged in some international activity of general interest, without seeking pecuniary profit and without any object of a purely national character.

World Bank defines also a non-governmental organization (NGO) as "private organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services, or undertake community development".

A first step in the direction of cooperation between United Nation and NGOs was outlined by the Article 71 of United Nation Charter which states that ,,The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned".

Today UN ECOSOC[6] Resolution 1996/31 governs the relationship between ECOSOC and NGOs by establishing the eligibility requirements for consultative status[7], rights and obligations of NGOs in consultative status and procedures for the withdrawal or suspension of consultative status. NGOs that have consultative status can attend international coferences and events and make oral and written statements on this events, lobbing and networking.

The relationship between ECOSOC and NGOs is positive for both sides. ECOSOC has the opportunity to avail itself of valuable and expert advice from NGOs, the NGOs in turn also have the opportunity of expressing their views and influencing the work of the Council.

After obtaining a consultative status with ECOSOC, an NGO has the duty to send a report of activity every four years. This guarantees that an NGO is respecting and is continuing to meet the requirements established at their accreditation.

But there are voices that had been criticized the work of ECOSOC's Commitee in garanting the accreditation of NGOs because of lack of due process and the huge political influence in accreditation[8].

It is also important the discussion about NGOs personality, because it is essential in determining the immunities and the rights of an NGO and their standing before courts[9]. NGOs have legal personality only in municipal law, not in international law[10].

Because usually the NGOs interests cross national borders they face problems like conflicting laws and the impossibility to carry out their purpose. In the lack of NGOs international legislation, some transnational NGOs have managed to sign agreements with States that gives them rights and immunities.

International legal personality had been difficult to achieve from two points of view. Firstly because States did not not want to reduce control of NGOs activities and secoundly, even NGOs fear that they may lose their autonomy.

NGOs legal status had been to the attention of the Council of Europe who drafted the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations in 1986, which sets a common legal basis for the existence and work of NGOs in Europe. Article 11 of the European Convention on Human Rights protects the right to freedom of association, which is also a fundamental norm for NGOs.

NGOs developed over the years into strong advocacy networks that have influenced environmental politics[11].

Not all domestic NGOs work at international level, but some of them developed strong links with international NGOs. It is the case of some environmental protection organization or human rights organization that formed effective communication network by linkage with each other with the purpose of emerging into an international advocacy network.

NGOs can form global networks with national offices, like WWF, FoE or Greenpeace. Often the national offices are autonomous and have their own priorities and funding. By their structure, NGOs can be of universal interest (as International Union for Conservation of Nature) or of regional interest

[5] Resolution on Granting of International Status to Associations Established by Private Initiative adopted by the Institute of International Law at its 49th Session.

[6] United Nation Economic and Social Council: www.csonet.org.

[7] "... Consultative arrangements are to be made, on the one hand, for the purpose of enabling the Council or one of its bodies to secure expert information or advice from organizations having special competence in the subjects for which consultative arrangements are made, and, on the other hand, to enable international, regional, sub-regional and national organizations that represent important elements of public opinion to express their views."— ECOSOC resolution 1996/31, part II, paragraph 20.

[8] Jurij Daniel Aston, The United Nation Committee on non-governmental organization: Gurading the entrance to a politically divided house, 12 EUR J.INT L 943 (2001).

[9] Steve Charnovitz, Nongovenmental Organisationa and International Law, 100 Am. J. Int L 348 (2006)

[10] Martens, Kerstin (2003) "Examining the (Non-) Status of NGOs in International Law," *Indiana Journal of Global Legal Studies*: Vol. 10: Iss. 2, Article 1.

[11] Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders:Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press,1998).

(African Wild Fondation –Kenya or European Environmental Bureau - Belgium).

In the same time it is worthy to mention that not all NGOs have the same goals and visions. There is not a homogeneous global community of environmental NGOs[12]. In spite of they advocate for the cooperation between human rights and the environment, NGOs have different objectives, priorities mostly depending on their size, goals, ideology and on their capability to transcend national borders.

2.The role of NGOs in environmental litigations

The most striking issue concerning the presence of NGOs in environmental litigations is the way they are representing public interest and the possibility of bringing matters to court themselves.

By adopting the Aarhus Convention[13], the rights of environmental NGOs had been strongly reinforced in national, international and European Law.

According to Christian Schall, in determing public interest there are three factors *inter alia*: (1) there is a public interest in the outcome of the litigation; (2) the applicant has no personal, proprietary or pecuaniary interest in the outcome, or if such interest exists, it does not justify the litigation in a economic way; (3) the issued raised by the litigation are beyond the immediate interests of the parties[14].

NGOs can participate in procedures before international courts and tribunals in two forms, as party (or third party) and as *amicus curiae*[15].

2.1. Access by NGOs in procedures before international courts and tribunals

a) NGOs difficulties in standing before international courts and tribunals

International Tribunal of the Law of *the Sea*, unlike International Court of Justice where by the competence ratione personae, only States may be parties in cases before the Court, access to Tribunal jurisdiction is opened not only to States Parties of the Convention of United Nation on Law of the Sea from 1982, but also to non-state entities[16].

Article 187 of the Convention states that juridical persons and State enterprise may have access as parties before the Tribunal of the Law of the Sea. There are thought opinions that only profit-organisation can stand in proceedings before the Tribunal[17], and in this case it is difficult for NGOs to overcome this practice.

European Court of Justice, can be invoked by Member States, EU institutions , by individuals but also by national courts. Regarding NGOs they can stand before Court only if their members themselves lodged a complaiment to the Court Article 230, para.4,of the EC Treaty states that ,, An natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or addressed to another person, is of direct and individual concern to the former.” Of relevance is the Greenpeace case to the European Court where the Court held that ,, the association formed for the protection of the collective interests of a category of persons can not be considered to be directly and individually concerned for this purpose of the forth paragraph of Article 173 of the Treaty by a measure affecting the general interest of the category, and is therefore not entitled to bring an action for annulment of where its members may not do so individually…”.

b) Effective access for NGOs before human rights bodies: European Court of Human Rights, African Commision on Human Rights and Inter-American Court of Human Rights

Human Rights systems in Europe, Inter-America and Africa are the exception bodies that allow not only the States to bring case to the Court by also give the possibility to individuals and NGOs to stand before courts. The three Courts form a network of international human rights treaties of international and regional application[18].

The requirements for admissibility before *European Court of Human Rights* (ECtHR) are set out in Article 34 and Article 35 of the Convention. According to Article 34 the applications must be submitted by any person, group of individuals or NGOs. The primary condition is that the claimant to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or in the Protocols thereto. We must say that the quality of victim is a *sine qua non* condition for the applicants. As the Court stated in many decisions, in order for applicants to be able to claim to be a victim, they must produce reasonable and convincing evidence that a violation affected them personally. In this case we speack about direct victim status. There is also the possibility of representation, indirect victim status, this is the case of NGOs, that act in certain situations as

[12] McCormick, John. "The Role of Environmental NGOs in International Regimes" *Paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Quebec, Canada*, Mar 17, 2004.

[13] 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

[14] Christian Schall, Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concep?, Journal of Environmental Law, Oxford University Press, 2008, p. 419.

[15] Beyerlin, Ulrich. "The Role of NGOsin International Environmental Litigation." (2001).

[16] See Raluca Miga Beșteliu, Drept internațional public, vol. II, Ed. 2, Editura C.H.Beck, 2014, p.21

[17] McCormick, John. "The Role of Environmental NGOs in International Regimes" *Paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Quebec, Canada*, Mar 17, 2004.

[18] Harris, O Boyle& Warbrick, Law of the European Convention on Human Rights, Third Edition, Oxford University Press, 2014, p. 5.

representatives for the direct victim[19]. There is though an exceptional case, when an NGO is bringing a case to the Court which does not fall into any of the above classification (direct victim or indirect victim). It is the exemple of Valentin Câmpeanu v. Romania case, and even if it is not a case with link to environment, it is a good exemple of how an NGO may stands before the Court even if it is not direct victim or indirect victim. In this case the Court found that Valentin Câmpeanu was a vulnerable person with no next-of-kin, so it was a direct victim in the sens of Article 34 of the Convention ,, of the circumstances which ultimately led to his death and which are at the heart of the principle grievance brought before the Court". The Court stated that the NGO in this case can not stand as indirect victim but in some exceptional circumstance and bearing in mind the serious nature of allegations, the NGO should act as representative for the victim, notwithstanding the fact that the victim had no power to act on his behalf and that he died before the application was lodged under the Convention. The reason way the Court held as admissible *ratione personae* this case was as it stated: ,, To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examinated at international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative" to act for the victim.

In Asselbourg and Greenpeace Luxemburg v. Luxemburg the Court examined whether the applicants are the victims of violation of Article 8 of the Convention within the meaning of Article 34 of the Convention. Regarding the claim of Greenpeace Luxemburg, the Court held that that NGO can stands as a representative of its members or employes, in the same way, a lawyer represents his client.

In their applications before the Court NGOs can invoke rights as, the right to life (Article 2), the right to fair trail (Article 6), the right to respect for private and family life (Article 8), freedom of expression (Article 10), freedom of assembly and association (Artcile 11).

Under the *Inter-American Human Rights* system the applicants, individuals or NGOs, may lodged a claim but only to the Inter-American Human Rights Commision not to the Inter-American Court of Human Rights. According to Artcile 23 of the Rules of Procedure of the Inter-American Human Rights Commision the applicants does not have to demonstrate that they have the victim status.

In Yanomami Indians v. Brazil20 case, the Commision determinate that was violated the right to life because of the environmental degradation of Yanomami lands and the health problems following this. The case was submitted by several individuals that were directly affected by living conditions of Indians and the Commision treated them as legitimate representatives of Indians.

According to Articles 55 and 56 of *African Commision on Human and Peoples Rights* (ACHPR) individuals and NGOs may logded a petition to ACHPR. For this petition to be held admissible there must be an identification of the victim and the State Party to the Commision must be found responsible for violation of one of the rights protected by it. NGOs may participate before ACHPR as legal representatives or as amicus curiae.

The African Commision has a very small number of decisions in respect to environmental NGOs and most of them lack of effective enforcement mechanism.

2.2.1. Access of NGOs as *amicus curiae*

The role of NGOs as *amicus curiae* in international litigations procedures, although very modest in influencing courts judgements, became more a practice than an exception in courts.

NGOs have benefited from the intensification of international litigation procedures to gain access to the courts, often as "friends of the court" (*amicus curiae*). The advantage of participation as *amicus curiae* is that in this case NGO is not a party to the dispute but is nevertheless allowed to contribute in many ways to the work of the Court, by acting as a valuable source of information, sensitize the Court on particular issues, raise the attention of public opinion etc.

For exemple, International Court of Justice had been reductant to NGOs *amicus curiae* participation to their hearings. Yet, Article 34 paragraph 2 provides that ,, the Court may request the public international organizations informations relevant to cases before it…". In the case Gabcikovo-Nagymaros the Court admitted unofficially that received written NGOs submissions.

In ECtHR the Court invites an *amicus curiae* submission or a third-party seeks to provide information to the Court on its own initiative. Rule 44 of the Court provides that, once notice of an application has been given to the respondent State, the President of the Chamber may invite, or grant leave to, any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in hearings

Amicus curiae participation should not be confused with the third party intervention, as the latter is designed to protect the legal interest and rights of the intervening entity likely to be affected by the Court judgement[21].

[19] Asselbourg and 78 Others and Greenpeace Luxemburg v. Luxemburg (Application no. 52620/99) EctHR June 1999.
[20] Yanomami Indians v. Brasil, Case 7615, Resolution no 12/85, Annual Report 1984-85.
[21] Beyerlin, Ulrich. "The Role of NGOsin International Environmental Litigation." (2001).

3. Conclusions and future perspectives

The role of environmental NGOs as ,,guardians of the environment" has increased tremendously over the last decades. Important was the enormous presence of NGOs at the three most important conferences on environment: Stockholm, Rio and Johannesburg.

Their contribution in lobbing governments and international organizations by influencing negociation on international environmental agreements had been also considerable.

Of great importance is the fact that some NGOs have gained a consultative status in international and regional organizations influencing the process of drafting and adopting norms of international environmental law.

Unfortunately, NGOs does not have proper access to justice in international courts and tribunals, exception being the access of NGOs before human rights bodies: European Court of Human Rights, African Commision on Human Rights and Inter-American Court of Human Rights.

NGOs influence on environment international standards is not as it was expected at the begings, mostly because its hard to overcome the political will and the governments interests.

Over the years NGOs developed strengths and weaknesses regarding their activities. The most important strengths for NGOs are the independence and the good public reconnaissance. The weakness is mainly about the fragmentation of environmental NGO, about the fact that most of them act without a common vision and a common purpose and sometimes the huge number of environmental NGO and the very different manners in approaching environmental protection creates confusion and lack of effectiveness in relation with States and international organizations.

In sum, even of the increased number of NGOs in taking part in the mechanism of environmental law making and the participation, in different forms, in international juridical procedure, the legal status of NGOs in international law did not progres much.

On consideration of this facts, it is obvious the need for environmental standards, in the form of an international convention, that shall regulates the status and the activities of NGOs at international level.

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THE CAPACITY OF INTERNATIONAL ORGANIZATIONS TO BEAR INTERNATIONAL RESPONSIBILITY

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Abstract

The status of international personality is not exclusively reserved for states. In modern days, the international organizations have legal international personality and also have the capacity to be internationally responsible for their conduct. Some particularities of the legal personality of international organizations are decisive in determining their international responsibility. The study will establish the connection between the foundations of the personality and responsibility of an international organization. It will be also analysed the situation of third parties in establishing the responsibility of an international organization.

Keywords: *Responsibility, International Organization(s), International Legal Personality, International Responsibility, Attributable to.*

Introduction

The responsibility of international organizations creates specific issues regarding the imputability in international law. The International Law Commission(ILC) had to face complex problems, to which international law does not answer unequivocally, had to base its findings on a fragmented practice and marked by a great pragmatism and on a limited importance of jurisprudence and less conclusive. The complexity of the problem is related to the particularity modes of international organizations activity. Indeed, they often act through the Member States or using their organs. At the same time, Member States exercise strong influence on the operation and decision making within the organization. The imputability study of conducts related to activities of international organizations should take into account the control interrelations and power between the organization and its members. They impact both on the responsibility of international organizations and the responsibility of Member States following facts organization.

The responsibility is the final test of international personality.

The legal personality is translated by the ability to be the holder of rights and obligations and, therefore, have the responsibility in case of obligation's infringement. The identical imputability with the legal international entity which has to answer for a crime committed by a person who does not have the same quality.

Indeed, the ability to commit a wrongful international act belongs by definition only to international law subjects. This is the situation when a conduct can be attributed to an entity, contrary to international law, can be considered a subject of international law. Similarly, international personality has the effect of making susceptible subject likely to be considered responsible for any internationally breaches attributed to it. By this mean the international imputability organization of the breaches is both a consequence but also an indicator of its international personality.

The legal personality allows to the international organization to activate similar to a self- governing subject.

The international organization became a law subject, able to be entitled, on his right, of their rights and obligations. It can be the beneficial owner of those obligations put on its task under the law of international responsibility if an infringement of its international obligations can be attributable to it.[1]

The responsibility for breaching its obligations allows to third parties to submit their claims directly to the organization. It was seen as representing a certain risk for the third parties. Concrete means of responsibility are less developed in case of international organizations than in the case of states. This acknowledgement powered its argumentation in favour of the Member States' subsidiary responsibility.

International responsibility as an index and consequence of the separate personality of an international organization (**1.**) may rise special difficulties to people who complain about its activity (**2.**).

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[1] Pierre Klein, *La responsabilite des organisations internationales dans les ordres juridiques internes et en droit des gens*, Bruylant, Bruxelles, 1998, p.2.

Content

1. Legal personality of international organizations - the foundation of their responsibility

Necessary relationship between responsibility and personality was highlighted many times. The international responsibility of international organizations assumes that they have a legal international personality, that they are international law subjects, different than Member States. The international personality of the organization, so her actual existence in the international order, is essential to its ability to see that those wrongful acts they committed were required to it.

The responsibility of the international organization for those wrongful conducts which are imputed is a "necessary condition"[2] of their legal personality.

The possession of international legal personality just make the distinction between international organization and simple common organs of several states[3], like the tripartite administration NAURU[4].

States must be directly responsible for the State's conduct which wouldn't be only their instrument without possessing any autonomy to them, without their own will.

To have an international personality, the organization must have a distinct will[5].

The international organization's legal personality of international law was recognized by the International Court of Justice (ICJ) in the evaluation notice of April 11th, 1949. This legal international personality is distinct from the one that states form and it depends on the will of these states so as shown in the evaluation notice of the Organization in which it finds its foundation, without a required disposition, which would be expressly conferred.[6]

Those kind of explicit assignments are very rare and scarce, organizations must have an independent will, distinct from that of Member States. This criterion is considered as "the foundation stone" of the international personality[7], "its fundamental criterion".

International organizations are, like States, legal entities which act by individuals or groups. International organizations are "secondary" international law entities, to the extent that they are, themselves made up of states that are also at the origin of their creation and execution of the will of organizations. The issue of international responsibility award is made more complex by the double position of the state towards the organization also like a founder and performer.

The legal personality of international organizations, and therefore their ability to answer for their actions in the international law, depends on the states' will, the primary subjects and entire body of international law. International organizations often remain closely linked to their creators and are very dependent, hence resulting difficulty to divert their will to that of their members and operate attributing their acts.[8] Member States tend to try to guide the organizations' action those they created in a way according to their interests and it tries "to provide at least partial control".[9] However, organizations often receive certain autonomy towards their members, due to the dynamics created by the establishment of their own organs. They are often the place of some complex power games and, if their action is submitted to Member States' will, the opposite is also true: Member States may act under its control or following the instructions of the organization. The creation of an organization has just the effect of restricting action' states freedom, even if the transfer of competences to the organization is based on a voluntary basis.

International organizations are responsible as law international subjects for those international law breaches that they commit. Their capacity to be responsible for their international law violations, which are attributable to them can be deduced of their capacity as holders of international obligations and therefore of their international legal personality.[10] This principle is summarized by Ian Brownlie which believes that " If an organization has a different legal personality from that of the Member States, and action which left to the states would create responsibility, it is reasonable to be attributed the organization's responsibility.''[11] If it is the consequence of the international personality of the organization, the responsibility is, also, "often presented as the ultimate test of the effectiveness of the legal personality of a given entity." [12] Other authors emphasize the logical connection between the legal personality of the organization and its capacity to be internationally responsible. The responsibility of the organization depends on its legal personality and depends on "how

[2] Alain PELLET, Patrick DAILLIER, Mathias FORTEAU, *Droit international public*, 8 eme edition, L.G.D.J., Paris, 2009, §478.

[3] Philippe SANDS, Pierre KLEIN, *Bowett's Law of International Institutions*, 6 th Editon,Sweet and Maxwell, London, 2009, § 15.001.

[4] CIJ, *Certaines terres a phosphates a Nauru (Nauru c. Australie*), arret du 26 juin 1992 (Exceptions preliminaires), Rec. p. 258, §47.

[5] Rosalyn HIGGINS, "The Legal Consequences for Membre States of the Non Fulfilment by International Obligations of their Obligations towards Third Parties", *Annuaire de L'institut de Droit International*, vol. 66-I, Pedone, Paris, 1995, p. 254.

[6] Alain PELLET, Patrick DAILLIER, Mathias FORTEAU, *Droit international public*, 8 eme edition, L.G.D.J., Paris, 2009, §383.

[7] Joe VERHOEVEN, *La reconnaissance internationale dans la pratique contemporaine*, Pedone, Paris, 1975, p. 199.

[8] Manuel PEREZ GONZALES, "*Les organizations internationals et le droit de la responsabilite*", Revue generale de droit international public (RGDIP), Pedone, Paris, 1988, p. 69.

[9] Pierre-Marie DUPUY, *Droit international public*, 9 eme ed. Dalloz, Paris, 2008, p.156.

[10] C.F.AMERASINGHE, *Principles of the institutional law of international organizations*, Oxford University Press, 2005, 2nd ed., p. 399.

[11] Ian BROWNLIE, *Principles of Public International Law*, 6th ed., Oxford University Press, 2006, p.655.

[12] Pierre Klein, *La responsabilite des organizations internationales dans les ordres juridiques internes et en droit des gens*, Bruylant,Bruxelles, 1998, p.5.

the organization is conceived"[13] either as an independent subject or even beneficiary of autonomy to Member States, either as a simple instrument for them. This can be deducted from the Founding States' will organization's own organs to assign a specific mission, in short to translate "the organization's character placed in some ways in front of his members."[14]

The legal personality of international organizations is functional, it is according to the specialized principle and it is limited by the Founding Treaty. International organizations' responsibility occurs for all documents are held liable in all cases where responsibility for conduct can be assigned , as either enter or not within its powers.[15]

International organizations form an united whole, and for assigning responsibilities, we cannot make any difference between the most integrated organs of the organization – as secretary office and organs composed of states' representatives. Finn Seyersted wrote about United Nations (UN) that, resulting from distinct legal personality of organizations, Member States, in this position as members of the internal organ, cannot be declared responsible for the acts of the organization.

Indeed, "it requires a clear delegation setting of power, that Carta doesn't provide", this would lead to the transformation of organizations in a kind of federation, which was not desirable. [16] Member States act as organs of the Organization and not directly as isolated states. In case that an organization has international personality, which means a distinct will of their members, the action of the last one in the decision-making organs of the organization is without influence on imputability of conduct to the organization. Their collective act is, in this hypothesis, considered as an act of the organization, and will be also bear the responsibility.

The vote doesn't create obligations to the state when is deciding in an international organization, so this isn't a unilateral act of the state. One state isn't responsible for the wrongful conduct of an organization which was accomplished by applying a decision taken by vote, only when the vote can be assimilated with aid or assistance in committing the illegal act, which implies that the act wouldn't have been adopted without vote rule. Basically the organization is the only one responsible for its wrongful acts that committed, the responsibility of Member States of the decision-making organ that have adopted the act that led to the violation of any of its obligations to the international organization cannot be engaged. The vote doesn't express an unilateral manifestation of the will. Indeed, the state is not tied by his affirmative vote, but by the decision according to the procedure provided by the Founding Treaty of the organization's member which it is. The obligation results from the power of the adopted act and not from the expression of the will of the state.

The international organization must be sufficiently independent to possess freestanding personality in front of founding states and quite coherent to set "a center of imputation" of international legal relations who are outstanding.

Creating an international law subject hasn't the objective to create a unique actor who has the function to centralize the action of various states in a particular field. This will be the organization's action, founded in its name, and not in that of an individual state, which means that international responsibility that could result from this action will be that of the organization. After Charles Visscher, "legal personality condition is one of concentration: concentration of wills oriented to follow the statutory goals, concentration of responsibilities by charging exclusive legal entity of the civil consequences of collective decisions made in the usual way", or after Evelyne Lagrange, " the legal personality gives to the organized community its legal unit."[17] The State's creation of an international organisation has the purpose to create a new person which will bear the responsibility of the action that fallow to be committed. The organization is acting on its own behalf and not as representative of its members.[18] Acting as international law subject, the organization is entitled to rights and indebted to obligations, and - in case of violating thereof - it will be the only responsible.

This conclusion led to great difficulties, related mostly to the rarity of cases in which a third party injured can turn against an organization in front of international jurisdictions. There have been imagined yet detours that led to greater confusion in this area.

2. Third parties' situation against specific risk of international organizations

International organizations are responsible for the facts that are attributable to them. Although , certain ways of adjusting disagreements especially judicial, which can be used against states are ineffective in terms of international organizations.

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[13] Manuel PEREZ GONZALES, "*Les organizations internationals et le droit de la responsabilite*", Revue generale de droit international public (RGDIP), Pedone, Paris, 1988, p. 66.

[14] CIJ, *Reparations de dommages subis au service des Nations Unies*, Avis consultatif du 11 avril 1949, Rec. p.174.

[15] Manuel PEREZ GONZALES, "*Les organizations internationals et le droit de la responsabilite*", Revue generale de droit international public(RGDIP), Pedone, Paris, 1988, p. 68.

[16] Finn SEYERSTED, *Common Law of International Organizations*, Martinus Nijhoff Publisher, Leiden, 2008, p.90.

[17] Evelyne LAGRANGE, *La representation institutionnelle dans l'ordre international*, Kluwer Law International, La Haye, Londres, New York, 2002, p.8.

[18] Evelyne LAGRANGE, *La representation institutionnelle dans l'ordre international*, Kluwer Law International, La Haye, Londres, New York, 2002, p.45.

In some instances, third parties have been affected by the inherent difficulties in applying the responsibility of international organizations. Many detours of this difficulty were imagined, most often being the evocation of the international personality absence, of a specific organization to approach the direct responsibility of Member States.

Multilateral treaties for the protection of human rights, without exception - are not opened only to the states adhesion, although they are often the work of international organizations.[19]

The difficulty was showed especially in front of the European Convention of Human Rights.

This state of fact, although leading to an issue of responsiveness, may have an incidence on the imputability issue of the litigious act itself, or at least of the responsibility for this act, and with the desire of ensuring the effectiveness of the European system of human rights protection could push to the temptation to modify certain points of States' law responsibility and international organizations. As an author presented it, "in front of the international inability in which could be an individual faced with the situation of asking directly concerned in front of an international surveillance in Strasbourg, it is tempted to try to make a state which would be part of the Convention to bear responsibility violation"[20].

The Union's accession to the European Convention of Human Rights will adjust the acts of the latter issue, the issue can still be about the conduct of other organizations. It should be emphasized that such an assumption of temptations was issued especially by the doctrine, European Court of Human Rights remain reserved on this subject.

The will to avoid that states pass by their obligations, taking refuge behind international independent personality of an international organization, the inability to bring an organization before the ICJ and fears of the organization's insolvency were an argument presented in favor of subsidiary responsibility of the Member States of the Organization for wrongful acts committed by it.

The relationed issues of distinct legal personality of the former European Communities were the subject of a rich jurisprudence of the European Convention of Human Rights organs.

Complaints about the attributable conduct of the European Union were directed against it or against all Member States.

These complaints brought against Community acts were declared inadmissible based on the competence's absence ratione personae of Court when they aimed specifically European Communities. Instead of this, the Court did not directly answer the question about a possible collective responsibility of all Member States when the petition was directed against them.

The first of these cases is that one of Confederation francaise democratique de travail(CFDF) petition directed against the European Community and alternative against "the community of their Member States" and "their states individually."[21]

The union complained that it was not appointed by the Council of the European Communities as a representative organization called to establish candidates' lists for the ECSC Consultative Committee, although it, given its importance, was the second among the five organizations recognized as representative in France.

European Commission of Human Rights declared the request, because it is directed against the European communities which have their own legal personality[22], as inadmissible *ratione personae*, which are not party to the Convention[23], and thus benefit of "total immunity"[24] of it. She concludes about "the corporate member states", a notion that has not been defined by the applicant, but the Commission has treated it as part of the European Community Council. After this decides regarding the request as inadmissible ratione personae on France, it still not accepting the right of individual appeal, the Commission estimated that the responsibility of other states cannot be considered for attended the Council decisions of the European Community, and in failing states, in circumstances of the case, their "jurisdiction", according to article 1 of the Convention[25]. The Commission did not recognize any collective responsibility or secondary of European Community Member States, based on the autonomy of members of their communities. She doesn't agree to recognize a "community of Member States" that would exist outside the organization's institutions. This recognized the possibility that Member States, taken collectively, to respond for their international

[19] Robert KOLB, Gabriele PORRETTO, Sylvain VITE, *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales – Forces de paix et administrations civiles transitoires*, Bruylant, Bruxelles, 2005, p.239.

[20] Pierre APRAXINE, "*Violation de droits de l'homme par une organisation internationale et* responsabilite des Etats au regard de la Convention europeenne », Revue trimestrielle des droits de l'homme(RTHD), Bruylant, Bruxelles, 1995, p.16.

[21] Commission europeenne des droits de l'homme, *Confederation francaise democratique du travail c. Communautes europeennes, subsidiarement la collectivite de leurs Etats membres et leurs Etats membres pris individuellement*, dec. Du 10 juillet 1978, Req. No 8030/77.

[22] Commission europeenne des droits de l'homme, *Confederation francaise democratique du travail c. Communautes europeennes, subsidiarement la collectivite de leurs Etats membres et leurs Etats membres pris individuellement*, dec. Du 10 juillet 1978, Req. No 8030/77 §2.

[23] Commission europeenne des droits de l'homme, *Confederation francaise democratique du travail c. Communautes europeennes, subsidiarement la collectivite de leurs Etats membres et leurs Etats membres pris individuellement*, dec. Du 10 juillet 1978, Req. No 8030/77 §3.

[24] Frederic KRENC, "La decision *Senator Lines* ou l'ajournement d'une question delicate", Revue trimestrielle des droits de l'homme (RTHD) , Bruylant, Bruxelles, 2005, p. 124.

[25] Frederic KRENC, "La decision *Senator Lines* ou l'ajournement d'une question delicate", ", Revue trimestrielle des droits de l'homme(RTHD), Bruylant, Bruxelles, 2005 , p. 124, §7.

organization's performed acts whose members are, would mean to deny international distinct legal personality of European Commission. The responsibility of a "Member States' collectivity" of the European Community, different and parallel to the last one, would emptied the substance of organization's autonomy.

Another request directed also against "European Community, subsidiary, against the community of Member States and their Member States individually" for the European community organs' acts, was tried and declared inadmissible, as being directed against them. The Commission then examines the problem, namely "whether the act in question, committed by an organ of the European Community may engage the responsibility of each of the 12 Member States of the European Community on the Convention's ground." The Commission did not decide on this point and declare the request as inadmissible because there weren't used all of the Communities appealing means. Other applications directed against the European Community or against institutions were systematically declared inadmissible ratione personae. This solution was recently confirmed by the European Court of Human Rights, which estimated that "although the holder of sovereign powers transferred in this way, the international organization in question can not, as long as it is not part of the Convention, to see her responsibility held for procedures carried in front of her organs or decisions given by them."[26]

In front of the inability to attract an organization directly before the European Court of Human Rights , were submitted requests against the completeness of their Member States, putting in question the responsibility of Member States for its organization's acts. If any real form of secondary responsibility was denied by the Court, states may be responsible for not taking the necessary measures accomplished during the transfer of powers to the benefit of the organization.

Not having the means to put into practice, the organization's, requests were directed against the North Atlantic Treaty Organization (NATO) member states which are parties to the European Convention on Human Rights. However, the European Court of Human Rights did not decide on the question of responsibility for acts committed by NATO member states during military operations against the Federal Republic of Yugoslavia.

Despite these procedural issues, and whatever advantages to the third party get in touch with an organization, no rule which imposes responsibility subsidiary of the members of an organization have appeared in international law.

Conclusions

The problem of imputability of an international organization or its Member States of their wrongful conduct, translate all its complexity between these different subjects. However, a guiding thread running throughout this study: responsibility depends on the mean margin of the international law subject, the capacity to adopt an autonomous conduct. One subject under the will of other could not be the holder of responsibility. The Member States, in principle, are not responsible for the imputable international organizations violations, except where they do not exercise control of it, situation in which it cannot be considered as an entirle law subject due to the inexistence of a distinct will from that of the states. This lack of autonomy may be general, and in this case the organization does not possess international personality, she is just a normal organ or Member appears only in special case, situation in which the organization is subject to control or coercion of one or more states. In parallel, a State is not responsible for committed acts after the application of the international organization's decision unless it in this case have no margin maneuver.

However, relations between international organizations and their members are generally complex activities of international organizations or States within their adherence to an international organization is likely to give rise to responsibility all actors, depending on the method and the actual degree of control over committing the wrongful act.

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[26] CourEDH, GC, arret du 30 juin 2005, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi c. Irlande,* §152.

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THE EFFECTS OF PRELIMINARY RULINGS

Iuliana-Mădălina LARION*

Abstract

The study analyses the effects of the preliminary rulings rendered by the Court of Justice for the judicial body that made the reference and for other bodies dealing with similar cases, for the member states, for the European Union' s institutions and for EU legal order. Starting from the binding effect of the preliminary judgment for national judicial bodies, which requires them to follow the ruling or make a new reference, to the lack of precedent doctrine in EU law, continuing with the possibility to indirectly verify the compatibility of national law of the member states with EU law and ending with the administrative or legislative measures that can or must be taken by the member states, the study intends to highlight the limits, nuances and consequences of the binding effect. It mentions the contribution of the national courts and of the Court of Justice of the European Union to the development of EU law, such as clarifying autonomous notions and it emphasizes the preliminary procedure's attributes of being a form of judicial protection of individual rights, as well as a means to review the legality of acts of EU institutions. The paper is meant to be a useful instrument for practitioners. Therefor, it also deals with the possibility and limits of asking new questions, in order to obtain reconsideration or a refinement of the legal issue and with the problem of judicial control over the interpretation and application of the preliminary ruling by the lower court.

Keywords: *preliminary ruling/judgment; binding effect; precedent doctrine; interpretation; validity.*

Introductory notes

Article 267 of the Treaty on the Functioning of the European Union establishes the Court of Justice's jurisdiction to give preliminary rulings concerning the interpretation of the European Union's treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. The European Court answers questions referred by national courts or tribunals of the member states, dealing with a European Union law issue that is applicable in a pending case.

The national judicial body that asks the question suspends the national proceedings and waits to receive the preliminary rulling.

Once the Court of Justice renders the preliminary ruling[1], the judgment or order is sent back to the national court wich made the reference and it is published on the official web-site of the Court of Justice[2]. The study covers the thematics of the legal effects of these rulings.

Depending on the object of the question or questions asked by the national courts, the effects of the preliminary rulings can be divided into two separate issues: the effects of rulings on the interpretation of treaties, of acts of the institutions, bodies, offices or agencies of the European Union (EU) and the effects of rulings on the validity of acts of the institutions, bodies, offices or agencies of the EU[3].

The other important criteria is the subject that observes the ruling and the effects are different for the national judicial body that made the reference, for the other judicial bodies in the same member state or in the other member states, for the institutions of the European Union, for the member states and, of course, for the Court of Justice itself, with respect to that particular case or to subsequent cases.

It is important for national judicial bodies, member states and institutions of the EU to understand and apply correctly EU law, as they may otherwise be subjected to national or international sanctions. Therefor, it is also importand for them to have a complete image of the legal effects of the preliminary rulings that interpret EU law or decide on its validity.

The study intends to analyse in a synthetic and structured manner the limits, nuances and consequences of the binding effect of these rulings, covering, at the same time, all the aspects that can be of interest for legal practicioners, administrative bodies or state authorities, in order for them to find it a useful instrument.

There are few national doctrinal works that deal with the effects of the preliminary rulings in detail. Foreign authors have been more preoccupied on covering this subject, but their books might not be as easily accessible to Romanian readers. The study tries to present and aknowledge the existing contributions by prominent national and foreign authors.

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[1] At present, only the Court of Justice has jurisdiction to decide on preliminary questions, even if article 256 paragraph 3 of the Treaty on the Functioning of the European Union renders jurisdiction to the General Court to hear and determine questions referred for a preliminary ruling, in specific areas laid down by the Statute. The Statute of the Court of Justice has not yet been modified in this respect.

[2] www.curia.europa.eu

[3] The Court of Justice does not have jurisdiction to decide on the validity of the treaties that establish the European Union. They are international conventions and are subject to the will of the member states, acting within the limits of public international law.

2. Binding effect of preliminary rulings

2.1 Binding effect for national courts of the member states

A. The national court that made the preliminary reference and the parties to the main action

Fist, it must be noted that the words "courts or tribunals of a member state" have an autonomous meaning in EU law, describing any national judicial body from a member state, established by national law, permanent, that has the power to apply national law and to render a definitive decision, independently, after following an adversarial procedure[4].

The Court of Justice[5] shall establish if a judicial body fulfills these conditions and may give on order of inadmissibility if the body does not have legal standing to ask a preliminary question of if the body asks the question outside its judicial function.

If this body receives an order of inadmissibility for these resons, it may not ask a new preliminary question. Also, the body may not ask new questions if the first one was declared inadmissible on the ground that the national dispute does not need the application of EU law.[6]

If the Court of Justice renders a preliminary ruling, the judgment is binding on the body that sent the question in the sense that it must observe the solution, as well as the reasons for which it was given[7], as more important rules are presented in the part dedicated to the grounds of the judgment, not in the operative part, which contains the concise answer to the preliminary questions[8]. The preliminary judgment is binding in the main action that gave rise to the reference (*inter partes litigantes*), but cannot be ignored by other courts dealing with the same legal issue (*erga omnes*)[9].

The practical consequence is that the national body cannot use a different interpretation of the EU act to give a solution in the national dispute and may not apply the act if it was declared void. This effect is *ex tunc*, for both types of judgments, meaning that the rule, as interpreted by the Court, must be applied by the national courts even to legal relationships arising and established before the preliminary judgment[10].

The national court does not have the power to limit the effects in time of the preliminary ruling. Only the Court of Justice may do so and only in the judgment whose effects are limited[11], for reasons like respecting the principle of legal certainty[12] or avoiding serious financial consequences[13]. If this is the case, the national court cannot establish a different application in time.

Sometimes, the European Court's rulings "are so detailed that they leave national courts little room for discretion in how they decide the dispute in hand."[14], but there is also the possibility that the national judicial body gives a solution without using the preliminary ruling because, as one author observed[15], depending on the procedural moment of the national dispute when the question was referred, the national court may directly give a solution to the case or it may continue to administer evidence or supplementary evidence or it may ascertain the parties will to desist or to settle the litigation amiably.

If the national judicial body gives a solution in the main proceedings based on the Court of Justice's response, it is not recommended to just copy or quote parts of the preliminary judgment. The grounds and solution rendered by the Court should be integrated in the arguments of the decision given by the national judicial body[16].

The judicial body of a member state may refer new preliminary questions, on different EU law issues or on the same issue, if the need of claryfing the effects or motivation of the fist preliminary ruling arises[17]. The new questions may be about an act that was not declared void, as the Court can analyse new reasons for annulment.[18]

The Court of Justice has stated that an interpretation it has given binds the national court in question "but it is for the latter to decide wether it is sufficiently enlightened by the preliminary ruling

[4] For more information, see Andreşan-Grigoriu, 2010, 72-140, Steiner and Woods, 2009, 226-229, Kaczorowska, 2009, 255-260.

[5] The name Court of Justice is used both for the present Court of Justice, as part of the three courts that compose the Court of Justice of the European Union, as well as for the former Court of Justice of the European Communities, its predecessor.

[6] For more examples of reasons not to send preliminary questions, see Şandru, Banu and Călin 2013, *Refuzul*.

[7] Judgment of 16 March 1978 in case 135/77 Bosch/Hauptzollamt Hildesheim, paragraph 4, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 24 February 2015.

[8] Andreşan-Grigoriu, 2010, 352.

[9] See Toth, 1990, 422.

[10] Judgment of 27 March 1980 in case 61/79 Amministrazione delle finanze dello Stato/Denkavit italiana, paragraph 16, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[11] Broberg and Fenger, 2010, 420.

[12] For example, judgment of 15 December 1995 in case C-415/93 Union royale belge des sociétés de football association and others/Bosman and others, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 5 March 2015.

[13] For example, judgment of 9 March 2000 in case C-437/97 EKW and Wein & Co., http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 5 March 2015.

[14] Chalmers, Davies and Monti, 2010, 169.

[15] Andreşan-Grigoriu, 2010, 349.

[16] Şandru, Banu and Călin, 2013, *Procedura*, 527.

[17] For example, three preliminary questions were sent by British courts in the Factortame dispute: cases C-213/89, C-221/89 and joint cases C-46/93 and 48/93.

[18] Broberg and Fenger, 2010, 413. Arnull et al., 2006, 528.

given or wether it is necessary to make a further reference to the Court."[19]

It was emphasized that the preliminary ruling procedure is a non-contentious one. Thus, only the national court may decide whether it has obtained sufficient guidance from the preliminary ruling delivered in response to its question or to the question of a lower court or whether it appears necessary to refer the matter once more to the Court of Justice. Accordingly, the parties to the main action cannot rely on article 43 of the Protocol on the Statute of the Court of Justice of the European Union in order to request the Court to interpret judgments delivered in pursuance to article 267 of the Treaty on the Functioning of the European Union.[20]

This early jurisprudence has been enshrined in the Rules of procedure[21]. Article 104 states that article 158 of the Rules of procedure, relating to the interpretation of judgments and orders, shall not apply to decisions given in reply to a request for a preliminary ruling.

This is not the case with errors in the preliminary judgments. Article 103 provides the right of an interested person, *i.e.* including a party to the main proceedings, to ask that clerical mistakes, errors in calculation and obvious inaccuracies affecting judgments or orders to be rectified by the Court of Justice. The request must be made within a period of two weeks from the delivery of the judgment or service of the order.

One author[22] expressed the contrary view that, since there are no parties to the non-contentious preliminary ruling procedure, only the Court of Justice can rectify errors. The same author noted that not even the national court that sent the question can ask for rectification.

This argument may be a valid one in relation to the means provided by article 155 of the Rules of procedure, regarding the failure of the Court to adjudicate on a specific claim or on costs and the right of a party to ask the Court, within a month after service of the decision, to supplement it. The point of view that only the Court of Justice can supplement its judgment *ex officio* is supported by a literal and systematic interpretation of the texts: in article 103 the term used is not „party", but „interested person". Also, article 103 is included in the part of the rules of procedure dedicated to the preliminary ruling procedure (Title III), whereas article 155 is in Title IV „Direct actions", Chapter 9 „Requests and applications relating to judgments and orders".

The judgment of the Court cannot be the object of a question on its validity or interpretation under article 267 of the Treaty on the Functioning of the European Union. The Court stated that a preliminary ruling does not rank among the acts of the EU institutions whose validity is open to review by the means of a new preliminary question.[23]

Another issue that may arise is if the preliminary judgment has a binding effect for the national court which sent the question with respect to the part of the ruling that exceeds the question or questions asked (*ultra vires* answers). In our opinion, the entire judgment must have a binding effect, as the Court of Justice tries to offer a useful answer and this might entail extracting the real question from the imperfect questions that have been reffered, with the result of an apparent *ultra vires* judgment. A contrary interpretation would open up a Pandora's Box of uncertainty as to what part of the judgment is binding, at the discretion of the national court that made the refference, whereas all other courts have to observe the judgment in its entirety.

French and British courts have expressed a different opinion, based on the argument that the Court of Justice does not have standing to decide on the facts or to apply law in the main proceedings, but they seem to have reconsidered this position in recent cases[24].

Although examples of nonconformity are rare[25], it must be stressed that EU law does not provide sanctions for the national judicial bodies that don't apply correctly the preliminary rulings. It is for the national law of each member state to establish efficient legal means to prevent and amend such a situation. Otherwise, the state might be the subject of an infringement procedure[26] or of an action in engaging state responsibility[27].

Thus, the final decisions of national judicial bodies might be challenged in national courts by the parties to the main action. In what regards judgments rendered by national courts in the strict sense of the word, in Romanian civil procedural law the parties to the national dispute that want to complain of the incorrect interpretation and application of a the preliminary ruling by the national court may use the regular appeal procedure (article 466 and the following

[19] Judgment of 24 June 1969 in case 29/69 Milch-, Fett- und Eierkontor/Hauptzollamt Saarbrücken, paragraph 3, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 24 February 2015.

[20] Order of 18 October 1979 in case 40/70 Sirena/ Eda, paragraph 3 and paragraph 4, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[21] http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf, last accesed on 5 March 2015.

[22] Broberg and Fenger, 2010, 431.

[23] Order of 5 March 1986 in case 69/85 Wünsche/Germany, paragraph 16, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[24] Broberg and Fenger, 2010, 408-409.

[25] Broberg and Fenger, 2010, 407. Vaughan and Robertson, 2012, 2.430. Chalmers, Davies and Monti, 2010, 169.

[26] Articles 258-260 of the Treaty on the Functioning of the European Union.

[27] Judgment of 30 September 2003 in case C-224/01 Köbler, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 5 March, 2015. See Schütze, 2012, 300. See Şandru, Banu and Călin 2014, *Există sancţiuni*, 708-713. For Romanian case law in this respect, see Şandru, Banu and Călin 2013, *Refuzul*, LXIV-LXX.

of the Civil Procedural Code) or the appeal in cassation (article 488 paragraph 1 point 8 of the Civil Procedural Code[28]).

If the decision of the court is final, Romanian law does not provide a specific procedural means for the parties to criticize this aspect. The motion for annulment (articles 503-508 of the Civil Procedural Code) and the motion for revision (articles 509-513 of the Civil Procedural Code) provide specific grounds for changing a definitive judgment and the incorrect use of a preliminary ruling is not one of them, as it could, în some cases, entail the censoring of higher courts by lower courts in applying material law.

However, Romanian administrative law stipulates, in article 21 paragraph 2 of Law no. 554/2004, as a suplementary reason for revision of judgments in this field, the situation when a definitive judgment is given by disrespecting the principle of priority (supremacy) of EU law, stated by article 148 paragraph 2 coroborated with article 20 of Romania's Constitution[29].

This paragraph was declared contrary to the Romanian Constitution by the Romanian Constitutional Court[30] and then repelled by Law no. 299/2011, wich was itself declared contrary to the Romanian Constitution, with the effect that the paragraph in question is still in force and is applicable in the manner described by the Constitutional Court.[31]

This last decision states that Law no. 299/2011 is a forbidden limitation of the procedural means that ensure the uniform application of EU law, as interpreted by the Court of Justice of the European Union (CJEU). In stating the grounds, the Romanian Constituional Court emphasizes the binding effect of preliminary rulings for member states and makes references to Romanian case law subsequent to cases C-402/09 Tatu and C-263/10 Nisipeanu, concluding that the lack of such a revision motive would be equivalent to denying the binding force of CJEU's judgments for national courts of the member states and that depriving the litigant of these effects would mean to disconsider the principle of priority (supremacy) of EU law.[32]

B. Other national courts

The other national courts from the same member state as the court that sent the question or from the other member states must observe the preliminary ruling. Its binding effect (*erga omnes*) means that the EU act must be applied according to the interpretation given to it by the Court of Justice and that the EU act declared void cannot be applied in other pending or subsequent cases. This effect is justified by the role of the preliminary ruling procedure in ensuring a uniform interpretation and application of EU law in all member states.

The ruling can be applied without having to send a new question[33], even by a court that pronounces a final solution in a case, with no possibility of appeal.[34]

"The ruling is also binding on appellate courts or courts of review dealing with the same case, although they may also put further questions to the Court of Justice to clarify the initial ruling."[35]

At the same time, other national courts cannot ignore a preliminary ruling on the ground that they consider it to be wrong or inequitable. In British law "it is provided by section 3(1) of the European Communities Act 1972 that any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning, or effect of any Union instrument, must, if not referred to the European Court for a ruling, be decided in accordance with the principles laid down by any relevant decision of the European Court."[36]

Indeed, as was shown above, the possibility to ask new questions cannot be used as an instrument to contest the validity of a preliminary ruling, as this would call in question the allocation of jurisdiction between national courts and the Court of Justice under article 267 on the Treaty on the Functioning of EU[37].

The Court of Justice stated that if a judgment declaring an act of an institution to be void is directly addressed only to the national court which reffered the preliminary question, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment it has to give[38]. Otherwise, "chaos would result."[39]

The other national courts may not ask new questions on the same points of law, in similar cases, even if they are courts of final resort, unless they have serious grounds to believe the Court of Justice might

[28] Article 488 paragraph 1 point 8 of the Civil Procedural Code states: "The cassation of judgments can be asked only for the following reasons of illicitness: […] 8. When the judgment was given by infringing or incorrectly applying material law." (our translation)

[29] The paragraph was introduced by article 30 of Law no. 262/2007, in force from 2 August 2007.

[30] Decision of the Romanian Constitutional Court no. 1609/2010, available on www.ccr.ro.

[31] For further details, see Șandru, Banu and Călin, 2013, *Procedura*, 559-584.

[32] Decision of the Romanian Constitutional Court no. 1039/2012, http://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx, last accesed on 24 February 2015.

[33] Judgment of 13 May 1981 in case 66/80 International Chemical Corporation/Amministrazione delle fianze dello Stato, paragraph 13, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[34] Pertek, 2001, 161, 163 and 165.

[35] Vaughan and Robertson, 2012, 2.429.

[36] Hartley, 2010, 319.

[37] Order of 5 March 1986 in case 69/85 Wünsche/Germany, paragraph 15, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[38] Judgment of 13 May 1981 in case 66/80 International Chemical Corporation/Amministrazione delle fianze dello Stato, paragraph 18, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 24 February 2015.

[39] Vaughan and Robertson, 2012, 2.430.

reconsider its case law. They may also ask about the effects of the ruling. For example, about the grounds, the scope and the consequences of the nullity, in the case of a judgment declaring an EU act void[40].

If it finds no reason to reconsider its case law, the Court of Justice shall dismiss, as inadmissible, the questions whose answer can be found in its previous jurisprudence.

2.2. Effect for the European Union's institutions

The preliminary judgments are a means to review of the legality of the acts of EU's institutions, bodies, offices or agencies of the Union, supplementary to the direct action for annulment[41].

The effect of a judgment declaring an act void is *ex tunc* and *erga omnes*, *i.e.* the act is to be considered inexistent since the moment it came into force and can no longer be applied by anyone. The institutions must, therefor, retract or reppel the act and, if the act is only partially void, to modify and/or amend it.

The institutions must observe the judgments rendering a certain interpretation of their acts, as they must apply the act in accordance to that interpretation. The effect of a judgment on interpretation is also *ex tunc* and *erga omnes*[42].

This is the reason for which EU institutions are allowed to intervene and express their point of view in the written and/or oral procedure before the Court of Justice in preliminary actions[43]. Article 96 paragraph 1 letters c) and d) of the Rules of procedure of the Court of Justice stipulate that the European Commission and the institution which adopted the act the validity or interpretation of which is in dispute shall be authorised to submit observations.

The Court of Justice has reserved to the EU "institution concerned the exclusive right to draw conclusions from the invalidity of its act and take the necessary measures to remedy the situation."[44] In spite of that, it can offer alternatives for the institution for the period of time needed to take the appropriate measures in order to comply with the Court's judgment.[45]

2.3. Effect for the Court of Justice of the European Union

A. Case law

There are no *stare decisis* or precedent doctrines[46]. However, the European Court of Justice "tends to follow previous decisions to maintain consistency and will cite previous judgments or parts of a judgment as a basis for a current decision."[47]

The Court can reconsider its case law in similar cases, on the same point of law, if there are serious grounds to do so.

The preliminary judgment and order are not subject to appeal in EU procedural law. The Court expressly stated that its judgments cannot be the object of an exceptional review procedure either. [48] The Court of Justice decides as a first and last instance court[49]. From this perspective, the preliminary judgment can be considered final[50].

B. EU law

The Court of Justice's judgments are not sources of EU law. But, by rendering preliminary rulings, the Court of Justice has defined autonomous notions in EU law, contributing to EU law development. For example: the definition of measures having equivalent effect to quantitative restrictions on imports or exports[51]; the direct effect doctrine[52]; the invention of state liability for breaches of EU law[53]; its case law on the free movement of persons inspired the adoption of Directive 2004/38/EC etc..

The doctrine[54] noted that the preliminary reference procedure contributes to the development of EU legal and judicial orders in four ways: the development of EU law by new interpretations of the norms, resolving uncertainties, correcting injustices and enunciating principles; maintaining the institutional balance through judicial review by private parties; ensuring the uniformity and consistency of EU law in all member states, as all Union courts are part of a single judicial order and legal territory; the

[40] Judgment of 13 May 1981 in case 66/80 International Chemical Corporation / Amministrazione delle fianze dello Stato, paragraph 18, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 24 February 2015.

[41] Articles 263-264 of the Treaty on the Functioning of the European Union.

[42] Judgment of 27 March 1980 in case 61/79 Amministrazione delle finanze dello Stato/Denkavit italiana, paragraph 16, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[43] See article 40 of the Protocol on the Statute of the Court of Justice of the European Union.

[44] Kaczorowska, 2009, 284. See also Judgment of 19 October 1977 in joint cases 124/76 and 20/77 Moulins Pont-à-Mousson/ONIC, paragraph 28, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[45] Judgment of 29 June 1988 in case 300/86 Van Landschoot/Mera, paragraph 24, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March, 2015.

[46] Schütze, 2012, 298. Chalmers, Davies and Monti, 2010, 169.

[47] Foster, 2009, 197.

[48] Order of 5 March 1986 in case 69/85 Wünsche/Germany, paragraph 14, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[49] Fuerea 2002, 132.

[50] Petrescu, 2011, 152.

[51] Judgment of 20 February 1979 in case 120/78 Rewe/Bundesmonopolverwaltung für Branntwein, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[52] Judgment of 5 February 1963 in case 26/62 Van Gend en Loos/Administratie der Belastingen, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[53] Horspool and Humphreys, 2008, 111.

[54] Chalmers, Davies and Monti, 2010, 157-158.

administration of justice in national disputes by tapping into the expertise of the Court of Justice.

Two authors[55] expressed the view that the Court of Justice's emphasis on maximum uniformity through the preliminary ruling procedure has the potential to jeopardize legal integration because the European Court's insistence on accepting references and its unwillingness to trust national courts undermines the role of national courts as a network of EU courts. Also, its attachment to uniformity runs strongly against any claim that may be made by the EU to be evolving into a more mature legal order.

Two main arguments run against such a conclusion. First, the increasing number of preliminary refferences is due to the need of national courts to engage in dialog with the European Court. Thus, the increasing number of preliminary rulings can be interpreted not as an expression of distrust between the Court of Justice and national courts, but as an expression of success[56], of the good cooperation throughout time. National courts perceive this dialog as a fruitful one.

At the same time, one must not forget the objective reality that the number of member states has increased considerably, reaching 28, that the number of EU acts has increased and the complexity of the legal issues is higher than it was ten or twenty years ago. All of these factors have a great influence on the need for dialog through preliminary references.

Besides, as another author observed: "The increase in cases and increasing case backlog is argued to have led to a change in attitude on the part of the ECJ and it is now less willing to accept all references without question." [57]

Secondly, it is arguable if a more mature legal order implies an even greater independence in rendering judgements on EU law issues at a national level, greater than the possibility of dialog left at the discretion of the national courts, without endangering the uniform application of EU law in all member states.

In this respect, it can be noted that the preliminary ruling procedure inspired the introduction in the Romanian civil procedural law of the means provided by articles 519-521 of the Civil Procedural Code that allows a chamber of the High Court of Cassation and Justice, of the court of appeal or of the tribunal to ask the High Court of Cassation and Justice to give a preliminary judgment on a point of national law that is necessary for solving the pending dispute, if the point of law has not been the object of a ruling of the High Court. The court that refers the question must suspend the proceedings until it receives an answer from the High Court. The answer is binding for the court, from the moment it is given, as well as for the other national courts, from the moment it is published in the Oficial Journal of Romania.

Like the preliminary ruling procedure, this internal procedure is free of costs and it allows the parties to send written observations, but, unlike the preliminary ruling procedure, it entitles other national courts dealing with similar cases to suspend the proceedings until the preliminary decision is given.

2.4 Effect for the member states and their nationals

The authorities of a member state are under the obligation to take all necessary measures to ensure that EU law is observed and implemented correctly on their territory. Thus, in order to comply with preliminary rulings, the states may find themselves obliged to take administrative measures (for example: repayment of a pollution tax, with interest[58]) or legislative measures (changing the law that provides the pollution tax[59]) and even offer compensation for damages[60].

The preliminary ruling procedure allows for an indirect verification of the compatibility of national law with EU law[61]. Though the Court of Justice has stated in numerous occasions that it does not have jurisdiction to apply law in the main action[62], the compatibility can often be deduced without any reasonable doubt from the grounds of the ruling[63].

When a national court or administrative authority has given a decision which conflicts with a subsequent Court judgment, one effect can be the need to reopen or review the case, even if the decision is final.[64] One author observed that: "Legal certainty will prevent it being reopened unless four criteria are met: there is an administrative body that has the power to reopen the decision; the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance; that judgment is based on a misinterpretation of EU law and the court failed to refer; the person concerned complained to the

[55] Craig and de Búrca, 2011, 391-393. For a contrary oppinion, in favour of dialog, see Kombos, 2010, 145.
[56] Smit, Herzog, Campbell and Zagel, 2011, 45-46. Arnull, 2006, 100.
[57] Foster, 2009, 198.
[58] Judgment of 18 April 2013 in case C-565/11 Irimie, an answer to a preliminary question sent by a Romanian court, http://curia.europa.eu /en/content/juris/c2_juris.htm, last accesed on 5 March 2015.
[59] Judgment of 7 April 2011 in case C-402/09 Tatu led to the repelling of Government Ordinace no. 50/2008 by Law no. 9/2012, that established a new way to calculate the pollution tax on motor vehicles, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 5 March 2015.
[60] Arnull et al., 2006, 527.
[61] See Vaughan and Robertson, 2012, 2.412.
[62] For example, judgment of 21 January 1993 in case 188/91 Deutsche Shell/Hauptzollamt Hamburg-Harburg, paragraph 27, judgment of 3 March 1994 in joint cases C-332/92, C-333/92 and C-335/92 Eurico Italia and others/Ente Nazionale Risi, paragraph 19, judgment of 17 June 1999 in case C-295/97 Piaggio, paragraph 29, http://curia.europa.eu/en/content/juris/c2_juris.htm, last accesed on 5 March 2015.
[63] See Dollat, 2010, 390.
[64] Judgment of 13 January 2004 in case C-453/00 Kühne&Heitz, paragraphs 23-27.

administrative body immediately after becoming aware of that decision of the Court"[65]. The author also noted that these conditions are cumulative and restrictive and that there is no general obligation to reopen cases simply because they conflict with subsequent preliminary rulings.

As shown above, if member states do not take efficient measures, the European Commission may start the infringement procedure or private persons may file a motion in order to engage the state's responsibility for the way national courts and other internal authorities apply EU law.

For the nationals of the member states, the preliminary ruling procedure is an indirect way of acces to the Court of Justice, as the parties to the main action may ask judicial bodies to refer preliminary questions. The Court's jurisprudence gave powerful rights to individuals to use article 267 of the Treaty on the Functioning of EU, which has encouraged more litigation and more references to be made[66]. Thus, private persons can highlight different possibile interpretations of an EU act and put forward motives for declaring an EU act invalid[67]. This ensures a form of protection of individual rights, keeping in mind that individual acces by means of the direct action for annulment[68] is highly limited[69].

It has been pointed out that the Court's narrow interpretation of the availability of direct actions for private parties has caused them to raise such issues in front of national courts, asking for the referral of preliminary questions. In this respect, an important role is played by interest or pressure groups such as trading associations or unions that can present well-documented motions and make concerted attacks, often by group action[70]. For example, in Romania, in the last few years, there have been group actions, consumer actions and actions brought by the national institution with power to enforce consumer protection legislation, all in the field of unfair provisions in credit agreements, which have resulted in a few preliminary questions reffered to the Court of Justice regarding the interpretation of some provisions of Council Directive 93/13/CEE of 5 April 1993 on unfair terms in consumer contracts[71].

However, the Court indicated that the preliminary ruling procedure cannot be used to examine the validity of an EU act when the interested party could have, without any doubt, challenged it by virtue of a direct action in annulment.[72]

3. Conclusions

"It is hard to exaggerate the importance of the preliminary rulings procedure."[73] Its utility is probably best understood when dealing with the final product of the procedure: the Court of Justice's judgment on the interpretation or on the validity of an EU act.

The study approached the main issues of the effects of the preliminary rulings by analysing them with respect to the subject that observes the ruling, as well as the type of ruling: judgment or order, concerning either the interpretation or the validity of an EU act.

The result is a synthetic, but structured and comprehensive presentation of the theme, meant to be a useful instrument for practicioners, researchers and other persons interested in a concise material about specific issues on the preliminary ruling procedure, a vast topic, which may entail further research on subjects such as the effects of the preliminary ruling for non-member states[74], in relation to article 96 paragraph 1 letters e) and f) of the Rules of procedure of the Court of Justice or on comparative law regarding the obligation of national courts to suspend proceedings while the Court of Justice gives an order or a judgment on the preliminary question, correlating national procedural provisions with article 23 of the Protocol on the Statute of the Court of Justice of the European Union.

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[65] Chalmers, Davies and Monti, 2010, 171. See also Kaczorowska, 2009, 278-280, Leclerc, 2011, 190.

[66] Steiner and Woods, 2009, 223.

[67] As the Court stated, private persons asking national courts to send preliminary questions on validity of EU acts are not restricted by the time-limit or by the grounds set in article 263 of the Treaty on the Functioning of the European Union. See in this respect judgment of 12 December 1972 in cases 21 to 24/72 International Fruit Company and others/Produktschap voor Groenten en Fruit, paragraph 5 and judgment of 27 September 1983 in case 216/82 Universität Hamburg/Hauptzollamt Hamburg-Kehrwieder, paragraphs 5-12, http://curia.europa.eu/en/content/juris/c1_juris.htm, last accesed on 5 March 2015.

[68] Articles 263-264 of the Treaty on the Functioning of the European Union.

[69] Mathijsen, 2010, 144.

[70] Craig and de Búrca, 2011, 383-385.

[71] For example, case C-143/13 Matei, pending case C-110/14 Costea and removed cases C-47/11 S.C. Volksbank România S.A., C-571/11 S.C. Volksbank România S.A., C-108/12 S.C. Volksbank România S.A., C-123/12 S.C. Volksbank România S.A., C-236/12 S.C. Volksbank România S.A..

[72] Mathijsen, 2010, 147. See also Kaczorowska, 2009, 282-283 and judgment of 12 October 1978 in case 156/77 Commission/Belgium, paragraph 25.

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REDUCING ADMINISTRATIVE BURDENS AND INCREASING LEGAL CERTAINTY AND TRANSPARENCY OF BUSINESS - DIRECTIVE 2012/17/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 13 JUNE 2012 AMENDING COUNCIL DIRECTIVE 89/666/EEC AND DIRECTIVES 2005/56/EC AND 2009/101/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AS REGARDS THE INTERCONNECTION OF CENTRAL, COMMERCIAL AND COMPANIES REGISTERS

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Abstract

The Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012, modifies three important company law directives, and is introducing also a new business registers interconnection system (BRIS). As article 2 from the consolidated version of the Treaty on European Union provides[1] the Union has set itself as an objective, promotion of economic progress through an area without internal frontiers but we must observe that such an approach needs permanent cross-border access to specific legal regulations and formalities applicable to the performed operations in each Member State. This article aims to point the steps to be made to achieve the goal of the Directive 2012/17/EU underlining the measures to be taken in each Member State in the process of implementing it.

Keywords: *interconnection, administrative burdens, BRIS, fees, implementation levels.*

Introduction

Interconnection of companies registers and facilitation of the access to information from a national commercial register for any interested person, irrespective of its geographical location should represent an impossible to ignore objective at EU level and beyond, not only in considering a stable legal environment but also in considering the possibility of carrying out the activity in states other than their own.As remarked in other occasion[2], issues around the interconnection of business registers can be resumed in three categories[3] - failure in updating business information in the register of foreign branches, difficult cooperation between registers in cross-border merger procedures and difficult cross-border access to business information . As the European Parliament stated following the financial and economic crisis there is need to restore trust in the markets but whereas the fact that business registers are not interconnected may cause economic losses and problems not only for stakeholders or for the companies employees but also for the consumers and the public having in mind lack of transparency, efficiency and legal certainty[4].We shall examine the sections in the three company law directives need to be improved and, as earlier said, the calendar of the measures need to be taken to ensure that the aim of the Directive 2012/17/EU[5] is achieved.

1. Directive 89/666/EEC of 21 December 1989[6] concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State defines the list of documents and particulars that companies have to disclose in the register of their branch. The disclosure requirements concern the address and the activity of the branch;the company's place of registration and registration number;particulars of the company directors;accounting documents and information on the closing of the branch but without establishing a legal obligation for the registers to exchange data, often we can find ourselves in a situation when despite the striking –off of a company from the home register, its branches continue to

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[1] Treaty on European Union, Consolidated version, http://www. eur-lex.europa.eu

[2] G.Fierbinţeanu, "Publication procedures and communication made by commercial registers in cross-border commercial activities", 2013, cks.univnt.ro/uploads/cks_2013_articles

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[4] European Parliament resolution of 7 September 2010 on the interconnection of business registers, http://www.europarl.europa.eu

[5] OJ L 156, 16.06.2012

[6] OJ L 395, 30.12.1989

function and operate because the information about the striking - off has not reached the register where the brunch is registered.

The business register of the branch is not in a position to constantly monitor updating of the information on businesses so that is not in position to have information about any changes in the registered data on the foreign company (including its removal from the register) unless the company provides this information or a complaint is received. In this case, without effective means of enforcement, a significant number of companies do not comply about the data. Consequently, the register provides misleading information to the market so that the quality problem is under the question.

The new introduced article 5a) provides now that the register of the company shall, through the system of interconnection of registers, make available, without delay, the information on the opening and termination of any winding-up or insolvency proceedings of the company and on the striking-off of the company from the register, if this entails legal consequences in the Member State of the register of the company.This information will be received without delay by the register of the brunch so that at the end where a company has been dissolved or otherwise struck off the register, its branches are likewise struck off the register without undue delay.We must notice that the syntagma "without delay" is been used almost in every paragraph of article 5 a) as a sign of understanding the importance, at economic level especially, of the rapid exchange of information between registers.Also to be noticed is that the second sentence of paragraph 4 [7]shall not apply to branches of companies that have been struck off the register as a consequence of changes in the legal form of the company concerned, mergers, divisions, or cross-border transfers of its registered office.We condsider that an exchange of information is also necessary in this matter because any changing procedures concerning the company must be also registered at the brunch register ensuring the transparency of data .

2. Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005[8] on cross-border mergers of limited liability companies requires the registers to cooperate across borders without indicating the right channels of communication which could overcome difficulties as the language or the period of time alocated for notices between Member States. Many communications between the competent authorities are done via mail, and predominantly in the language of the issuing authority and this leads to a rather extended uncertainty for the involved companies regarding the final registration of the merger. Also, after a cross-border merger or transfer of registered office is registered by the business register of the country of destination, the company appears to exist in both Member States until it is removed from its former register. Creditors may be misled by the content of the register.Unfortunately such a transition period is unavoidable, but the lack of communication prolong this beyond the necessary time.

The Directive applies to mergers of limited liability companies:formed in accordance with the law of a Member State;with their registered office, central administration or principal place of business within the EU;if at least two of them are governed by the law of different Member States.As article 13 paragraph 2 provides, *"The registry for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before*".The Directive Directive 2012/17/EU modified article 13 paragraph 2 as follows "*The registry for the registration of the company resulting from the cross-border merger shall notify, through the system of interconnection of central, commercial and companies registers established in accordance with Article 4a(2) of Directive 2009/101/EC and without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before*"At the first reading not many changes were made, the difference is given only by the introduction of the communication procedure through the system of interconnection of central, commercial and companies registers.The explanation can be found in the fact that there was nothing else to improve on the original form of the article 13 the only problem being the absence of a clear mechanism offering a quick and reliable form of communication.

3. Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009[9] on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent responded to the need to disclose the basic documents of the companies so that third parties can have acces to information concerning companies, with accent on the persons auhorised to bind the company, and also to the copies of the compulsory acts sustaining registered

[7] article 5a, paragraph 4: Member States shall determine the procedure to be followed upon receipt of the information referred to in paragraphs 1 and 2. Such procedure shall ensure that, where a company has been dissolved or otherwise struck off the register, its branches are likewise struck off the register without undue delay.

[8] OJ L 310, 25.11.2005

[9] OJ L 258, 1.10.2009

operations.For a more business-friendly legal and fiscal environment it is not enough to have a frame alowing acces to the registration processes because companies or the large public need to search the register on a country-by-country basis not having a tool creating the posibility to acces

information in a centralized manner no matter where the register or the enquierer is situated.The new introduced article 4a) establishes the system of interconnection of registers and also a European central platform as a part of this construction so that the Member States shall ensure the interoperability of their registers within the system of interconnection of registers via the platform.

4. Time limits. Costs. Free availability of information As mentioned above, exchanging information is to be made "without delay"but the time limits are design in the article 2a) amending Directive 2009/101/EC so that national legislator can apreciate correctly the necessary changes to be made in the provision of the civil and commercial laws governing the activity of trade registers.According to those new provisions, Member States shall take the measures required to ensure that any changes in the documents are entered in the competent register and are disclosed, in accordance with Article 3(3) and (5), normally within 21 days from receipt of the complete documentation regarding those changes including, if applicable, the legality check as required under national law for entry in the file. Member States shall ensure that up-to-date information is made available and shall provide the information required for publication on the European e-Justice portal, with the observation that the Commission shall publish that information on the portal in all the official languages of the Union. The exchange of information between registers shall be free of charge and the fees charged for obtaining the documents through the system of interconnection of registers shall not exceed the administrative costs. Member States shall ensure that through the system of interconnection of registers will be available freee of charge the name and legal form of the company; the registered office of the company and the Member State where it is registered; the registration number of the company or any other further documents and particulars choosen by Member State.In regard of the funding of the system of interconnection of registers, it entails participation by the Union and by its Member States in the financing of that system. According to the principle 24 of the Directive 2012/17/EU the Member States should bear the financial burden of adjusting their domestic registers to that system, while the platform and the portal serving as the European electronic access point should be funded from an appropriate budget line in the general budget of the Union. Maintenance and functioning of the platform shall be financed from the general budget of the Union and may be co-financed by fees for access to the system of interconnection of registers charged to its individual users(article 4d inserted in Directive 2009/101/EC**).** By means of delegated acts and in accordance with article 13a, article 4d gives the power to the the Commission to adopt rules on whether to co-finance the platform by charging fees, and, in that case, the amount of the fees charged to individual user.A delegated act adopted in the conditions of article 4d, shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object.

5. BRIS Project The scope of the new system, Business Registers Interconnection System (BRIS), is to increase the confidence in the European Single Market, to ensure a safer business environment for consumers and also for business partners, and to provide a higher legal certainty regarding the stored data in the trade registers.The BRIS project represents the convergent action of DG MARKT, DG JUST and DIGIT and covers European Central Platform (ECP), interconnection of the domestic business registers with this ECP, and the connection of the ECP with the e-Justice Portal that will become the European access point for searching information on companies in the interconnected business registers. The role of each of the components is as follows: European Central Platform will organize the traffic between the e-Justice Portal and the domestic business registers, data about company is indexed in ECP which maintains the relationships between companies and their foreign branches in order to send notifications only to those domestic business registers that are concerned, and to facilitate the display in the search results of data on a company's foreign branches and at last, on the e-Justice Portal will be made the payment for the information that is not free of charge. The three systems need to colaborate so that the e-Justice portal should offer the search module in order to disclose information, and provide access to payment facilities, facilitating mechanism will enable the communication between the e-Justice portal and the BRs, and between the BRs and the domestic BR systems should store and provide access to domestic information about registered companies and also are responsible to act on notifications received from other national business registers.BRIS system should cover several business needs: the need for a search facility allowing users to search in the whole of the EU and the need for a mechanism to interconnect the business registers of the Member States allowing them to inform each other in case of cross-border company mergers and of companies being striked of. In order to make the communication and the research easier and clear for all interested parties, new paragraphs were added in article 1 of the Directive 89/666/EEC with the idea of finding a common point of identification of the company so that the article stipulates that Member

States shall ensure that branches have a unique identifier allowing them to be unequivocally identified in communication between registers through the system of interconnection.The elements to be comprised in the structure of that unique identifier shall make it possible to identify the Member State of the register, the domestic register of origin and the branch number in that register, and, where appropriate, features to avoid identification errors.

6. Administrative burdens Over 112 000 branches registered in EEA countries belong to companies registered in different countries. In the field of the Cross-Border Mergers Directive, the United Kingdom reported four inbound and four outbound mergers in 2008. In 2009, one inbound and eight outbound mergers took place and so far in 2010 there have been six and seven respectively. In Estonia the figures are three inbound and one outbound in 2008, four and five in 2009 and one and none so far in 2010.[10] In some calculations, the cost of disclosure of accounting documents of the company of the branch was estimated at EUR 304 million a year and disclosure of information on the address, activities, trade register, name and legal form of the branch was estimated at EUR 43 million. Improving interoperability between countries within these areas will create the possibility of reducing not only these administrative costs but also waiting time . In cases of crossborder mergers where business registers do not currently communicate directly, the companies will still need to notify the former register themselves. Estimates suggest that this costs between EUR 8 and EUR 1 200 each time, out of which around 75 % are considered to be due to administrative burdens. In cases where the former register is notified by the new register, the lack of agreement on and standardisation of the technical details of the notification result in more time being spent on the registration on the part of the registers. The exact figure will depend on the extent of uncertainties in each individual case and the need for clarifications and translations.[11]

7. Implementing the Directive – stages at EU level

The Directive 2012/17/EU will be implemented in diferent stages:by 7 July 2014, Member States need to transpose into national law those provisions that are not impacted by the specification of technical details for the system and by 7 July 2015 the Commission will have to adopt the implementing acts including the technical specifications for BRIS. No later than two years after the adoption of the implementing acts Member States will have to ensure interoperability of the business registers via the central platform and transpose into national law the remaining provisions (as per Art. 5(2) of the directive). As can be observed there are two transposition levels so that Member States will have to communicate twice the national law provisions. Through implementing acts, the Commission shall adopt, according to article 4 c inserted in the Directive 2009/101/EC the technical specification defining the methods of communication by electronic means for the purpose of the system of interconnection of registers; technical specification of the communication protocols;the technical measures ensuring the minimum information technology security standards for communication and distribution of information ;the technical specification defining the methods of exchange of information between the register of the company and the register of the branch ; the detailed list of data to be transmitted for the purpose of exchange of information between registers, as referred to in Article 3d of the Directive, in Article 5a of Directive 89/666/EEC, and in Article 13 of Directive 2005/56/EC;the technical specification defining the structure of the standard message format for the purpose of the exchange of information between the registers, the platform and the portal;the technical specification defining the set of the data necessary for the platform to perform its functions as well as the method of storage, use and protection of such data;the technical specification defining the structure and use of the unique identifier for communication between registers; the specification defining the technical methods of operation of the system of interconnection of registers as regards the distribution and exchange of information, and the specification defining the information technology services, provided by the platform, ensuring the delivery of messages in the relevant language version; the harmonised criteria for the search service provided by the portal; the payment modalities; the technical conditions of availability of services provided by the system of interconnection of registers; the procedure and technical requirements for the connection of the optional access points to the platform.

Conclusions

"The significance of the data held in different business registers can vary and that this can in turn have legal consequences, not only for companies but also for their workers and for consumers, that may vary from Member State to Member State" stated the European Parliament in the resolution of 7 September 2010 on the interconnection of business registers. As the Internal Market and Services Commissioner

[10] Commission staff working document impact assessment - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers, 2010, http://ec.europa.eu/internal_market/company/docs/business_registers

[11] Commission staff working document impact assessment - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies registers, 2011

Charlie McCreevy declared when the public consultation on identifying better ways to cooperate between business registers was released by the European Commision: " Improving access to up-to-date and official information on companies for creditors, business partners and consumers could serve a means to restore confidence in the markets. Business registers play an important role in ensuring transparency and legal certainty in Europe."[12]

The steps reffered to in the Green paper elaborated by the Commission in 2009[13] were taken.All Member States shall participate in the decisional process having reliable information on companies, in all official languages of the EU, in a centralized manner and at the same quality of service across the EU. We can only hope that strengthen cooperation in the case of cross-border procedures, such as cross-border mergers, seat transfers or insolvency proceedings, interconnection of business registers and cross-border access by electronic means to business information will ensure an appropriate degree of transparency and legal certainty in the markets all over the EU and will reduce administrative burdens from the shoulders of european contributors.

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WASTE ELECTRICAL AND ELECTRONIC EQUIPMENT FRAMEWORK LEGISLATION AND MANAGEMENT SYSTEM IN EUROPE

Maria-Loredana NICOLESCU*

Abstract

Waste electrical and electronic equipment (WEEE) has become one of the most significant waste streams due to the increasing amounts and environmental impact. It is very important to know how to manage the WEEE quantities, what laws are in force in this field and what policies are available to apply.

This paper presents the e-waste legislation and management system from some of the European countries, as examples. The hierarchy of the management systems is presented according to the framework Directive and legislative approaches. There are also shown the "take-back" policy, the "polluter pays" principle and the "extended producer responsibility" principle. The goal of this research is to highlight the WEEE framework legislation in Europe and to present the EU policies for the WEEE management system.

Keywords: *waste electrical and electronic equipment, legislation, the "polluter pays" principle, take-back policy, the principle of extended producer responsibility.*

1. Introduction

WEEE management is an important issue, taking into account the increase of WEEE quantity from the last years, the opportunities for recovery of materials from recycling and not least the harmful effects on the environment and human health. Due to the various hazardous substances contained in waste electrical and electronic equipment, the risk on human health and environment increases if WEEE treatment is not done properly. The restrictions regarding the use of certain hazardous substances in electrical and electronic equipment are covered by the European Directive 2002/95/EC (RoHS Directive) recast as the 2011/65/EU Directive. The Directive 2002/96/EC was replaced by Directive 2012/19/EU, signed on 4th of July, 2012, in Strasbourg, which introduced higher WEEE collection targets. The new Ditrective was not fully transposed into the national legislation of each EU Member State, so the collection rate remains 4 kg/inhabitant/year as envisaged in the old Directive.

The Directive 2012/19/EU defines electrical and electronic equipment or "EEE" as "equipment which is dependent on electric currents or electromagnetic fields in order to work properly and equipment for the generation, transfer and measurement of such currents and fields and designed for use with a voltage rating not exceeding 1000 volts for alternating current and 1500 volts for direct current".

The categories of electrical and electronic waste, covered by 2012/19/EU Directive, are showed in table 1:

Table 1. Categories of electrical and electronic equipment (EEE)

Category 1	Large household appliances
Category 2	Small household appliances
Category 3	IT and telecommunications equipment
Category 4	Consumer equipment and photovoltaic panels
Category 5	Lighting equipment
Category 6	Electrical and electronic tools (with the exception of large-scale stationary industrial tools),
Category 7	Toys, leisure and sports equipment
Category 8	Medical devices (with the exception of all implanted and infected products)
Category 9	Monitoring and control instruments
Category 10	Automatic dispensers

Source: 2012/19/EU Directive, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:197:0038:0071:en:PDF

Waste electrical and electronic equipment (WEEE) is a waste type consisting of any electrical or

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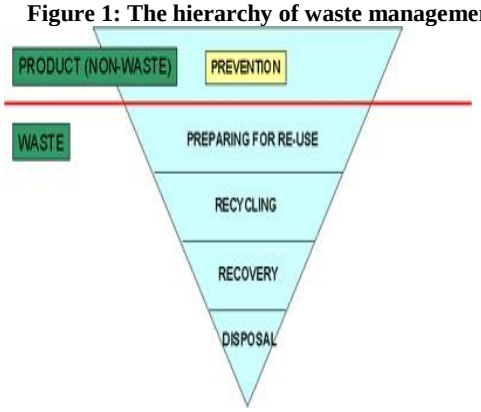
electronic device, broken or abandoned.[1] According to OECD, *electronic waste*, also known as *e-waste* is "any device that uses a power source, that has reached end of life". Managing waste electrical and electronic equipment needs a specialized collection, transport, treatment and final disposal system.[2]

2. Legislation and WEEE management system in Europe

In the last two decades, the number of environmental policies and legislation underwent substantial changes regarding the environment and its protection. One of the important points taking into consideration is related to the product, in order to reduce its environmental impact resulting from the use throughout its entire life cycle - from design, production, consumption, up to the end of life.[3] These policies and laws are almost all based on the principle of extended producer responsibility (EPR). EPR concept has become a principle of environmental policy established in many countries. EPR is a method of integrating the principles of sustainable development in international trade, based on international environmental law, a principle known as "Polluter Pays Principle".[4]

In Europe there is a framework directive in the field of waste, Directive 2008/98/EC which introduced the "polluter pays" principle, this being a guiding principle at European and international level. In this directive has been introduced the extended producer responsibility, representing "one of the means to support the design and production of goods which take into full account and facilitate the efficient use of resources throughout their life cycle, including their repair, reuse, disassembly and recycling without compromising the free movement of goods in the internal market". Directive 2008/98/EC established the concepts and definitions of waste management, recycling and recovery being basic elements. This explains the stage where waste ceases to be waste and become secondary raw materials, the so called criterion of end-of-waste. The Directive lays down some basic principles in waste management: it is assumed that the waste is managed without endangering human health or harming the environment and in particular without risk to water, air, soil, plants or animals, without causing a nuisance through noise or odors, and without adversely affecting the countryside or places of special interest. The legislation and the policy of the EU Member States apply the following hierarchy of waste management in represented in Figure 1[5]:

Figure 1: The hierarchy of waste management



Source: http://ec.europa.eu/environment/waste/framework/index.htm

According to the EU strategy, the waste management systems hierarchy is based on minimization, reuse, recycling, recovery and, in the second stage, on the elimination.[6]

Traditionally, in the EU and elsewhere, a legislative approach on environmental issues was one of "command and control", and at this stage the emphasis is on extended producer responsibility, those who produce the goods being responsible for environmental impact throughout the entire life cycle, by recycling, reuse and disposal.[7] The policy instruments of the extended producer responsibility include various types of taxes such as advance recycling fee, delivering the product at the end of its life cycle for recycling ("take-back policy"), raw material costs and combinations of these instruments. Other policies include "pay-as-you-throw", waste

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Darby L., Obara L., "Household recycling behaviour and attitudes towards the disposal of small electrical and electronic equipment", Resources, Conservation and Recycling 44 (2005): 17–35.

collection taxes and a ban on waste storages.[8] Holland was the first country in Europe which adopted and fully implemented the take-back policy. The Dutch approach involves a scheme of allocating the cost. It is based on the national system of collection points and has units with the purpose of dismantling equipment at their end of life.[9]

More and more countries in Europe are implementing "take-back" laws which require the manufacturer to take the used products at the end of their life.[10] Currently, the attention is focused on so-called "brown goods" (computers, mobile phones, etc.), but also on "white goods" (refrigerators, air conditioners, etc.), cars and batteries that require handling and special treatment.[11]

"Extended Producer Responsibility" - EPR is an indirect legislative policy of the European Commission designed to protect the environment through the WEEE management.[12] The Organization for Economic Cooperation and Development (OECD)[13] has defined EPR as "an environmental policy approach in which a producer's responsibility is extended to the post-consumer stage of the product life cycle, including the final step of eliminating them". EPR was also defined by Lindhqvist[14] as "... a matter of policy to promote a product's improvements through its full lifecycle through extending the product manufacturer's responsibilities regarding different parts of the product's life cycle, and especially at the return of the equipment, the recovery and final disposal of the product".[15] Due to environmental concerns, the legislation on extended producer responsibility includes reference to the entire supply chain, with manufacturers, importers and retailers, being responsible for the collection and recovery of end-of-life (EOL) products.[16] The main aims of extended producer responsibility are[17]:

- the prevention of waste generation and their reduction
- the reuse of products (equipment)
- the increased use of recycled materials in production
- the reduction of the consumption of natural resources
- the inclusion of the environmental costs in product prices
- the recovery of the energy when incineration is considered appropriate.

EPR was first established in Germany in 1991 by the passage inserted in the "Ordinance on the avoidance of packaging waste".[18] EPR aimed at motivating producers on environmental issues of "design" as much as possible at the source, the design of the product to reduce the cost of waste management. An example is to design a product that is energetically efficient during use, that generates less waste and is less dangerous, and especially at the end of its life there are facilitated the recovery, reuse and recycling.[19] In EPR, equipment manufacturers can outsource recycling and the global deficit is charged to the consumer when buying a new product.[20] EPR policy is based on the "polluter pays" and it is characterized by shifting responsibility away from municipalities, including the treatment and disposal costs in the product price and taking into consideration the environmental impact.[21]

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[21] Widmer R., Oswald-Krapf H., Sinha-Khetriwal D., Schnellmann M., Boeni H., „Global perspectives on e-waste", Environmental Impact Assessment Review 25 (2005): 436-458.

In Finland, it was developed an awareness project "AWARE-NESS" (WEEE Advanced Recovery and Recycling Management System), project launched in the summer of 2003, which was focused on the WEEE Directive's influences on producers. The aim was to assist companies to establish a consensus on the details of implementation of the WEEE Directive. In addition, the project aims to initiate cooperation between companies regarding different product categories and choose the optimal recycling processes of obsolete products. Awareness project comprises two sub-projects named SELMA and RecISys. Selma focused on management issues regarding operational recycling and developed communication activities between national authorities and companies. The main objective of ReclSys was to develop an online information system. Through this information system is possible the control of recycling processes, the reporting towards the authorities, the customer information regarding the entire recycling industry. In the Finnish system, institutions may contact the participating companies in the business of WEEE recovery to remove and retrieve equipment from the designated reception places. Most electronics retailers also take back the old equipment in association with buying a new one. The regional waste management companies also receive electronic waste. Most of the times, there is a fee paid to lift the waste and it varies between 1-36 euros depending on the category of the equipment. Yla-Mella et al.[22] evaluated the take-back and the recycling of WEEE system in Finland and they noticed that there are more business operators involved in the recovery of WEEE, but only a few of them deal with collected elements for recovery. The WEEE are normally collected and pre-treated by some operators before there are being transported elsewhere for treatment and effective use of materials.

Legislation on e-waste management was introduced into Switzerland in 1998 when the Ordinance on "The Return, the Taking Back and the Disposal of Electrical and Electronic Appliances" (ORDEA) came into force.[23] Switzerland has two separate WEEE recycling systems operated by two Producer Responsibility Organizations: the SWICO (The Swiss Association for Information, Communication and Organizational Technology) Recycling Guarantee and the S.EN.S (Stiftung Entsorgung Schweiz) System. SWICO manages "brown goods" namely electronic equipment such as computers, TVs, radio and others, while S.EN.S handles "white goods" such as washing machines, refrigerators, ovens, etc.[24] The SWICO Recycling Guarantee was created in 1993 by the SWICO Association of manufacturers and importers of office electronics and IT equipment in Switzerland. In 1994, when SWICO came into force, only electronic and IT equipment were covered. In the next years, were included further categories such as mobile telephone, equipment used in the graphics industry, telephones and telephone switchboard systems, consumer electronics, as well as dental equipment.[25] SWICO is a nonprofit company organized by industry with over 400 member companies.[26] Participation was originally voluntary, but it was mandated by a national ordinance in 1998.[27] In the Swiss system, the producers have full responsibility of the implementation and operation, covering the entire spectrum of WEEE, and the entire system is financed through recycling fees[28]. The retailers, the manufacturers and the importers must take-back their equipment free of charge and manage it in "an environmentally tolerable way".[29] Until January 2002, consumers had to pay a fee to voluntary

[22] Yla-Mella Y., Pongracz E., Keiski R.L., "Recovery of waste electrical and electronic Equipment (WEEE) in Finland", Proceedings of the waste minimization and resource use optimization conference, June 10, 2004, Oulu, Finland (2004):83–92, http://www.oulu.fi/resopt/wasmin/ylamella.pdf.

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recycle of their electronics through the SWICO system. Since 2002, the consumers were able to return their "end of life" electronics free of charge as the free system came into force.[30] Swiss Foundation for Waste Management (S.EN.S) was established in 1990 as a non-profit organization that operates with recover solutions from manufacturers, importers and retailers, having as initial work field the recycling of refrigerators and freezers. Today, S.EN.S is responsible for household appliances, construction, gardening, electrical and electronic toys, lighting equipment and so on. SWICO and S.EN.S. established the take-back policy and the recycling system financed by advanced recycling fees (ARF), the fee being paid by the consumer when he buys the electrical and electronic equipment (EEE). They both created a regulation that outlines the prerequisites for the recycling companies to be commissioned for either of the systems. In 2002, the overall recovery of IT equipment was estimated at 60–70% in Switzerland[31]. By the effort of these systems, about 75,000 tonnes of electrical and electronic devices were collected, sorted and dismantled and subsequently treated in Switzerland in 2004[32] while about 68,000 tonnes were collected in 2003[33]. Sinha- Khetriwal et al. (2005) observed that Switzerland was the first country in the world that established a formal system to manage e-waste.

In several European countries, the laws of the waste electrical and electronic equipment are differentiated by the responsibility belonging to the manufacturer/importer or local governments as the Khetriwal Deepali Sinha, Philipp Kraeuchi and Rolf Widmer presented in their paper "Producer Responsibility for e-waste management: Key Issues for Consideration e Learning from the Swiss experience ", Journal of Environmental management xx, 2007: 1-13[34]:

- In Switzerland came into force in July 1998, the "Ordinance on the return, take back and disposal of electrical and electronic equipment," the manufacturer/importer being responsible;

- In Denmark, since December 1999, it was imposed the "Statutory Order from the Ministry of Environment and Energy no. 1067" with the responsibility of local government;

- Netherlands must comply since January 1999 the disposal under the "White and brown Decree", the responsibility belonging to the manufacturer/importer

- Norway has signed since July 1999, the "Regulation of electrical and electronic discarded products", the manufacturer/importer being responsible for WEEE management;

- Belgium signed in March 2001 the "Environmental policy agreements on obligations to waste electrical and electronic equipment take-back. In this case the manufacturer/importer is responsible for the management of WEEE;

- In Sweden is in force since July 2002, the responsibility of manufacturer by Ordinance of electrical and electronic products (SFS 2000:208);

- Germany follows since March 2005 "The law governing the sale, the return and the environmental-friendly disposal of electrical and electronic equipment (Law ElektroG)" with the responsibility of the manufacturer/importer.

European legislation on waste electrical and electronic equipment (WEEE) refers to[35]:

- Directive 2012/19/EU of the European Parliament and of the Council of 04 July 2012 on waste electrical and electronic equipment (WEEE);
- Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE). Consolidated version;
- Directive 2003/108/EC of the European Parliament and of the Council of 8 December 2003 amending Directive 2002/96/EC on waste electrical and electronic equipment (WEEE);
- Directive 2008/34/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2002/96/EC on waste electrical and electronic equipment (WEEE).

Secondary legislation on WEEE refers to: (http://ec.europa.eu/environment/waste/weee/legis_en.htm):

- Commission Decision 2004/249/EC of 11 March 2004 concerning a questionnaire for Member States reports on the implementation of Directive 2002/96/EC of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE);
- Commission Decision 2005/369/EC of 3 May 2005 laying down rules for monitoring compliance of Member States and establishing data formats for the purposes of Directive 2002/96/EC of the European Parliament and of the Council on waste electrical and

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[34] Sinha Khetriwal D., Kraeuchi P., Widmer R., "Producer responsibility for e-waste management: Key issues for consideration-Learning from the Swiss experience", Journal of Environmental Management xx (2007): 1-13.

[35] European Comission, Environment, Waste electrical and electronic equipment (WEEE), accessed March 15, 2014, http://ec.europa.eu/environment/waste/weee/legis_en.htm.

electronic equipment (notified under document number C(2005) 1355);

- Council Decision 2004/312/EC and Council Decision 2004/486/EC, as well as acts related to the accession of new Member States, provide for some derogations, limited in time, as concerns the targets set by Directive 2002/96/EC (WEEE).

Regarding various substances used at electrical and electronic equipments production, there is Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment. On the other hand, WEEE recycling provides considerable opportunities regarding raw materials available on the market. EU legislation promotes the collection and recycling of WEEE in accordance with 2002/96/EC WEEE Directive. The legislation presumes the creation of some collection schemes where consumers give used equipment, without charge. The purpose of these systems is to increase recycling and reuse of such products. Currently, a third of EU WEEE compliance schemes is reported by the compliance systems such as they were separately collected and properly managed, the WEEE being[36]:

1) collected by the unregistered businesses and treated properly

2) collected by the unregistered businesses and treated improperly or even illegally exported abroad

3) disposed as part of the residual waste (for example, in landfills or incinerators).

The European Commission has revised the WEEE Directive, in order to increase the amount of collected and treated WEEE, to reduce waste and to give to the Member States the tools to fight against illegal export of waste more effectively. Reforming the 2002/96/EC Directive ended with the signing of the new Directive, 2012/19/EU Directive, on 4th of July 2012 at Strasbourg, which introduces higher collection target of WEEE. Until the total transposition of this Directive into the national law of each Member State, the current collection rate of 4 kg/inhabitant remains in force, following that, at the middle of 2016, the minimum collection rate being 45%, calculated based on the total weight of WEEE collected in one year, expressed as a percentage of the average weight of EEE placed on the market in the three preceding years.[37] In the second stage of the Directive, starting from 2019, the minimum collection rate to be achieved is 65% of the annual average weight of EEE put on the market in the three previous years in each Member State or, alternatively, 85% of generated WEEE in the respective state territory.[38] Norway, Sweden, Denmark, along with Italy, Ireland, Belgium, Luxembourg, Germany, Finland and Austria recorded the highest annual WEEE rate collection, over 8%, according to the European statistics (Eurostat)[39] sources, reporting for 2010, table 2.

Table 2. WEEE collection rate (kg per capita) in Europe (2010)

Country	2010
Norway	22,042
Sweden	17,215
Denmark	14,949
Italy	9,826
Ireland	9,743
Belgium	9,666
Luxembourg	9,514
Germany	9,502
Finland	9,484
Austria	8,879
Netherlands	7,711
United Kingdom	7,637
France	6,695
Bulgaria	6,092
Czech Republic	5,059
Iceland	4,996
Portugal	4,414
Slovenia	4,234
Estonia	4,228
Greece	4,172
Slovakia	4,065
Hungary	4,052
Malta	3,703
Spain	3,394
Cyprus	3,145
Poland	2,94
Lithuania	2,882
Latvia	2,044
Romania	1,296

Source: http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do

For 2011, according to table 3, the highest annual collection rates are registered in Norway, Sweden and

[36] EU WEEE compliance schemes, accessed May, 5, 2014, http://epp.eurostat.ec.europa.eu/portal/page/portal/waste/key_waste_streams/waste_electrical_electronic_equipment_weee.

[37] Journal of the European Union, Directive 2012/19/EU of the European Parliament and of the council of 4 July 2012 on waste electrical and electronic equipment (WEEE), (recast), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:197:0038:0071:en:PDF, accessed on February, 25th, 2015.

[38] Ecotic Press, accessed accessed March 15, 2014, www.ecotic.ro.

[39] European statistics, accessed February, 10, 2015, http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do.

Denmark. The last places are occupied by Latvia and Romania, considering the statistic reports for Eurostat.

Table 3. WEEE collection rate (kg per capita) in Europe (2011)

Country	2011
Norway	22,173
Sweden	18,687
Denmark	15,137
Belgium	10,408
Finland	9,745
Luxembourg	9,616
Italy	9,171
Austria	8,993
Germany	8,683
Ireland	8,658
United Kingdom	8,176
Netherlands	7,919
France	7,219
Bulgaria	5,504
Portugal	5,283
Czech Republic	5,282
Estonia	4,983
Slovenia	4,552
Slovakia	4,372
Liechtenstein	4,353
Croatia	4,09
Lithuania	3,908
Greece	3,808
Malta	3,757
Poland	3,72
Hungary	3,716
Spain	3,292
Latvia	2,263
Romania	1,043

Source: http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do

A similar situation is found in table 4 which contains the reported WEEE collection rate for 2012. The same countries occupy the first three places and the last two places.

Table 4. WEEE collection rate (kg per capita) in Europe (2012)

Country	2012
Norway	20,903
Sweden	17,713
Denmark	13,628
Belgium	10,465
Finland	9,784
Luxembourg	9,435
Austria	9,182
Ireland	8,977
Germany	8,588
Italy	8,354
United Kingdom	7,906
Netherlands	7,382
France	7,191
Bulgaria	5,26
Czech Republic	5,108
Lithuania	4,772
Slovenia	4,584
Poland	4,549
Hungary	4,462
Slovakia	4,192
Estonia	4,132
Liechtenstein	3,812
Croatia	3,792
Portugal	3,786
Malta	3,59
Spain	3,378
Greece	3,357
Latvia	2,307
Romania	1,151

Source: http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do

The current WEEE collection rate of 4 kg/capita/year from private households, as universal rate, does not reflect the economy of each individual Member State and therefore lead to sub-optimal targets for some countries and too ambitious for others.[40]

For example, Romania, like other countries from Central and Eastern Europe, will benefit from a transition period, translated by creating, in the first stage between 2016-2019, a collection rate of 40- 45% and delaying the achievement of the collection rate of 65% (applicable in the EU starting with 2019) until a date decided by the every Member State, but not later than 2021.[41]

The 2012/19/EU Directive provides to the EU Member States the necessary tools to combat illegal waste export more effectively. The illegal WEEE shipments disguised in legal shipments of used equipment against the EU rules of waste treatment is a serious problem. The new Directive requires to the

[40] ST17367 Proposal for a directive of the European Parliament and the EU Council on waste electrical and electronic equipment (WEEE), Brussels, December 8th, 2008.

[41] Ecotic, accessed March 15, 2014, www.ecotic.ro, http://www.ecotic.ro/uploads/original/8d4b99097775110adebcd6b4c26f50d8934d3cb7. pdf.

exporters to test and provide documents for such transfers. An improvement is the harmonization of national registration and reporting under the Directive. Member States registers for electrical and electronic equipment producers will be integrated more closely. Administrative burden is expected to be significantly reduced.[42]

3. Conclusions

The changes in European legislation regarding waste electrical and electronic equipment have as goal the alignment of Member States national legislation in a common objective and also accelerate his achievement. EU waste policy has evolved in the last 30 years passing through a series of action plans for environment and legislative framework that aims to reduce the negative environmental and health impact and create an efficient economy in terms of resources and energy.[43]

There are still countries in Europe that are not complying the 4 kilograms/capita/year collection target. As the new Directive introduces higher targets, it should be taking into consideration the solutions for this problem, may be for a more efficient WEEE management.

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CONSIDERATIONS ON POLITICAL PARTIES

Erhard NICULESCU[*]

Abstract

Political parties are the engine of social life, without which citizens would not be able to express political will. According to the law of political parties, they fulfill a public mission guaranteed by the Constitution. That is why, considering the subject very current, we considered it important to analyze in this study, in the notion of political pluralism: the concept of political party but also its constitutional dimension. To this end, the study shows the view of the doctrine combined with the jurisprudence of the Constitutional Court.

Keywords: *Constitution, political party pluralism, citizen, jurisprudence.*

1. Introduction

Political parties have had an overwhelming role in the modernization of political life[1]. Strictly, parties are more than a century and a half old[2]. According to Giovanni Sartori relationship between citizens and parties is defined as: "citizens in Western democracies are represented by the parties[3]". It is stated that the term *party* was used to designate factions that divided the ancient cities and clans of the Middle Ages and clubs of deputies from the revolutionary assemblies and committees which prepared the census election in constitutional monarchies[4]. In the U.K. political parties emerged in the form of affinity groups in Parliament, associated with networks of relations in the country, groups that divided in terms of governance in fact[5].

Therefore, we explain further, what the political parties are, combining doctrine, case law and the jurisprudence of the Constitutional Court of Romania. As rightly pointed out in doctrine, the concept of political party allows the correct interpretation of art. 8 of the Constitution in the sense that political parties contribute to defining and expressing the political will of the citizens[6]. We speak of this view of the special relationship that exists between the state and political parties. State expresses the community, while political parties express ideologies and interests of social groups that coexist within the nation[7].

According to Dan Claudiu Dănişor there are two phases of the approach of defining political party[8]. A first phase insists on doctrinal element of the party and its function in the state or its base class. A second phase emphasizes more on the institutional element of the political party.

As far as we are concerned, we understand the parties as *associations*, social groups. Social groups are of two kinds: some voluntary as for example: companies and associations in general, whose role is so great today; others are natural, such as primitive tribe and clan which are naturally constituted, as was the Roman *gens*, like family, as are the nations today[9].

According to the jurisprudence of the Constitutional Court of Romania[10] in the sense of the constitutional text to which it is devoted, the *right of association* is a recognized prerogative of the citizen, whose exploitation is the expression of conscious and free will. The Court shows that association occurs by consideration of the common reasons that close associates and ensures communication between them, ideological or professional etc.; is essential the existence of a system of common values and interests as a premise and some final common goals. In addition, the argument held by the Court that: "the option of association is based on the conviction that achieving the desired purpose is only possible due to the concerted action of a organized and structured community, therefore, logical and functional." The conclusion of the above highlighted decision is that "in a state of law is not possible to convert the right of association into an obligation."

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[1] Cristian Ionescu, *Compared Constitutional Law*, Ed.C.H.Beck, Bucharest, 2008, p. 25.

[2] Dan Claudiu Dănișor, *Constitutional Law and Political Institutions*, Ed.Europa, Craiova,1995, p. 93

[3] Giovani Sartori, *Representational Systems*, in International Encyclopedia of the Social Sciences, vol.13, 1968, p. 471.

[4] Dan Claudiu Dănișor, *op.cit.*, 1995, p. 93.

[5] *Constitutional documents of the United Kingdom of Great Britain and Northern Ireland*, Translation and notes E.S.Tănăsescu, N. Pavel, Ed. All Beck, Bucharest, 2003, p. 15.

[6] Ioan Muraru, Elena Simina Tănăsescu, *Constitutional Law and Political Institutions*, edition 14, vol II, Ed. CH.Beck, Bucharest, 2013, p. 23.

[7] Dimitri Georges Lavroff, *Les partis politiques*, Presses Universitaires de France, Paris, 1970, p. 101.

[8] Dan Claudiu Dănișor, *op.cit.*, 1995, p. 93 and next.

[9] Mircea Djuvara, *General Theory of Law. Rational Law, Origins and Positive Law*, Ed. All Beck, București, 1999, p. 298.

[10] Decision of the Constitutional Court of Romania no. 83 from February 10, 2005, published in the Official Gazette no. 36 from April 27, 2005.

2. Content

2.1. Doctrinal and legal definitions of the political party

Dimitrie Gusti said that "*political party* is one of the most suggestive and interesting collective personalities (...) is a free association of citizens, permanently united by interests and common ideas of a general nature, association which seeks in a full public light to reach the power to govern in order to create a social ethical ideal."[11]

According to Vasile Gionea "*political party is an association of people* who are organized based on common interests or views to conquer the power of state with the vote of the people."[12] Lucreţiu Pătrăşcanu defined the party as "*a group of people who defend certain class interests and struggle for political power: the determinant element of its structure is the nature of the interests it represents and for whose satisfaction unfolds its entire activity. By their content, class interests determine also adherence or lack of adherence of a political body to a social or political system within which it works, as also all interests set their objectives pursued and the decide the means by which it intends to use to achieve them, in relation to the existing rules of law. "*[13]

In another opinion is stated: "*political parties and groupings contribute to the expression of suffrage. They are formed and carry out their work freely. They must respect the principles of national sovereignty and democracy.*"[14] A party consists of groups and individuals who perceive the need to orient a certain conception regarding government policy and are interested to guide the evolution of the global society in a certain direction.[15] One author states that, whatever definition we embrace a common denominator is detectable in the ability of political parties to form the means by which citizens exercise their right to participate in the current policy configuration and administration of sovereignty.[16]

From the definitions of the political parties highlighted so far, stand off some features that once understood, will help us to deepen the concept of political party:

- political parties are associations or permanent groups of individuals united freely by common political beliefs and ideological affinities;

- political party is a legal entity (moral) has an independent organization; has corporate assets; works to achieve a legitimate aim;

- by definition, the political party tends to assume responsibilities in the exercise of power;

- parties are distinguished from mere political clientele, factions, clans or camarilla; parties differ in their willingness to exercise power by pressure groups and clubs that do not participate in elections and parliamentary life, but pressure on parties, government etc.

- peculiarity of parties is to personify a trend, to make taking shape a conception of man and society and fight to conquer power by attracting voters;

- legally, the political party is an association and the incorporation and operation are subject to legal conditions set for any association; therefore any political party acquires legal personality from the moment of its registration.[17]

Political parties are defined in the Organic Law no. 14/2003: *"the political associations of Romanian citizens, with the right to vote, that participate freely in the exercise of their political purpose, fulfilling a public mission guaranteed by the Constitution"*. The law also expressly states that political parties are public legal entities. Previously, in the Law no.27 / 1996 parties were defined as *"associations of Romanian citizens with the right to vote* (....)". Also, in the old regulation there was the provision that: political parties are public legal entities. Tudor Drăganu considered that the expression "*political parties are public legal entity*" is a legal nonsense because what characterizes public legal entities is that they can issue binding acts by way of unilateral expressions of the will, attribute lacked by the political parties.[18]

In addition, we note that in the Romanian Constitution political parties are not defined, but only mentioned, in the context of political pluralism. From this point of view, as shown by an author, constituent legislature consciously avoided a normative constitutional definition (omnis definitio periculosa est) of the political parties from at least two reasons:

a.) If political parties are the expression of the separation between state and society in a democratic political system, it requires a separation of the state and the party, the party-state is characteristic of totalitarian regimes. Therefore, a definition at the constitutional level would present many inconveniences, both to legislate subsidiary and for the existence and functioning of political parties to form party system in Romania.

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[11] D. Gusti, *Political Party in Doctrines of the Political Parties*, Romanian Social Institute, National Culture, Bucharest, 1992, p. 4.

[12] Vasile Gionea, *The Role of Political Parties in the State of Law, in Political Parties*, the Center for Constitutional Law and Political Institutions, Public Company "Official Gazette", Bucharest, 1993, p. 5.

[13] Lucreţiu Pătrăşcanu, *Fundamental Problems of Romania*, Ed. Socec, Bucharest, 1944, p. 24.

apud Mihai Bădescu, *Constitutional Law and Political Institutions*, revised and enlarged second edition, V.I.S.. Print, Bucharest, 2002, pp. 286-287.

[14] Roger-Gerard Scwartzenberg, *Sociologie politique*, vol. I, Ed. Lumina Lex, Bucharest, 1997, p. 315.

[15] Daniel- Lewis Seiler, *La politique comparée*, Armand Colin, Paris, 1982, p. 94.

[16] Ioan Stanomir, *Constitutionalism and Post-communism. Comment of the Romanian Constitution*, Ed. Bucharest University , 2005, pp. 19-20.

[17] Mihai Bădescu, op.cit., 2002, pp. 287-288.

[18] Tudor Drăganu, *Political parties are moral entities of public law?*, Public Law Journal no. 2/1998, p. 1 and next.

b.) The political parties, even if they have a major influence on the exercise of state power as institutional structures, these remain in the civil society area, being the expression and even the most efficient carrier of pluralism (political) of society. Reason which does not justify a normative constitutional definition of the political parties.[19]

2.2. Political and constitutional dimension of the political party

As shown in doctrine, political parties are a product of representative liberal democracy.[20] The parties through their activities and actions, by the perception and exercise of the constitutional role these have, largely establish the constitutional regime and quality of life.[21] Constant presence of associative phenomenon for political purposes to impose and develop scientific interest especially in the matter of modern parties, maintain aimed to unravel concerns: the distinct nature and sustainable associations generally of the party type, in particular, based on their mode of formation; role and objectives of the parties, their concrete forms of involvement in the functioning of the state; factors that accredits parties as actors linking social body, coagulated state in the nation, the fundamental institution of the political system.[22]

Position and location of parties in contemporary Constitutions have a great importance and has multiple meanings and not coincidentally in the Romanian Constitution, the concept of political parties appears in the title *"General Principles"* and in the context of supreme values of the political pluralism and in two fundamental constitutional principles of the organization of the state power: democracy and sovereignty.[23] Therefore, political parties are directly related to fundamental rights. According to art. 21 of the German Constitution, "parties will participate in the development of the peoples' political will." In the revised Romanian Constitution, we expressly find the notion of party, political party or other forms of association in articles such as art. 8 paragraph (2); art. 40 paragraph (3), art. 73 paragraph (3) letter b; art. 146 letter k; art. 9; art. 62 paragraph (62); 64 paragraph (5) and so on. According to art. 73 paragraph (3) letter b) of the Constitution, the organic law regulates: *"organization, operation and financing of political parties*".

The constitutional role of the political parties in our country is approved by the provisions of art. 8 paragraph (2) which states that parties *contribute to defining and expressing the political will of the citizens*. If we interpret this text, we can conclude that the political will is the will of the citizens and the party is the mean that contributes to the defining and expressing of the political will. These goals of the parties to contribute *to defining and expressing the political will of the citizens,* determines otherwise and their constitutional status, i.e. the set of principles and rules governing the formation and the rights and obligations of the parties in a pluralistic and democratic state.[24]

According to the jurisprudence of the Constitutional Court, the parties do not have a direct mission in forming or expressing the political will; general will as political will results from the vote and is expressed by the representatives and by referendum, and by voting is elected the parliament and not the parties, parties having only the role of mediation between the electorate and parliament for its establishment by the voters.[25] The characterization of the party as fulfilling a public mission guaranteed by the Constitution is not contrary to art. 8 paragraph (2).[26] "Defining and expressing the political will is a mission, as it refers to citizens in general can only be public. Party is a public legal entity and its mission can only be public, since regards a public interest and pursues the formation of a general political will of which it depend representativeness and legitimacy necessary to implement its political program." [27]

Referring to another interpretation that we can make to art. 8 paragraph (2) of the Constitution, in accordance with the provision that *political parties contribute to expressing the political will of the citizens*, we show that we should corroborate with art. 30 on freedom of expression to shape this constitutional role of political parties. The Constitutional Court jurisprudence has established that "the party expressing the political will of citizens, according to art. 8 paragraph. (2) of the Constitution is the political realization of freedom of expression provided for in art. 30 of the Constitution. Otherwise, it would mean that this freedom is different as exercised by citizens in an associative structure or outside such a structure, which is contrary to art. 30 of the Constitution".[28]

According to the doctrine[29] the contribution that parties have in defining and expressing the political will of the citizens is not only a right of the parties but also an obligation. Therefore, the author shows that the law allows the Bucharest Court to declare the

[19] Varga Attila, Some aspects of the constitutionality of political parties, Journal of Public Law, Supplement on 2014, pp. 123-124.
[20] Mihai Bădescu, op.cit., 2002, p. 294.
[21] Varga Attila, op.cit., p. 122.
[22] Constantin Nica, Parties- Vital Actors of Democratic Political Systems, Public Law Journal, Supplement on 2014, pp.116-117).
[23] Varga Attila, op.cit., p. 123.
[24] I. Muraru, E.S. Tănăsescu, *Romanian Constitution. Comment on articles*, Ed. C.H. Beck, Bucharest, 2008, pp. 84-85).
[25] Romanian Constitutional Court Decision no. 46/1994, published in Official Gazette no. 131/1994.
[26] Constitutional Court Decision no. 35/1996, published in Official Gazette no. 75/1996.
[27] Romanian Constitutional Court Decision no. 35/1996 cited above.
[28] Romanian Constitutional Court Decision no. 59/2000, published in Official Gazette no. 418/2000.
[29] Claudiu, Dănişor, Pluralism and Political Parties under art. 8 of the Constitution of Romania, Pandectele Române Journal no.5 / 2008, p. 58.

termination of the party if it does not designate candidates, alone or in alliance in two successive legislative election campaigns, in at least 18 constituencies or did not have any general meeting for 5 years, according to article 47 of the law on political parties. These directives were judged by the Constitutional Court as being compliant with the Constitution, because the purpose of the party is defining for it and includes inter alia, the obligation to participate with candidates in the election, such an activity is the natural result of institutional expression of the political will of the members of that association, not to exercise that power entails the impossibility of the association to have the status of a political party.[30]

As shown unduly in the doctrine, there can be identified two dimensions of the relationship, connection of the parties with the fundamental rights: freedom of establishment and functioning of political parties and the purpose of political parties.[31] The earlier Organic Law of Political Parties, was Law no. 27/1996 which was amended by Law No.14 / 2003.[32]

Chronologically speaking, however, we mention that prior to 1989 there was no law on political parties, as it exists today. All modern type political systems in Romania were characterized in terms of institutional and functional plan – except the period between January 21, 1941 and August 23, 1944, by: existence of party pluralism and free competition between them (during 1865 – February 11, 1938 August 23, 1944 and December 30, 1947, December 28, 1989-present); the exclusively constitutional role of the single party (between December 1938 / January 1939- September 5, 1940, September 6, 1940 - January 20, 1941, December 30, 1947 – December 22, 1989).[33]

However, Decree Law No. 8 / 31.12.1989 on the registration and operation of political parties and public organizations in Romania[34] was the first bill after the 1989 Revolution which have paved the way for multi-party system, though it had only a number 5 articles. This bill is closely related to the Decree-Law no. 2 / 12.27.1989 regarding the establishment, organization and functioning of the National Salvation Front Council. In 1996 with the adoption of the political parties law no. 27/1996, Decree-Law No. 8 / 31.12.1989 was recalled. We can talk about at this time of reactivation of historical parties, such as the National Liberal Party or Christian Democratic National Peasants' Party or Romanian Social Democratic Party, which were registered at the Bucharest Court or the establishment of other new parties such as: Romanian Ecologist Party or Democratic Union of Hungarians in Romania etc.

The Decree-Law No. 8 / 31.12.1989 on the registration and operation of political parties and public organizations in Romania is expressly stipulated in article 1 that: "*In Romania the formation of political parties is free*". It also provides an exception that refers to fascist parties or those that spread ideas contrary to the constitutional and legal order in Romania. Therefore, this act does not state the definition of a political party but specifies that the registration and operation of political parties shall be made in accordance with the provisions of this Decree-Law.

The Political Parties Law no.27 / 1996 has established more stringent legal conditions, among other things, on the establishment of political parties, which led to a sensible reduction in their number.[35] On the other hand, art. 8 paragraph. (2) in conjunction with the appropriate constitutional text of freedom of association, political parties are introduced as topic of constitutional order.[36]

3. Conclusion

Political parties were born from the need to express human desires and aspirations outside of each of us, ordinary people, for a better life. Along the way, political parties have gained recognition and legal protection. As shown in this study, political parties have not only a political dimension but also constitutional protection, being the form of expression of political pluralism.

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[30] Constitutional Court Decision no. 147/1998, published in Official Gazette No. 85/1999.

[31] Varga Attila, op.cit., p. 123.

[32] Political Parties Law no. 27/1996, published in the Official Gazette no.87 / 1996, amended by Law no.14 / 2003, published in the Official Gazette Part I, no. 25/2003 and republished in the Official Gazette no. 347 / 12.05. 2014.

[33] Constantin Nica, op.cit.., p. 116.

[34] Decree-Law No. 8 / 31.12.1989 on the registration and operation of political parties and public organizations of Romania, published in Official Gazette no. 9 / 31.12.1989.

[35] Ioan Muraru, Elena Simina Tănăsescu, op.cit., 2013, p. 32.

[36] Ioan Stanomir, op.cit., 2005, p. 19.

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THE CURRENT TRENDS OF CONSTITUTIONALISATION OF THE NEW CIVIL CODE AND OF THE NEW CIVIL PROCEDURE CODE - SELECTIVE ASPECTS

Nicolae PAVEL[*]

Abstract

By this approach, the proposed study opens a complex and complete vision, but not exhaustive on: The current trends of constitutionalisation of the new Civil Code and of the new Civil Procedure Code. The subject of the scientific endeavor will be circumscribed to the scientific analysis of its parts, as follows: 1) Preamble. 2) The first judicial review of the constitutionality of the law established in the United States and in Romania – their consequences. 3) Reflection of the constitutional principles in the new Civil Code and the new Code of Civil Procedure. 4) Reflection of the dispositions of new Civil Code and of the new Code of Civil Procedure in the Constitutional Court decisions. 5) Compliance with Romanian Constitution of new Civil Code and of new Code of Civil Procedure - the current trends of constitutionalisation of the law. 6) Conclusions.

Keywords: *judicial review of the constitutionality of the law, constitutional review, new Civil Code, new Civil Procedure Code, constitutional provisions in civil mater, constitutional provisions in civil procedure, current trends of constitutionalization.*

1. Introduction

The subject of the scientific endeavor will be circumscribed to the scientific analysis of the four major parts of it: 1) The first judicial review of the constitutionality of the law established in the United States and in Romania - their consequences. 2) Reflection of constitutional principles in the new Civil Code and the new Code of Civil Procedure. 3) Reflection of the dispositions of new Civil Code and of the new Code of Civil Procedure in the Constitutional Court decisions. 4) Compliance with Romanian Constitution of new Civil Code and of new Code of Civil Procedure - the current trends of constitutionalisation of the law.

In our opinion, the area studied is important for the constitutional doctrine, for the doctrine of civil law and civil procedure law, the general theory of law, for the legislative work of drafting laws as well as for the legislative technique, because through this scientific approach, we aim to establish through a diachronic and selective approach a complex and complete reflection, albeit not exhaustive of the current sphere, under the form of the entire selective aspects, regarding the topic under discussion.

In order to fully but not exhaustively cover the field of study, after the prerequisite explanations, the selective examination of the first judicial review of the constitutionality of the law first done in the United States and in Romania will follow, having as a consequence the establishing of the jurisprudential base of this review in the two countries. I have also selectively analyzed the diachronic evolution of this review in the United States of America and Romania.

This topic regarding "the current trends of constitutionalisation of the new Civil Code and of the new Civil Procedure Code" was performed according to a logical scheme of the analysis of the "compliance with the Romanian Constitution of the new Civil Code and the new Civil Procedure Code" thereby highlighting the contribution of the Romanian Constitutional Court to constitutionalise the law.

From the perspective of full but not exhaustive coverage of the area regarding "Current trends of constitutionalising the New Civil Code and the New Code of Civil Procedure", a flowchart was introduced on the evolution and consequences of this review regarding the conversion of the law under the influence of fundamental law.

Through this approach, we aim to pinpoint the theoretical, constitutional and legal sources of law regarding the direct consequences of constitutionalising of the Romanian law on the simplification of the Romanian legal system.

Even if the constitutionalisation of the law turns back in time to the first written constitution in the world, the theoretical interest to take it up again is determined by the fact that the existing literature has not always paid enough attention to some theoretical aspects of the constitutionalisation of the law.

Furthermore, it is our opinion that the literature does not retrospectively approach the review of the constitutionality of laws and its direct consequences.

In addition, the study focuses on the valorization of the constitutional and legal regulations in diachronic and selective approach regarding the review of the constitutionality of laws including under the legal regime of the New Civil Code and the New Code of Civil Procedure.

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2. The first judicial review of the constitutionality of the law established in the United States and in Romania – their consequences

2.1. The first judicial review of the constitutionality of the law established in the United States and in Romania – its consequences

The compliance with the Constitution, established in the title of the study, involves reviewing the constitutionality of laws which appeared shortly after the adoption of the first written constitution. The first written Constitution in the world is the United States Constitution adopted in 1787.[1] That is the reason why elected within the present study the first judicial review of the constitutionality of the law, approached from a historical perspective, established in the United States, in the famous Marbury versus Madison[2] decision in 1803, although the Constitution did not give the right to the Supreme Court of the United States to rule on the constitutionality of the law.

The cause is itself curious. In 1800 and very shortly after the presidential elections, the administration of President John Adams proceeded to appoint 42 judges, including William Marbury, who were only justices of the peace in the District of Columbia. Taking into account the *spoils system* (rewarding positions to loyal supporters of the winning candidates) in force in the US, one could obviously draw the conclusion that the interested ones owed their nomination to their federalist sympathies. Unfortunately for them and though the appointments were determined according to the legal rules in force, they had not yet been notified, when, following the presidential elections, President John Adams was replaced by Thomas Jefferson. The new administration and especially James Madison, the Secretary of State, who was authorized to monitor these appointments, was not willing to compromise at all and issued only 25 appointments, among which William Marbury was not present.[3]

He pleaded his case in front of the Supreme Court so that it would coerce the administration into issuing his appointment, though he was not at all interested, because the duration for which he was appointed had almost expired. The Supreme Court presided by the famous John Marshall was in a bit of a mess. President Marshall will preside with great strategic ability for the Court, asserting his authority without causing discomfort to President Jefferson's political adversaries.[4]

For this he will present a surprising argument which made him paradoxically touch on the matter, while declining the competence of Court. To simplify matters, it can be said that this argument can be summed up as follows: Thus the real problem consists in determining who can compel the administration to proceed with the issuance of this appointment. It is clear that a 1789 Federal law regarding the legal organization seems to ascribe this competence to the Court to give the administration the execution order firstly through a *writ de mandamus*, but this 1789 law is contrary to the Constitution, for it does not ascribe to the Court but a mere appeals competence, with the exception of a few competence cases listed firstly, among which there is obviously not the one who is subjected to it (according to art. 2 section 2 in the Constitution).[5]

In exchange for its own satisfaction, the Court asserted its right to review the government's administrative acts and the right to review the constitutionality of laws, though there was no susceptible text to fundament its competence in the field.[6]

Regarding the interpretation of the United States Constitution and federal jurisdictions, we specify the following: "Having to judge disputes which presuppose a conformity assessment with the Constitution, the federal jurisdictions must interpret this constitution, which is all the more necessary as the federal Constitution is a relatively short and very old text. Finally, we have to remember a statement of one of the *United States Supreme Court Presidents*. *Still, one has to insist that everything occurs as if the judges could add something to text by interpreting it.* As the *Chief of Justice* declared "The Constitution is what the judges say it is".[7]

2.1.1. Conclusions regarding the diachronic evolution of the constitutional review in the United States of America

The legal reasoning allowed the foundation of the constitutional review in the United States of America, making its unanimous acceptance possible and its current exercise, even by those people who would have initially denied the judges' competence to check the constitutional regularity of laws.

2.2. The first judicial review of the constitutionality of the law established in Romania and its consequences

We should specify that the doctrine of comparative law was analyzed as a Romanian precedent - the constitutionality of laws in Romania in the early twentieth century until 1938. In short, within the study, it is stated that since 1902 in Romania, and then much more successfully in 1912, the Court of

[1] Elena Simina Tănăsescu and Nicolae Pavel, The Constitution of the United States of America: (Bucharest: ALL BECK, 2002) 53-71.
[2] Alfred H. Kelly, Winfred A. Harbison, The American Constitution *Its Origins and Development*. (New York, W. W. Norton & Company Inc, 1963), 226-322.
[3] Elena Simina Tănăsescu and Nicolae Pavel, op. cit. 25.
[4] *Ibidem*. op. cit. 25.
[5] *Ibidem*, op. cit. 26.
[6] *Ibidem*, op. cit. 27.
[7] *Ibidem*, op. cit. 29-30.

Cassation, in the absence of any express empowerment, recognized the Romanian judge's right to refuse to enforce a law that it would have considered unconstitutional, at the request of one of the parties during the trial. And besides, it was taking such a bold decision for the era and, dare we say it, even innovative in Europe.[8]

In 1911-1912, the Ilfov Court and then the High Court of Cassation and Justice arrogated the right to check the constitutional regularity of laws in the famous tram business from Bucharest. Through a special law adopted in 1909, the Bucharest municipality was allowed to create a Tram Society equipped with statutes drafted by the municipality and approved by the Council of Ministers. In December 1911 an allegedly interpretative law was adopted that brought important changes to already adopted statutes, practically leading to the drafting of completely new ones.[9]

Since the amending law was intentionally declared interpretative, it was logical to think that its effects would have to occur at the time of the interpreted law, that is since the adoption of the statutes of the Bucharest Tram Society in 1909. Faced with severe problems, the Tram Company did not hesitate to ask the Ilfov Court to deem unconstitutional the allegedly interpretative law.[10]

The Court's decision was also subsequently confirmed through a decision of the High Court of Cassation and Justice. Thus, to sum up, the courts stated that, since a constitution distinguished between ordinary and constitutional laws, it places the latter ones above the former one in the norm hierarchy.[11]

Since the constitution establishes that the courts are independent, it recognized their power and duty not to enforce laws which may be contrary to a constitutional provision. A judge's main task is to resolve the conflict of laws, so he always has to make sure the most legally binding prevails to the prejudice of the lesser legally binding, moreover when the lesser legally binding law breaks the one which is superior. Since the Constitution is not just a list of vague principles, but a true legal norm which is directly enforced, the judge did not exceed his usual authority when he settled a conflict between two law, one of which was constitutional and the other one lesser legally binding.[12]

2.2.1. The diachronic evolution of the constitutional review of laws in Romania – selective aspects

During 1923-1947 the constitutional review of laws in Romania was achieved only by the Court of cassation in united sections, pursuant to the provisions of art.103 of the 1923 Constitution,[13] which established: "Only the Court of cassation in united sections has the right to judge the constitutionality of laws and to declare inapplicable the ones who are contrary to the Constitution. The judgment of the unconstitutionality of laws is limited only to a specific case. The Court of cassation will pronounce itself as it did on the past on attribution conflicts. The right to an appeal in cassation is constitutional".

The 1938 Constitution kept the same system regarding constitutional review, established by art. 75, paragraph. (1) in the Constitution.

During 1948-1989, the constitutional review of laws was conducted by the *Constitutional Commission* of the Great National Assembly, pursuant to art. 53 of the Constitution of the Romanian Socialist Republic from August 21, 1965,[14] with additional reprints, which established: "While exercising the review of law constitutionality, the Great National Assembly elects a constitutional commission during this legislature".

After the revolution in December 1989, the Romanian Constitution from December 8, 1991,[15] with additional reprints, within Title V, entitled *The Constitutional Court*, regulated the constitutional review in Romania.

3. Reflection of constitutional principles in the new Civil Code and the new Code of Civil Procedure

3.1. Theoretical aspects regarding the ratio between constitutional principles and the New Code principles

I have set to do this study because I have noticed that the afore-mentioned thoughts are not biunique, the legislator selectively choosing the constitutional principles in the field.

Regarding the *principles of law* concept from the doctrine regarding *the general theory of law*, I have selected the following opinion for the present study: "The principles of law are those general ideas, guiding postulates or governing precepts which orient the

[8] Gérard Conac, A Romanian Anteriority: the Control of Law Constitutionality in Romania from the beginning of the the twentieth century till 1938): Public Law Review, nr. 1/2001, 1.

[9] Ioan Muraru and Elena Simina Tănăsescu, (Constitutional Law and Political Institutions) Edition 14, Volume I. (Bucharest: C H Beck, 2011): 74.

[10] Ioan Muraru and Elena Simina Tănăsescu, op. cit., 74.

[11] *Ibidem*, op. cit. 74.

[12] *Ibidem*, op. cit. 74-75.

[13] The Romanian Constitution from 1923 was published in the Official Gazette, Part I, no. 282 from 20.03.1923

[14] The Constitution of the Socialist Republic of Romania from August 21, 1965, was published in the Official Gazette, no. 1, from August 21, 1965.

[15] The text of the Romanian constitution was published in Romania's Official Gazette, Part I, no. 233 from November 21, 1991.

drafting and the implementation of legal norms in a branch of law or to the level of the entire law system. They have the force and meaning of superior, general norms which can be expressed in the texts of normative acts, usually in Constitutions, or if they are not clearly expressed, they are deduced in the light of acceptable supported social values."[16]

From the constitutional doctrine, regarding the constitutional principles, we remember the following opinion for this present study: "The first title, named *General Principles*, includes norms related to the unitary structure of the state, its republican government form. In chapter I, named *Common Dispositions*, the constitutional principles enforceable to the field of rights and liberties are established".[17]

Still considering the constitutional doctrine, regarding the constitutional principles, we retain the following opinion for this present study: "*The principle rights* are those rights and liberties which represent true principles to exercise all the other rights and liberties, including here the universality of rights, equality, non-retroactivity of the law, free access to the legal system, etc.[18]

Regarding *the general principles of civil law*, we retain the following opinion for the present study: "The legal principle can be established by a text in relatively general terms to inspire several applications, asserting as a superior authority, such as the general principles from Title I of the Romanian Constitution, which establishes the principle of sovereignty, nationality, equality as well as the fundamental rights and obligations of citizens, which are even required of the Parliament in its lawmaking activity".[19]

Regarding *the fundamental principles of the civil trial*, we retain the following opinion for the present study: "The fundamental principles represent essential rules which determine the structure of the trial and govern its entire judicial activity". Some of these principles are related to the organization of courts and the status of magistrates, but with implications for the civil trial too, others refer to the judgment activity".[20]

3.2. Reflection of constitutional principles in the new Civil Code

From the systematic analysis of the normative content of the new Civil Code[21] it turns out that the constitutional provisions on the subject are reflected in the following articles: **Art. 4**: *The Primary Enforcement of international human rights treaties*. (1) In matters regulated by the present code, the provisions on rights and liberties shall be interpreted and enforced in accordance with the Constitution, the Universal Declaration of Human Rights, pacts and other treaties to which Romania is a party. (2) If there are inconsistencies between the pacts and treaties on fundamental human rights, to which Romania is a party, and the present Code, international regulations have priority, except when the present code contains more favorable provisions. **Art.5**: *The Primary Enforcement of the European Union Law*: In matters regulated by the present code, the norms of EU law primarily apply, regardless of the quality or status of the parties; **Art. 27:** *Foreign citizens and stateless ones*: (1) Foreign citizens and stateless ones are assimilated according to the law, with Romanian citizens regarding their civil rights and liberties. (2) The assimilation is also enforced for foreign legal persons. **Art. 30**: *Equality before the civil law:* Race, color, nationality, ethnic origin, language, religion, age, sex or sexual orientation, opinion, personal convictions, political and union adherence, to a social or disadvantaged category, wealth, social origin, cultural level, as well as other similar situations do not have any influence on the civic capacity.

3.3. Reflection of constitutional principles in the new Code of Civil Procedure

From the systematic analysis of the normative content of the new Code of Civil Procedure,[22] it results that the constitutional provisions on the subject, are explicitly or implicitly reflected in the following articles: **Art. 3**: *The primary enforcement of international treaties regarding human rights:* (1) In matters regulated by the present code, the provisions on rights and liberties shall be interpreted and enforced in accordance with the Constitution, the Universal Declaration of Human Rights, pacts and other treaties to which Romania is a party. (2) If there are inconsistencies between the pacts and treaties on fundamental human rights, to which Romania is a party, and the present Code, international regulations have priority, except when the present code contains more favorable provisions. **Art. 4**: *The Primary Enforcement of the European Union Law*: In matters regulated by the present code, the norms of EU law primarily apply, regardless of the quality or status of the parties; **Art. 6**: The right to a fair trial, within a reasonable and predictable time: (1) Everyone has the right to a fair trial, within a reasonable and predictable time by an independent and impartial court, established by law. To this end, the court is to use all measures allowed by law and to ensure a quick trial. (2) The provisions of paragraph (1) are enforced accordingly even in the case of forced execution. **Art.**

[16] Ion Craiovan, (General Theory of Law Treaty) (Bucharest, Juridical Universe, 2007) 347.
[17] Ioan Muraru şi Elena Simina Tănăsescu, op. cit. 105.
[18] Ştefan Deaconu, *Constitutional Law*, (Bucharest, CH Beck, 2007) 207.
[19] Marilena Uliescu – coordinator - *The New Civil Code – Studies and Commentaries*) Volume I, Book I and Book II (articles. 1-534), (Bucharest, Juridical Universe, 2012) 60.
[20] Mihaela Tăbârcă, *Civil Procedural* Law: Volume. I (Bucharest, Juridical Universe, 2005) 35.
[21] The new updated Civil Code 2014 – Law 287/2009.
[22] Gabriel Boroi, coordinator and team, *The New Civil Procedure Code*, Article commentary, Tom I, Articles. 1-526: (Bucharest, Hamangiu 2013), 1-29.

8: *Equality*: In the civil trial, the parties are guaranteed the exercise of their procedural rights equally and without discrimination. **Art. 12**: *Bona fide:* (1) The procedural rights must be exerted in good faith, according to the aim for which they have been recognized by the law and without breaking the procedural rights of the other party. **Art. 13**: *The right to a defense*: (1) The right to a defense is guaranteed. **Art. 18**: *The language of the trial:* (1) The civil trial shall be in Romanian. (2) Romanian citizens who belong to a national minority have the right to express in their native language in front of courts, according to the provisions of the law. (3) Romanian and stateless citizens who do not understand or who do not speak Romanian have the right to know all the documents and materials, to speak in court and draw conclusions, through an authorized translator, if the law provides otherwise. (4) The requests and procedural documents shall be drafted only in Romanian.

4. Reflection of the provisions of the New Civil Code and the New Code of Civil Procedure in the Constitutional Court decisions.

4.1. Reflection of the provisions of the New Civil Code in the Constitutional Court decisions.

4.1.1. *DECISION no. 96 from February 28, 2013 referring to the unconstitutional exception of provisions of article 383 paragraph. (2) from the Civil Code*[23]

When motivating the unconstitutionality exception, it is alleged that the criticized legal provision conflicts with the constitutional principle *of equal rights*, given that the court which pronounced the divorce may grant the spouses to keep the married name, a decision motivated by the best interest of the minor who resulted from this marriage.

Examining the unconstitutionality exception, the Court ascertains that the author of the exception asserts that the unconstitutionality of the same legislative solution, this time comprised within art. 383 par. (2) from *the new Civil Code*, showing that granting one of the spouses the right to keep the married name and after the dissolution of the marriage is detrimental to the other spouse's right to bear a name and is not justified by the necessity of protecting the child's superior interest resulted from the marriage, given the fact that the spouse who was granted to keep the name can remarry at anytime.

The court also states that the criticized legal text does not create privilege or discrimination, being applicable to all people who would find themselves in the hypothesis regulated by the legal disposition, so both for the wife who had the husband's name during marriage and for the husband who was in the same situation.

For all the reasons presented, the Constitutional Court *deems unfounded the unconstitutionality exception* of provisions of art. 383 par. (2) of the *Civil Code*.

4.1.2. *DECISION no. 227 from May 9, 2013 referring to the unconstitutionality exceptions of dispositions of art. 403 from the Civil Code* [24]

When motivating the unconstitutionality exception, it is alleged that the dispositions of art. 403 from the Civil Code *are unconstitutional*.

It is also asserted that the extension of applicability of this legal text is called in question regarding the status of minors born outside the parent's marriage, *since the new Civil Code* does not have a separate chapter related to the status of minors born outside the parent's marriage, *unlike the former Family Code*.

Examining the unconstitutionality exception, the Court ascertains *that the object of the unconstitutionality exceptions is constituted by the provisions of art. 403* of the Law. *no. 287/2009* regarding the Civil Code, republished in Romania's Official Gazette, Part I, no. 505 from July 11, 2011.

The Court notes that, in reality, the points made do not constitute a genuine criticism of unconstitutionality, but represent issues related to the interpretation and enforcement. As it is clear from the provisions of art. 126 para. (3) of the Constitution, only the courts can rule on the interpretation and application of the law, the High Court of Cassation and Justice having the power to unify the judicial practice.

Thus, it is clear that the things showed in the *unconstitutionality exception are aspects whose solution exceeds the competence of the Constitutional Court*, which also determines *the inadmissible nature of the plea of unconstitutionality*.

For these reasons, the Constitutional Court *rejects as inadmissible the exception of unconstitutionality* of art. 403 of the Civil Code.

4.2. Reflection of the provisions of the New Code of Civil procedure in the Constitutional Court decisions.

4.2.1. *DECISION no. 266/2014 referring to the exception of unconstitutionality to the provisions of art. 200 of New Code of Civil Procedure, as well as, of those from art. 2 par. (1) and. (12) and art. 601 from Law no. 192/2006 regarding mediation and organization of the mediator profession, in effect from 25.06.2014* [25]

When motivating the exception of unconstitutionality, its author asserts that the provisions of art. 200 from the Code of Civil Procedure are unconstitutional as the application of these procedural dispositions extends to aspects which pertain to the proper judgment of the petition form request.

[23] Decision no. 96/2013 was published in the Official Gazette Romania, Part I, no. 165 from March 27, 2013.
[24] Decision no. 227/2013 was published in the Official Gazette Romania, Part I, no. 428 from July 15, 2013.
[25] Decision no. 266/2014 was published in the Official Gazette of Romania, Part I, no. 464 from June 25, 2014

Examining the exception of unconstitutionality, the Court finds that the object of the unconstitutionality exception, as it was noted by the notification ruling, is constituted by the provisions of art. 200 of the Code of Civil Procedure, as well as, those, of art. 2 par. (1) and art. 601 of Law no. 192/2006 on mediation and the mediator profession, published in the Official Gazette of Romania, Part I, no. 441 of May 22, 2006, as amended and subsequently supplemented.

To determine the object of mediation and where the parties may resort to mediation, the Court observes that, as is apparent from art. 2 par. (5) of Law no. 192/2006, the parties may resort to mediation when it comes to the rights that they may possess.

For these reasons, the Constitutional Court admits the exception of unconstitutionality raised by the company CEZ Vânzare – SA from Craiova, Dolj County, through trustee EOS KSI Romania Trading Company –Ltd. in Bucharest, file no. 14.501/215/2013 of the Craiova Court - Civil Division and finds that art. 2 par. (1) and (12) from Law no. 192/2006 on mediation and the mediator profession are unconstitutional.

4.2.2. *DECISION no. 348 from June 17, 2014, referring to the unconstitutionality exceptions of dispositions of art. 650 par. (1) and of art. 713 par. (1) from the Civil Procedure Code*[26]

On the grounds of unconstitutionality exception, the author argues that the criticized legal provisions are unconstitutional, as they establish a subjective criterion when it is decided that the territorial jurisdiction of the courts resolves civil disputes. Article 713 of the Code of Civil Procedure establishes the competence of law enforcement of appeals court for enforcement, a court which is defined in art. 650 par. (1) of the Civil Procedure Code as the court in whose jurisdiction the judicial executor's office who performs the execution is. When examining the unconstitutionality exception, the Court decides that the object of the unconstitutional exception is represented by the dispositions of art. 650 par. (1) and art. 713 par. (1) from the Code of Civil Procedure.

When examining the exception of unconstitutionality, the Court holds that the provisions of art. 650 par. (1) of the Civil Procedure Code determine the court in whose jurisdiction the judicial executor's office is; he also performs the execution as the enforcement court, and the dispositions of art. 713 par. (1) from the Code of Civil Procedure establish the judgment competence of the appeals to be enforced in favor of the enforcement course, a court which is defined in art. 650 par. (1) of the Code of Civil Procedure as being the court in whose circumscription there is the judicial executor's office who performs the execution.

For these reasons, the Constitutional Court rejects as unfounded the exception of unconstitutionality raised by the same party in the same file of the same court and finds that the dispositions of art. 713 par. (1) from the Code of Civil Procedure are constitutional regarding the critics.

5. Compliance with Romanian Constitution of new Civil Code and of new Code of Civil Procedure - the current trends of constitutionalisation of the law.

5.1. From the constitutional doctrine, I selected the following aspects of the current trend of constitutionalization of law as a result of compliance with the Romanian Constitution and the New Civil Code New Code of Civil Procedure [27]

1. The main effect of the Constitution supremacy and of the existence of the Constitutional Review*l aws made by a judicial authority* is the *constitutionalization of law*. This is a complex *legal phenomenon* that affects the whole legal system through the interaction established between the legal norms of the fundamental law and other legal norms inferior to the Constitution. 2. The constitutionalisation of law is defined as a *general process*, which involves a certain amount of time, beginning with the adoption of the constitution and continued mainly under constitutional jurisdiction control especially created by the fundamental law to ensure its supremacy, a process that gradually affects all branches of the legal system. 3. It consists of *the progressive interpretation* of the norms in the constitution and of those inferior to the constitution and is manifested through two phenomena: one *ascending* of quantitative increase of constitutional norms and another *descending*, going deeper into these rules. 4. The *multiplication* of constitutional norms is achieved primarily through the collection by the fundamental law of rules and principles specific to other legal norms which grants constitutional value to them. 5. Conversely, the dissemination of constitutional norms in the legal system materialize through the impregnation of law branches with constitutional norms directly applicable which take into account the specificity of the field in which they are applied, but which tend to impose the standards with a bigger legal impact. The law constitutionalisation does not necessarily presuppose, but it can be supported by the existence of *favorable conditions*. 7. The practice of various countries has shown that the process of constitutionalisation of law is much more *accelerated* in the field of *fundamental rights*, where the direct applicability of constitutional norms is more easily perceived. 8. *The citizens' direct public access to constitutional justice* is a catalyst of the process of constitutionalisation, although it does not constitute an absolutely necessary condition for it to manifest. 9. As a direct *consequence* of

[26] Decision no. 348/2014 was published in the Official Gazette of Romania, Part I. no. 529, from July 16, 2014.
[27] Ioan Muraru and Elena Simina Tănăsescu, op. cit.: 80-82.

constitutionalisation, *the transformation of law* under the influence of fundamental law means the deduction of new legal rules based on existing ones by canceling legal norms contrary to the Constitution and by interpreting and applying legal rules so that they are consistent with those contained in the fundamental law. 10. Indirectly, this transformation involved a simplification of the legal system, through which the latter is prevented from becoming rigid and is stimulated to permanently liberalize itself.

5.2. From the constitutional doctrine, I selected the following aspects:[28]

1. Constitutionalisation of law is the effect of supremacy of the Constitution. Constitutionalisation is a complex legal phenomenon involving the entire legal system and consists of the interaction between legal constitutional norms and other legal rules of constitutional law which have a diminished legal power, inferior to the Constitution. 2. The phenomenon of the constitutionalisation of law appeared as a transformation process of some legal rules of certain branches of law in constitutional rules. Therefore, constitutionalising law designates a process of transformation of some rules and principles of law rules and constitutional principles. 3. The process of constitutionalisation does not occur on its own. It presupposes the existence of two conditions: a) the first and most important condition is the existence of a Constitution. b) the second is the existence of a judicial body that can ensure the supremacy of the Constitution. 4. There are a series of consequences resulting from the process of the constitutionalisation of law. These consequences are either direct or indirect. Among direct consequences there are: a) the general obligation of the entire society to observe the constitution. b) the annulling of legal norms contrary to the constitution. c) the interpretation of legal norms in accordance with the constitutional text. 5) The indirect consequences of the law constitutionalisation phenomenon are the modernization, unification and simplification of the legal order.

Making the most out of the above mentioned things, I can assert that through the constitutionality review, some principles of law have a constitutional value.

6. Conclusions

In our opinion, the aim of the study regarding current trends of constitutionalisation of the new Civil Code and of the New Civil Procedure Code - Selective aspects has been achieved.

The main directions to reach the set aim were the following:

1) The first judicial review of the constitutionality of the law established in the United States and in Romania – their consequences. I selected for this study the first judicial review of the constitutionality of the law established in the United States and in Romania, as in our opinion, for the review of constitutionality, the following conditions must be met: a) the existence of a Constitution. b) the existence of a judicial-type mechanism to ensure the supremacy of the Constitution. Both countries met those conditions at that moment. Furthermore, the foundation of the constitutional review, established in the two countries, continued in the two country, under the conditions specified above. Regarding the diachronic evolution of the constitutional review in Romania, various forms of review were highlighted, taking into account the historical evolution of the Romanian state.

2) Reflection of the constitutional principles in the new Civil Code and the new Code of Civil Procedure.

The paragraph begins with the tackling of some theoretical issues regarding the relationship between constitutional principles and the principles of the New Codes. The following concepts-principles are contained within these theoretical aspects.

They are established by the general theory of law and by the constitutional doctrine: a) principles of law. b) general constitutional principles. c) rights principles. d) general principles of civil law. e) the fundamental principles of the civil trial. Following these theoretical studies, I proceeded to identify the constitutional principles in the New Civil Code and the New Code of Civil Procedure.

3) Reflection of the dispositions of new Civil Code and of the new Code of Civil Procedure in constitutional provisions. From the analysis of a significant number of Decisions taken by the Constitutional Court, I only referred to the ones which concerned the seizing of the court, only those which referred to the principles of the two codes.

4) Compliance with the Romanian Constitution of the new Civil Code and of the new Code of Civil Procedure - the current trends of constitutionalisation of the law.

5) From the constitutional doctrine, I selected the following aspects regarding the current trend of constitutionalization of law as a result of compliance with the Romanian Constitution of the New Civil Code and New Code of Civil Procedure: a) The definition of the concept of constitutionalisation. b) The multiplication of constitutional norms. c) The dissemination of constitutional norms within the legal system as a whole. d) The direct consequence of constitutionalisation is represented by the right under the influence of the fundamental law. e) The simplification of the law.

6) The four parts of the study may be considered a contribution to the broadening of research regarding current trends of the constitutionalisation of the new

[28] Ştefan Deaconu, op. cit: 96-98.

Civil Code and the new Code of Civil Procedure – selective aspects, in accordance with the current trend in the field.

7) I would also like to specify that the study above is beginning of a complex and complete vision, which is not exhaustive on the area under analysis..

8) Given the selective approach of the current trends of the constitutionalisation of the new Civil Code and the new Code of Civil Procedure – Selective aspects, the key-scheme proposed may be multiplied and extended to other relevant subsequent studies, given the vastness of the area under analysis.

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THE CONTROL EXERCISED BY THE COURT OF JUSTICE IN LUXEMBOURG ON INTERNATIONAL AGREEMENTS TO WHICH THE EUROPEAN UNION IS A PARTY

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Abstract:

The European Union as subject of international law can conclude external agreements, under a procedure which is the object of art. 218 of the Treaty on the Functioning of the European Union (TFEU). Regarding the legal force of such agreements, the Court of Justice of the European Union ruled that they were part of the EU legal order. In addition, pursuant to provisions of art. 216 para. (2) TFEU, these agreements „link Union institutions and their Member States". However, it should be noted that the competence of the Court of Justice in Luxembourg reflects also its ability to rule, at the request of a Member State, the European Parliament, the Council or the Commission on the compatibility of an international agreement with constitutive treaties, whether prior to the entry into force of an international agreement or later. Considering this aspect, in the contents of our study, we shall highlight, by using the specialized doctrine and case law in the field, the role that the Court of Justice of EU has in the field of control over international agreements. This analysis will consider the control aimed at formal validity (compliance with the procedure of adoption), on the one hand, and the control on the substance (compliance of the agreement with EU primary law).

Keywords: *European Union, international agreement, Court of Justice of the EU, „constitutional" review, a posteriori control.*

1. General aspects

Through this study, we propose an analysis of CJEU competences on the control of international agreements[1] to which the EU is a party. To achieve this goal, we shall conduct a thorough study of the French, English and Romanian doctrines, an important place being reserved to historical jurisprudence, but also to recent jurisprudence of the Court of Justice of the European Union. In this research, we shall resort to a range of research methods, specifically: the logical method, the comparative method, the historical method and the quantitative methods. Thus, in analyzing the CJEU jurisdiction in international agreements to which the EU is a party, we shall use, in particular the historical method, but also the logical method in the approach to capture structural and dynamic aspects from historical and evolutionary perspective. In deciphering considerations and grounds of regulations and goals pursued by the solutions proposed by the court in Luxembourg, we shall use, predominantly, the logical method for capturing their theoretical and practical implications, and synthesizing research results in conclusions drawn and presented at the end of the analysis.

We shall start from the fact that the proposed research is a current approach, given the realities Romania is currently facing and which have very profound and various consequences on the Romanian society after 2007, which is increasingly and firmly anchored in the context of universal and regional international society of the stage. EU legal order (i.e., including international agreements to which the EU is a party) is of particular importance for the evolution of the organization, for which, we believe that efforts are needed to acknowledge peculiarities that it involves, their understanding and learning in order to adopt and implement them, including by specialists in our country[2].

2. Constitutional review

The European Union, as subject of international law can conclude external agreements under the procedure laid down in art. 218 TFEU. According to the Court, once published in the Official Journal of the European Union, the agreements to which the EU is a party „are part of the Community legal order"[3]. In addition, pursuant to provisions of art. 216 para. (2) TFEU, these agreements "link Union institutions and their Member States". However, as stated in the legal doctrine[4], this binding effect resulting from art. 216

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[1] For details regarding international agreements to which the EU is a party, see **Augustin Fuerea**, *Manualul Uniunii Europene*, ediția a V-a, Fifth edition, revised and enlarged after the Treaty of Lisbon (2007/2009), Universul Juridic Publishing House, Bucharest, 2011, p. 173-175.

[2] See **Elena Emilia Ștefan**, *Reflections on the principle of independence of justice, CKS - journal* 2013, p. 671 (http://cks.univnt.ro/cks_2013.html).

[3] ECJ Judgment, 30 April 1974 *R. & V.Haegean v./Belgian State*, 181/73, pt. 5 (http://www.ier.ro/sites/default/files/traduceri/61973JO181.pdf.)

[4] **Quentin Lejeune**, *L'application des accords internationaux dans l'Union européenne: entre défiance et confiance à l'égard du droit international*, p. 9 (http://www.lepetitjuriste.fr/wp-content/uploads/2014/04/IHEI-L_application-des-accords-internationaux-dans-l_Union-europe%C2%B4enne-9677695_1.pdf?aa0226).

para. (2) „must be, however, relativized" and this because, in the jurisdiction of the Court of Justice in Luxembourg, it is found also its ability to rule, at the request of a Member State, the European Parliament, the Council or the Commission on the compatibility of an international agreement with constitutive treaties, whether prior to the entry into force of an international agreement or later. Given the Court's judgment in *Kadi* Case[5] where the Court referred to the „constitutional principles of the Treaty"[6], in doctrine, such control was described as a „constitutional review"[7].

Thus, art. 218 TFEU provides that „a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice on the compatibility of an envisaged agreement with provisions of the Treaties. In the case of a negative opinion of the Court, the agreement shall enter into force only if it is amended or if Treaties are revised. In other words, in practice, a negative opinion given by the Court leads to the impossibility of ratification of the agreement or to its ratification, but only after the revision of Treaties. In both cases, however, this would lead to a blockage in the European Union, at least for a certain time, if we also consider the fact that the revision procedure involves, in certain stages, the unanimity vote. However, regulating the capacity of the Court to give an opinion prior to ratification of the agreement, is a way to overcome another blockage that may arise, namely that that would result, as the Court[8] observed since 1975, from the "legal challenge of the issue of compatibility with the Treaty, of international agreements that commit" the Union.

The issuance of a negative opinion results, naturally, in the impossibility of entry into force of the Agreement which was the subject of that opinion. The case law of the Court in Luxembourg is constant regarding the issuance of negative opinions when it finds the establishment, by agreement, of a court system, different from that regulated at EU level.

Thus, in Opinion 1/76[9], the Court concluded that the *Draft Agreement establishing a European Fund for retention of inland waterway vessels* is not compatible with the Treaty. The draft established a judicial system that assigned certain competences to a body (background Court), which by its composition, was different from the Court of Justice established by the Treaty. The Court had to decide, in the field of the European Fund, on actions brought against Fund bodies or against states, and on actions undertaken for failure of obligations brought against the States on which the Statute would have had binding status (and not against the Community, at the time, as it was). However, the Court would have been competent to rule on prejudicial actions of which it would be informed by national courts, under certain conditions. With respect to these actions, it was mentioned the fact that they could have as object not only the validity and interpretation of acts adopted by bodies of the Fund, but equally, the interpretation of the Agreement and the Statute. Regarding this last point, the Court stated, since 1974[10], that an agreement concluded by the Community with a third country is, in respect of the Community, an act adopted by one of the Community institutions, and under the provisions of Community Treaties, the Court within the Community legal order is competent to decide preliminary rulings on the interpretation of an international agreement"[11]. Under these conditions, there would be the issue whether provisions on jurisdiction of the Fund Court are consistent with those of the Treaty relating to the jurisdiction of the Court. According to the Court, „the establishment of a judicial system such as that provided by the statute, which on the whole ensures effective legal protection of individuals, cannot elude imperatives arising from participation of a third State. The need to establish actions and proceedings which will ensure equally for all individuals, compliance with law in the activities of the Fund, can justify (...) the establishment of the Tribunal. Although, initially, the Court approved the concern to organize, within the Fund, a legal protection adapted to difficulties of the situation, the Court was obliged to have some reservations about the compatibility of the "Fund Tribunal" structure with the Treaty"[12].

The Court had the same position in 1991, when it issued another negative opinion[13], this time on *the Draft Agreement between the Community, on the one hand, and the European Free Trade Association (EFTA), on the other hand, on the creation of the European Economic Area (EEA),* draft which provided, inter alia, a review mechanism on the

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[5] ECJ Judgment, 3 September, 2008, *Kadi*, Joined Cases C-402/05 P and C-415/05 P, (http://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=223391), the expression repeated in the ECJ judgment, 18 July 2013, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, pt. 5 (http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d5cd74ae9dd6b746869ad9c018185ba940.e34KaxiLc3qMb40Rch0SaxuOchj0?text=&docid=139745&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=221729)

[6] Pt. 285, *Kadi, cited above*.

[7] **Robert Kovar**, *La compétence consultative de la Cour de justice et la procédure de conclusion des accords internationaux par la Communauté Economique européenne*, Mélanges Reuter. Le droit international: unité et diversité, 1981, pp. 357-377-quoted by Quentin Lejeune, *cited above*.

[8] ECJ Opinion, November 11, 1975, 1/75 (http://www.ier.ro/sites/default/files/traduceri/61975V0001.pdf)

[9] ECJ Opinion, 26 April 1977 (http://www.ier.ro/sites/default/files/traduceri/61976V0001.pdf). For details, see **Mihaela Augustina Dumitraşcu,** *Dreptul Uniunii Europene şi specificitatea acestuia,* Universul Juridic Publishing House, Bucharest, 2011, p. 50.

[10] ECJ Judgment, 30 April 1974, *Haegemann*, 181/73, pt. 18 (http://www.ier.ro/sites/default/files/traduceri/61973J0181.Pdf).

[11] Id.

[12] Pt. 21 of Opinion 1/76.

[13] Opinion ECJ, 14 December 1991, 1/91 (http://www.ier.ro/sites/default/files/traduceri/61991V0001.pdf).

interpretation of the Agreement, representing, otherwise the action brought by the Commission before the Court. In fact, the judicial system that was meant to be established, aimed at three objectives, namely: 1. settlement of disputes between Contracting Parties; 2. settlement of internal conflicts within EFTA and 3. strengthening the legal homogeneity within the EEA. These powers would „be exercised by a Court of the European Economic Area (EEA Court), which would be independent, but would be integrated from functional perspective, in the Court of Justice, and by an independent Court of First Instance of an EEA, operating, though, by the EEA Court or by the Court itself"[14]. According to the draft, provisions of the Agreement were to be interpreted in accordance with the jurisprudence of the Court of Justice, prior to signing the agreement. In addition, „in the application or interpretation of provisions of that Agreement or of provisions of the ECSC and EEC Treaties, as amended or supplemented, or of acts adopted pursuant to those treaties, the Court of Justice, the EEA Court, the Court of First Instance of EC, the Court of First Instance of the EEA and Courts of EFTA States will take due account of the principles arising from decisions ruled by other Courts or Tribunals, so as to ensure an interpretation of the Agreement as uniform as possible[15]. In this context, the main issue which the Court had to solve was to examine whether „the judicial system envisaged is likely to undermine the autonomy of the Community legal order in pursuit of its specific objectives"[16]. Once the problem defined, the Court grounded its reasoning on the particularity of the Community legal order that is based on „a community of law"[17] and concluded that „the jurisdiction conferred upon the EEA Court under the agreement may affect the division of powers defined by the Treaties and thus, the autonomy of the Community legal system which is enforced by the Court of Justice (...). This exclusive jurisdiction of the Court of Justice is confirmed[18], including by the Treaty," whereby Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement, other than those provided for therein"[19]. „Therefore, the assignment of this competence to EEA Court is incompatible with Community law"[20]. The result of this negative opinion was, naturally, the following: the Agreement was revised and the new draft agreement was the subject of another opinion[21] of the Court, this time of a favorable one.

In 2011, the Court maintained its position on the establishment of a parallel judicial mechanism, even if, it was about the establishment of a specialized court. Opinion 1/09 had as object the compatibility examination of the *Draft agreement on the European and Community Patents Court with European Union law*. Under the agreement, the European and Community Patent Court would be an institution outside the institutional and judicial Union, having legal personality under international law. Competences of the Tribunal would be, some of them exclusive „in relation to a number of actions brought by individuals in the field of patents, particularly actions for infringement or potential infringement on patent, revocation actions and specific actions for damages. In this regard, Member States' courts are deprived of these competences and keep, therefore, only tasks that do not fall within the exclusive competence of the European and Community Patents Court"[22]. The Court, in the exercise of its functions, had to interpret and apply EU law[23]. The Court's reasoning has as starting point reiterating „the fundamental elements of the legal and judicial system of the Union, as established by the founding Treaties and developed by the Court"[24], namely: 1. unlike ordinary international treaties, the founding treaties of the Union established a new legal order, completed with its own institutions, for which the States have limited their sovereign rights in areas increasingly more extensive and the subjects of which comprise not only Member States, but also their nationals and 2. the essential characteristics of the Union legal order thus constituted, are in particular, its primacy over the law of Member States and the direct effect of a whole series of provisions applicable to Member States and their citizens. The Court held that, „unlike other international jurisdictions on which the Court has ruled until present time, the European and Community Patents Court has the task to interpret and apply not only the international agreement provided, but also law provisions of the Union. In addition, the Court found that by creating this jurisdiction, courts should be deprived of the possibility or, where appropriate, of the obligation to refer to the Court for preliminary reference in the patent field, given that the draft agreement provides a mechanism of preliminary references which reserves only to the European and

[14] http://www.ier.ro/sites/default/files/traduceri/61991V0001.pdf on the jurisdiction of the EEA Court, see also section 5-12 of the Opinion.
[15] Pt. 8 and 9 of the Opinion.
[16] Pt. 30 of the Opinion.
[17] **Quentin Lejeune**, *op.cit*., p. 10.
[18] Pt. 35 of the Opinion.
[19] Id.
[20] Pt. 36 of the Opinion.
[21] ECJ Opinion, April 10, 1992, 1/92 (http://www.ier.ro/sites/default/files/traduceri/61992V0001.pdf)
[22] Press release no. 17/11, 8 March 2011 (http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/cp110017ro.pdf).
[23] About the existence of constant law, see **Elena Anghel**, *Constant aspects of law*, în proceedings-ul CKS - journal 2011, Pro Universitaria Publishing House, Bucharest, 2011, pag. 594.
[24] Pt. 64 of the Opinion.

Community Patents Court, the possibility of reference, depriving national courts of this possibility"[25]. Given that a Member State is bound to fix the damage caused to individuals by breaches of EU law which it is responsible of, and that, if a breach of EU law is committed by a national court, the Court may be referred to in order to find a violation of obligations by the Member State concerned, the Court noted that a decision of the European and Community Patents Court that would violate EU law, could not be the subject of proceedings for infringement and could not draw any patrimonial liability of one or more Member States. Therefore, the Court held that „by the fact that it assigns exclusive jurisdiction to settle a number of actions brought by individuals in the Community patent field and to interpret and apply EU law in this area in favor of an international court which is outside the institutional and judicial framework of the Union, the envisaged agreement would deprive the courts of Member States, of powers concerning the interpretation and application of EU law[26]„. The Court, therefore, concluded that the envisaged agreement, through which a European and Community Patents Court would be settled, is not compatible with EU law.

As a conclusion, we can say that proceedings of the opinion issued by the Court, before the entry into force of the Agreement to which the EU is a party, help to ensure integrity and compliance with EU treaties. As mentioned above, the opinion of the Court may intervene also after the entry into force of international agreements to which the EU is a party.

3. A posteriori control

Regarding the control exercised by the Court after the entry into force of an agreement to which the EU participates, control exercised through the action for annulment, in the specialized literature, several arguments were outlined to support the theory according to which this type of control is purely theoretic, in practice being impossible to accomplish. Thus, it is argued that the existence of a procedure of *a priori* opinion precludes the possibility of the Court to review the compatibility of the agreement with EU law, *a posteriori*[27]. On the other hand, the Court's declaration of incompatibility of an agreement entered into force with European Union law, leads to international liability of the European Union, and this because the Union cannot rely internationally on the judgment in annulment delivered by the Court because, according to Vienna Convention on Treaties (1969) and the Convention on the Law of Treaties concluded by states and international organizations (1986), a State or an international organization cannot exempt from liability by invoking its own internal rules. And last but not least, according to TFEU, only acts of the Union's institutions[28] may be subject to an action for annulment[29].

However, in practice, the situation is different. There are opinions in the specialized literature[30] that support the argument that the Court cannot exercise *a posteriori* control on agreements to which the EU is a party as long as a regulated procedure of *a priori* opinion „distorts the content of the Treaty because if it was not asked, the Court would see failed the power to rule *a posteriori*"[31]. At the same time, it was discussed, including the fact that the Luxembourg Court did not distinguish between „act" and „agreement" as it ruled since 1971: „the action for annulment must (...) be open regarding all provisions adopted by the institutions, irrespectively of their nature or form, which are intended to have legal effect"[32]. According to the Court, „to determine whether the contested measures are acts within the meaning of Article 173[33], it is necessary (...) to examine their substance. According to the jurisprudence of the Court, acts or decisions which may be the subject of an action for annulment (...) are those measures which produce binding legal effects likely to affect the interests of the applicant by modifying in a specific manner, its legal status"[34]. On the other hand, „the form in which acts or decisions are made is, in principle, irrelevant regarding the possibility of attacking them, by an action for annulment"[35]. Furthermore, in Opinion 1/75[36], the Court stated explicitly on the *a posteriori* control, as follows: „since the question whether the conclusion of a particular agreement falls or not within the

[25] Press release no. 17/11, *cited above*.
[26] Id.
[27] **Quentin Lejeune**, *op.cit*., p. 12.
[28] Art. 288 TFEU: To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions (...).
[29] Art. 263 para. (1) TFEU: the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, the Commission and the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and the European Council intended to produce legal effects to third parties. It also controls the legality of acts of bodies, offices or agencies intended to produce legal effects to third parties (...).
[30] **Eugène Schaeffer**, *Monisme avec primauté de l'ordre juridique communautaire sur le droit international*, Annuaire de droit maritime et aérospatial, 1er janvier 1993 n ° 12, pp. 565-589.
[31] **Quentin Lejeune**, *op.cit.*, p. 12.
[32] ECJ Judgment, 31 March 1971, *the Commission of the European Communities v./Council of the European Communities – "European Agreement on Road Transport"*, 22/70, pt. 42.
[33] The current 288 TFEU.
[34] ECJ Judgment, November 11, 1981, *International Business Machines Corporation v./Commission of the European Communities*, 60/81 pt. 9 (http://www.ier.ro/sites/default/files/traduceri/61981J0060.pdf).
[35] Id.
[36] *Cited above*.

competence of the Community and if, as appropriate, these powers were exercised in accordance with the Treaty, being in principle susceptible of being submitted to the Court of Justice, directly under Article 169[37] or Article 173[38] of the Treaty or by the proceedings for preliminary ruling, it must be, therefore, admitted that the Court may receive the preliminary procedure of Article 228[39]„. In Opinion 1/91, the Court considers that such a control is justified by the existence of a „legal order that must be protected"[40]: „The EEC Treaty, although concluded as an international agreement, constitutes the constitutional charter of a community of law"[41]. Regarding this last point, we recall the observation of the General Advocate Maduro P., from his Conclusions presented on 16 January 2008 in *Kadi* Case, „although the Court takes great care to respect Community obligations under international law, it seeks, first of all, to preserve the constitutional framework created by the Treaty. It would be wrong to conclude that, since the Community is bound by a rule of international law, Community Courts must bow to that rule and apply it unconditionally in the Community legal order"[42].

Therefore, the practice does not preclude the possibility of the Court of Justice in Luxembourg to achieve a „constitutional review"[43] on international agreements to which the Union is a party. It should be noted that even at EU level, there is a difference between acts authorizing the conclusion of agreements and enforcement provisions of the agreement. Moreover, the Court itself distinguishes between „act authorizing the signing of the agreement" and „act concerning its conclusion": „the act authorizing the signing of the international agreement and that stating its conclusion are two distinct legal acts involving completely distinct obligations for stakeholders and the second act is not in any way the confirmation of the first. Under these circumstances, the lack of action for annulment of the aforementioned first act does not constitute an obstacle to bringing such an action against the act of concluding the agreement envisaged, and it doesn't make inadmissible an opinion which raises the question of its compatibility with the Treaty"[44]. Therefore, the provisions on international agreements are likely to be cancelled. From the case law of the Court in the area, we stop at two cases that dealt with the conclusion of international agreements to which the EU is a party. The first case[45] refers to the signing by the European Commission, of an agreement with the United States, in the competition matter. The Court that was not requested an opinion before the entry into force of the Agreement, recognized its jurisdiction to control the act signed by the European Commission: „it is clear from the text of the agreement that it seeks to produce legal effects. Consequently, the act whereby the Commission sought to conclude the agreement must be the subject of an action for annulment"[46]. The Judgment of the Court was seeking the annulment of that act, because the Commission was not competent to sign the act as that power was conferred upon the Council.

In the second case[47], the Court declared partially void the act concerning the conclusion of the framework agreement on bananas (the Uruguay Round), for breach of the principle of non-discrimination.

If the two previous cases dealt with the review exercised *a posteriori* by the Court, over the acts authorizing the conclusion of an agreement, we shall still remember two actions that have focused on the *a posteriori* review exercised by the Court on acts of enforcement of an international agreement to which EU is a party, namely *the Hellenic Republic v./Council of the European Communities*[48] and *the Hellenic Republic v./Commission of the European Communities*[49]; in both cases, the Court submitted to control, the special aid granted to Turkey by the EEC Association -Turkey Agreement.

Through this type of control, the Court, with its judgment, may prevent the Union to apply in its legal order, the agreement that was the subject of annulment, which, internationally, means that the EU does not execute its obligations, following, however, to be held accountable, but as noted in the specialized literature, the Court may „be prudent"[50], resorting to general

[37] The current art. 260 TFEU.
[38] The current art. 263 TFEU.
[39] The current art. 218 TFEU.
[40] **Quentin Lejeune**, *op.cit*., p. 12.
[41] Pt. 21 of Opinion 1/91.
[42] Pt. 24 of the Conclusions (http://curia.europa.eu/juris/celex.jsf?celex=62005CC0415&lang1=ro&type=TXT&ancre=)
[43] **Quentin Lejeune**, *op.cit.*, p. 13.
[44] ECJ Opinion, December 6, 2001, *the Cartagena Protocol*, 2/00, section 11 (http://www.ier.ro/sites/default/files/traduceri/62000V0002.pdf)
[45] ECJ judgment, August 9, 1994, *the French Republic v./Commission of the European Communities*, C-327/91 (http://www.ier.ro/sites/default/files/traduceri/61991J0327.pdf)
[46] Pt. 15 of the judgment ruled in C-327/91, *cited above*.
[47] ECJ Judgment, 10 March 1998, *Germany v./Council of the European Union*, C-122/95 (http://www.ier.ro/sites/default/files/traduceri/61995J0122.pdf)
[48] ECJ Judgment, 27 September 1988, *the Hellenic Republic v./Council of the European Communities*, 204/86 (http://www.ier.ro/sites/default/files/traduceri/61986J0204.pdf)
[49] Judgment of the ECJ, 14 November 1989, *the Hellenic Republic v./Commission of the European Communities*, 30/88 (cited by Quentin Lejeune, *op.cit.*, p. 14).
[50] **Joël Rideau**, *Ordre juridique de l'Union Sources écrites*, JurisClasseur Europe Traite, 30 novembre 2006, par. 403 (cited by Quentin Lejeune, *op.cit.*, p. 14).

principles of international law, such as the principle of consistent interpretation[51].

4. Conclusions

We believe that the Court in Luxembourg, through the control that it can have on international agreements to which the EU is a party, behaves, in terms of international law, as a national constitutional Court, if we consider the opinion of the General Advocate P. Maduro expressed in the Opinion from *Kadi* Case[52], namely: „the ratio between international law and Community law is governed by the Community legal order itself, and international law can interact with this legal order only under the conditions set by the constitutional principles of the Community".

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[51] For details see, **Elena Emilia Ştefan**, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ,* Pro Universitaria Publishing House, Bucharest, 2013, p.318.

[52] *Cited above*.

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PLACE OF INTERNATIONAL AGREEMENTS TO WHICH THE EUROPEAN UNION IS PART WITHIN THE EU LEGAL ORDER

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Abstract:

The various categories of international agreements to which the European Union is part that are currently multiplying and diversifying by increasing participation of the Union in international relations are true sources of law for the European Union's legal order. However, apart from the fact that they oblige the Union internationally, integrate into its legal order and become sources of law. In terms of the level of international agreements to which the EU is part in the Union legal order, we notice, at the end of the study, that it is inferior to the primary law, but superior to the derivative law.

Keywords: *International agreements; the European Union; the EU's legal order; jurisprudence of the European Union's Court of Justice.*

1. Introductory considerations

In this study, we propose to highlight the place that the international agreements to which the European Union is part, occupy within the union legal order and to identify the legal effect that such agreements have on the Union's legal order. The approach has, as a starting point the particularity of the agreements to which the Union is part, in respect of their direct implementation and invocation, not only in the legal orders of the Member States and in front of the national courts, but also within the EU legal order and in front of its Court of Justice[1]. In addition, we note that, although the Court of Luxembourg has held since 1974[2], that once came into force, the provisions of an agreement are „part"[3] of the European Union law, things are not so simple, because not a few times, „in the field of international agreements, a series of political considerations appear"[4]. Moreover, „the question whether the provisions of a specific agreement have a direct consequence is not disposed of only by reference to the legal criteria defined, initially, in the Van Gend and Loos decision".[5]

2. The European Union's competence to conclude international agreements

According to public international law science, legal subjects are considered, at this level, all those entities that meet the following cumulative conditions: participate in the creation of the international law rules; have the capacity of recipients of these rules and have the ability to assume and exercise rights and acquire obligations within the international legal order[6]. In other words, are subjects of international law, „those entities involved in legal relations governed by the rules of international law and which may be holding direct rights and obligations in the international legal order". In other words, subjects of international law are „those entities involved in the legal relations governed by the international law rules and which may be holders of direct rights and obligations in the international legal order".[7]

Specialized doctrine considers that one of the most important changes to the European Union through the entry into force of the Treaty of Lisbon on December 1, 2009 is the express indication of its legal personality. By all account, until such date, the European Union had been attributed by the doctrinarians, an implicit legal personality, taking into account the provisions of Art. 24 and 38 of the Treaty on European Union, which articles granted the Union the competence to conclude international agreements. Once with the entry into force of the Treaty of Lisbon, the European Union became the subject of international law, by participating in international relations by virtue of legal personality which Article 47 of the Treaty on European Union (TEU) gave it. Thus, the shortest article of the Treaty on European Union enshrines, for the first time in the history of the Union, the legal personality of this entity: „the Union has a legal personality". What legal effect does this

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[1] **Paul Craig, Gráinne de Búrca,** „*Dreptul Uniunii Europene. Comentarii, jurisprudenţă şi doctrină",* 4th edition, Hamangiu Publishing House, Bucharest, 2009, p. 258.

[2] Decision ECJ, April 30, 1974, *Haegeman*, 181/73.

[3] Pursuant to section 5 of the *Haegeman, precited* decision (http://www.ier.ro/sites/default/files/traduceri/61973J0181.pdf).

[4] **Paul Craig, Gráinne de Búrca,** *op.cit.*, p. 259.

[5] *Idem.*

[6] According to **Dumitra Popescu, Felicia Maxim,** *„Drept ionternaţional public"*, vol.1, Renaissance Publishing House, Bucharest, 2011, p. 59.

[7] **Dragoş Chilea,** „*Drept internaţional",* Hamangiu Publishing House, Bucharest, 2007, p. 50.

text produce?[8] It is relatively easy to answer, namely: since December 1, 2009, we can say that, on the international scene, a new subject of law appears, namely the European Union, if we relate to the definition given in Article 1.1, of the Convention of 1975 on the representation of States in their relations with international organizations having universal character and Art. 2 of the Convention on the law of treaties of 1969.

Endowment of the European Union with legal personality:

- is the result of a prerequisite with regard to the clear determination of the legal status of the Union at international level, in general and European, in particular;
- „contributes to improving the perception of the Union and its capacity for action, facilitating the political and contractual activity of the Union at bilateral and multilateral levels on the international scene, as well as to its presence in other international organizations;
- contributes to the visibility of the Union and provides the citizens of the Member States with an identity in relation to the Union;
- constitutes a critical element in the establishment of a system for the protection of fundamental rights at Union level;
- helps to correct the malfunctions resulting from that stilt structure".[9]

We conclude by specifying that, with effect from December 1, 2009, the Union turns out from a special subject of international law into a derivative one, if we consider Art. 1 third paragraph of the TEU, as amended by the Treaty of Lisbon, article according to which 'the Union shall take the place of the European Community and succeeds to it". Having acquired legal personality, the European Union has the capability of representation (the right of active and passive legation), the ability to negotiate and conclude international agreements, the right to sue in court, the ability to become a member of an international organization (if its statute allows it) and the ability to adhere to international conventions (such as the European Convention on Human Rights).

In addition, the consequences of legal personality granted to the EU, are also the following: only the Union is empowered to conclude international agreements in its areas of competence; the Union has its own budget, officials and offices and has also the opportunity to sign contracts.

In its capacity as a subject of international law, even if it is a special one, the European Union „may conclude agreements with one or more third countries or international organizations, where the treaties so provide or where the conclusion of an agreement is necessary either in order to achieve, within the framework of the Union's policies, one of the objectives established by the treaties or is provided by a binding legal act of the Union, whether it can influence the common rules or may change its scope".[10] „The Treaty of Lisbon simplifies appreciably, the procedure of negotiation and conclusion of international agreements, the unique legal personality of the EU allowing the removal of duplicate procedures (different on stilts). At the same time, it takes place (at least to some extent) a clarification of the EU's external competences, basically resuming the jurisprudence of CJ, as well as a strengthening of the role of the European Parliament „.[11]

Prior to the Treaty of Lisbon, „the Community lacked an explicit external competence, except that in certain cases: monetary policy, the common commercial policy (CCP), research, environment, development cooperation, economic and financial cooperation with third countries, association with one or more States or international organizations. The former Art. 300 of the Treaty establishing the European Community (EC) restricted the conclusion of international agreements by the European Community to cases in which the provisions of the Treaty set forth the conclusion of agreements and seemed to exclude any implicit external competences."[12] However, the Court of Justice has established the existence of implicit external competences of the European Community in the *AETR*[13] decision, decision in which it mentions the principle of parallelism between internal and external competences. According to the principle, „every time when, for implementing a common policy envisaged by the Treaty, the Community has adopted provisions which lay down, regardless of form, common rules, the Member States are no longer entitled, individually or collectively, to enter into obligations with third countries which affect those rules."[14] In such situations, the Community was competent, in order to ensure coherence between internal and external rules.

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[8] **Augustin Fuerea**, „*Legal personality and powers of the European Union",* Lex ET Scientia International Journal - Juridical Series, Nr. XVII, vol. 1/2010, Pro Universitaria Publishing House, Bucharest, p. 204.

[9] Adaptation after the Report of the European Parliament, „Rapport sur la personnalité juridique de l'Union européenne (2001/2021(INI))", Final A5-0409/2001, conducted by the Commission for Constitutional Affairs, rapporteur Carlos Carnero González, presented on November 21, 2001.

[10] Art. 216 first paragraph of the Treaty on the Functioning of the European Union.

[11] **Augustina-Mihaela Dumitraşcu**, „*Dreptul Uniunii Europene şi specificitatea acestuia",* second revised and enlarged edition, Universul Juridic Publishing House, Bucharest, 2015, p. 147.

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[13] Court Resolution of March 31, 1971, *The Commission of the European Communities c./ Council of the European Communities* (European agreement on road transport), 22/70 (http://www.ier.ro/sites/default/files/traduceri/61970J0022.pdf).

[14] Section 17 of decision.

Subsequently, in the *Kramer*[15] decision, the Court claimed that „assuming international commitments is within the competence of the Community (...), because such jurisdiction derives not only from its explicit rendering through the Treaty, but may implicitly result from other provisions of the Treaty"[16], a matter which is also resumed in the Opinion 1/76[17]: „whenever the Community law has established for the Community institutions, internal powers in order to achieve a specific objective, the community has the competence to assume international commitments necessary for attaining this goal, even in the absence of a specific disposition in this regard"[18]. In other words, the Community also became competent when the conclusion of an agreement was necessary to achieve one of the objectives of the Community, without subordinating this power to the existence of an internal Community rule.

3. The direct effect of international agreements to which the Union is part

The agreements concluded by the Union, according to Article 216 second paragraph of the Treaty on the Functioning of the European Union (TFEU), „shall be binding on the institutions of the Union and for the Member States". Agreements to which the Union is part may be described as being, on the one hand, classical-type agreements when they are concluded with third countries or international organizations, they became mandatory only for the States or organizations which are parts thereto and, on the other hand, as the specific agreements the European Union law, acquiring its characteristics (immediate, direct and priority implementation). In the latter case, the question arises whether such agreements have a direct effect, or not i.e. if they are clear and unconditional enough to be able to be invoked by private individuals. This is because, as it was established on a jurisprudential manner, in order that a rule of law of the European Union has direct effect, it must be clear, precise and unconditional. Strictly formal, those agreements concluded by the Council and published in the Official Journal are, by the very fact of their publication, placed not only in the Union legal order, as well as in the national legal order of each Member State, without the need for ratification or publication at the national level.[19] In this way, the agreement concluded becomes binding upon the Member States and their private persons (individuals and legal entities) will be able to invoke its provisions before the national courts.

The conditions under which international agreements to which the EU is part have a direct effect in the internal legal order of the European Union have been established by the Court in Luxembourg, once with the issuance of judgment in the case of *Demirel*.[20] Thus, according to the Court, „a provision in an agreement concluded by the Community with third countries is regarded as being directly applicable when, having regard to the content, the subject matter and nature of the agreement, it sets out a clear and precise obligation whose performance or whose effects do not depend upon the intervention of any subsequent act"[21]. In this way, according to the Court, the assessment is made according to the nature and structure of the international agreement, accuracy, clarity and unconditional nature of the rules contained therein.

4. The relation between international agreements to which the EU is part and the primary law of the European Union

Since the issuance of judgment in the *Haegeman*[22] case, the Court has embraced the monistic theory regarding the relationship between the Union's legal order and the international one[23]. The situation is entirely different when we consider, however, the relationship between the primary law of the European Union and international law, namely the priority of one over the other and this is because, the Court, in this situation, varied the application of the monistic theory. Thus, in terms of the relationship between the primary EU law and international law, the Court pointed out that, where the „international agreement (...) has already been concluded, (...) the State or Community institution (...) could introduce an action for annulment against the Council decision to conclude the agreement and could request, on this occasion, interim measures by means of an application for judge's order"[24]. In addition, in Article 218, eleventh paragraph 1 of the TFEU, the last sentence, we find again the jurisprudential matter on the relationship between the

[15] Court decision of July 14, 1976, joined cases 3/76, 4/76 şi 6/76 (http://www.ier.ro/sites/default/files/traduceri/61976J0003.pdf).

[16] Section 19 and 20 of the decision.

[17] Court Opinion of April 26, 1977, Opinion issued under Art. 228, first paragraph, second subparagraph of the EEC Treaty „Draft agreement on the establishment of an European Fund for holding inland navigation vessels" (http://www.ier.ro/sites/default/files/traduceri/61976V0001.pdf)

[18] Section 3 of the Approval.

[19] See **Augustin Fuerea**, *Drept comunitar european. Partea generală*, All Beck Publishing House, Bucharest, 2003, p. 155.

[20] Decision of ECJ of September 30, 1987, *Meryem Demirel c./ Stadt Schwäbisch Gmünd*., 12/86 (http://ier.ro/sites/default/files/traduceri/61986J0012.pdf).

[21] Section 14 of the decision.

[22] *Pre-cited*.

[23] See **Koen Lenaerts**, **Eddy De Smijter**, *The European Union as an Actor under International Law*, Yearbook of European Law, 2000, pages 95-139.

[24] ECJ Decision of March 10, 1998, *Federal Republic of Germany c./ European Union Council*, C-122/95, section 41 et sequens (http://ier.ro/sites/default/files/traduceri/61995J0122.pdf).

primary EU law and international law: „in the event of a negative opinion of the Court, such agreement may enter into force only after its amendment or revision of the Treaties".

According to the treaties of the European Union, the Court of Justice of the European Union is competent including in relation to the issuance of approvals on the compatibility of a future agreement to which the Union is part and the EU law, thus conducting an *a priori* control. Within such control, the Court checks „the compatibility of agreements with the provisions of material law and with those concerning the powers, procedures and organization of the Community institutions, especially those relating to the delimitation of competences in the fields of" negotiation and conclusion of international agreements „[25]. Thus, according to the Court, „compatibility of an agreement with the Treaty may depend on, not only the substantive law, but also those which provide for the competence, procedure or institutional organization of the Community". After a careful analysis of the Court jurisprudence, we find that it has exercised its jurisdiction to conduct an *a priori* control was exercised over and over again. In this regard, we recall: Opinion 1/76 on the Draft Agreement establishing an European Fund for those vessels sailing on inland waters[26], Opinion 1/91 of the Draft Agreement between the Community, on the one part, and the countries belonging to the European Free Trade Association, on the other hand, with regard to the creation of an European Economic Space[27] and Opinion 2/94[28] on accession of the Community to the European Convention for the protection of human rights and fundamental freedoms[29].

As regards *a posteriori* control, its performance by the Court of Luxembourg raises issues within the international legal order. In accordance with him regulations occasioned by its jurisprudence, „the question of whether the conclusion of a certain agreement is within the competence of the Community or not and whether, in a given case, this competence was exercised in accordance with the provisions of the Treaty, is a problem which may be subject to the Court's analysis[30]". How problematic may be the consequences of such a decision is revealed by the Court's decision to annul the agreement on the implementation of the rules in the field of competition, signed on September 23, 1991 between the Commission and the authorities of the United States of America[31]. This precedent is able to highlight situations of legal uncertainty in the relations of the Union with external partners that can sensitize the bilateral or multilateral framework and, in particular, may involve the international liability of the Union[32].

Basically, the rule of international law or of the obligations arising out of international commitments on the measures belonging to the secondary legislation of the European Union may be the subject of an analysis of the Court of Justice of the European Union, such as its own jurisprudence regulates[33]. Pursuant to article 216 second paragraph, both the Member States and the institutions of the Union must take steps that are in strict compliance with the international law. Court jurisprudence has introduced the mention that the obligation to observe the international commitments by the Member States continue both in legal relations with partners, as well as in their relations with the European Community (nowadays, in their relations with the European Union). Thus, although a measure taken within the European Union is not in conformity with an obligation born by virtue of an international agreement, the Union must comply with/implement the provisions of international law, in the detriment of measures belonging to the secondary law. The Court, in accordance with Art. 216 of the TFEU, has the power to check the compliance with this obligation.

From this rule, it was also the Court that led the way to introducing some exceptions via two cases related to the implementation of GATT and WTO rules, respectively. In the first case, Germany has challenged the compliance with the provisions of GATT for a Council regulation on the organisation of the market as regards bananas[1]. Although the Court recognized the applicability and superiority of GATT rules in the community legal order, it considered „the spirit, the general framework and the terms of the international agreement in question"[2] as representing

[25] ECJ, October 4, 1979, Opinion 1/78 (http://ier.ro/sites/default/files/traduceri/61978V0001.pdf). Section 30 and 31 have been acknowledged by Art. 107 (2) of the CEJ Rules of Procedure of din June 19, 1991.

[26] Opinion issued on the grounds of Article 228 first paragraph, second subparagraph of the EEC of April 26, 1977 (http://ier.ro/sites/default/files/traduceri/61976V0001.pdf)

[27] Opinion of December 14, 1991 (http://ier.ro/sites/default/files/traduceri/61991V0001.pdf)

[28] Opinion of March 28, 1996 (http://ier.ro/sites/default/files/traduceri/61994V0002.pdf)

[29] For further details, see also **Koen Lenaerts**, **Eddy De Smijter**, *op. cit*., p. 98.

[30] ECJ Opinion of November 11,1975, pursuant to Art. 228 first paragraph of the TEEC, Agreement on standards for local costs, Opinion 1/75.

[31] Case C-327/91, *Franced c./ Commision*.

[32] We can talk about „liability for all social categories, including governors" (pursuant to **Elena Emilia Ștefan**, *Examen asupra jurisprudenței Curții Constituționale privind noțiunea de „fapte grave" de încălcare a Constituției*, in the Public Law Revue no. 2/2013, Universul Juridic Publishing House, Bucharest, p. 86.

[33] In the doctrine there is the opinion according to which, ' (...) if originally, courts checked the compliance with the legality in the work of the Administration, at this point, there is also question to comply with the European Union law **(Elena Emilia Ștefan**, *Legal liability. A special look on liability in the administrative law*, Pro Universitaria Publishing House, Bucharest, 2013, p. 105).

[1] ECJ Judgment, October 5, 1994, *Germany v. / Council of the European Union*, 70/87, (http://www.ier.ro/sites/default/files/traduceri/61993J0280.pdf).

[2] Pt. 105 of the judgment.

an additional condition in the context of the analysis of the incompatibility of Community measure with the said agreement. In this case, the Court concluded that, „thanks to the spirit, the general framework and the terms in which the referenced provision has been designed, it cannot be regarded as establishing a rule of international law, directly applicable in the internal legal order of the Contracting Parties, so that such provision cannot represent a foundation for challenging the lawfulness of secondary law measures."[3]

In connection with the request addressed to the Court by Portugal, to annul the decision of the Council to conclude agreements in the field of textiles between the European Community, on the one hand, and India and Pakistan, on the other hand[4], given that they would not abide by a set of rules and principles of the WTO, the Court refused to consider the legality of Community measures on the grounds that this would constitute an unbalanced application of WTO rules, provided that the principle of reciprocity is fundamental to the WTO[5]. Moreover, the Court held that the courts of the most important members of the WTO do not examine the lawfulness of national laws in the light of the WTO[6], this attribute belonging to WTO mechanism for the resolution of disputes. Implementation by the court of a control of compatibility of secondary law rules with the WTO rules would deprive the Community (now the Union) from the advantage of negotiations that it would be equipped with as a member[7].

The relationship between the agreements concluded by the Member States before the entry into force of TEC or before the accession to the European Union, as appropriate as well as the European Union law, is given by Article 351 of the TFEU[8], article which states the following: „the provisions of the treaties shall not affect the rights and obligations arising from agreements concluded before January 1, 1958 or, for acceding States, before the date of accession; between one or more Member States, on the one hand and one or more third countries, on the other hand". However, Member States are required that, if the scope of some of these agreements are not compatible with the treaties, „to use all appropriate means to remove the incompatibilities detected". The logic of this provision is represented by the" the imperative of uniformity of European Union law"[9], and, in doctrinal interpretation, it was the one that represented the Foundation of the Court's judgment in ERTA case and not the doctrine of implied powers. In Klabbers' opinion, "the court deduced the Community's ability to conclude agreements with third countries in the field of road transport in order to ensure the uniformity of Community law and not necessarily because that would have been the intention of the parties to the TEC or that such jurisdiction should be implied"[10].

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[3] Pt. 110 and following.

[4] ECJ Judgment, 23 November 1999, *The Portuguese Republic v./ Council of the European Unio*n, C-149/96 (http://www.ier.ro/sites/default/files/traduceri/61996J0149.pdf)

[5] Pt. 45 of the judgment.

[6] Pt. 43 of the judgment.

[7] Pt. 27 of the judgment.

[8] Former Article 307 of TEC.

[9] As regards the role of law principles in interpretation, see **Elena Anghel**, *The importance of principles in the present context of law recodifying*, în proceedings-ul CKS - journal 2012, pages 753-762.

[10] **Jan Klabbers**, „*Treaty Conflict and the European Union*", Cambridge University Press, Cambridge, 2009, p. 11.

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LEGAL ASPECTS OF INTERNATIONAL TERRITORIES IN THE SUBMARINE AREA

Nicolae PURDĂ*

Abstract

United Nations Convention on the Law of the Sea held in Montego Bay in 1982, in Part XI, has established a radically distinct legal regime on soil and subsoil bottoms seas and oceans, beyond the limits of national jurisdiction of coastal States, different rules for other parts of the sea, including sea water above the free zone.

The entry into force of the Convention of 1982 on November 16, 1994, was possible only after the adoption on 28 July 1994 in New York, of the Agreement on Implementation of Part XI of the Convention of 1982, which amends the legal regime of submarine territories beyond the limits of national jurisdiction established by the 1982 Convention.

Keywords: *Law of the Sea, the international submarine territories, international authority, company, room for settlement of disputes relating to underwater territories.*

1. Introduction:

The issue of the legal regime of seabed generated an extensive analysis of the doctrine and raised complex issues in international practice of the states, especially after the sharp development of exploration technologies to great depths which allowed the identification of mineral resources including polymetallic nodules.

Polymetallic nodules are rock formations, mainly of iron and manganese hydroxide, arranged in concentric layers around a nucleus. This nucleus is converted often microscopic mineral crystallization process magnesifere through.

The composition of polymetallic nodules from 42 elements, but economically significant nodules, industrial capitalized, are rich in manganese, iron, nickel, cobalt and copper.

Research has allowed the identification of more than 150 worldwide operating fields and the rate of multiplication of nodes is high operating current pace.

Currently, it is estimated that around 15% of the seabed is covered with polymetallic nodules, the most important deposits being at depths ranging between 4000-6000 meters.

In the scientific research carried out in the Pacific Ocean there have been identified the most promising concentrations of polymetallic nodules in its limits focusing richest clusters of ferro-manganese concretions from what have been identified to date. Here indeed the first pioneers investors have defined perimeters in the exploitation and subsequent transition to commercial scale operation.

Other areas that contain these minerals are considered to be: Blake Plateau in Georgia (USA), Southern Province Red Clay Bermuda area of San Diego Garcia and Madagascar in the Indian Ocean sea area south and southwest coasts adjacent South Africa, the Galapagos in law and Equatorial Peruvian shores.[1]

2. Shaping the legal status of the International Zone underwater territories

For a long time in doctrine and practice it was tried as international legal status of these underwater areas to be based on classical thesis: "res nullius", according to which these areas are considered to belong to the first discoverer, it will benefit from exclusive access and unlimited resources available in the area; "Res communis omnium" according to which the submarine territories beyond the jurisdiction of coastal States - seabed water column above them, and for the basement, follows the legal regime of the high seas.[2]

The Declaration on 1 November ISSUED 1967 in the United Nations General Assembly, Ambassador Arvid Pardo, Permanent Representative of Malta to the United Nations, stressed the underwater exploration and exploitation Need for territories beyond the limits of national Jurisdiction in the interest of humanity.[3]

On December 18, 1967 was adopted United Nations General Assembly Resolution no. 2340 (XXII) on the importance of protecting soil and subsoil beneath the high seas beyond the limits of national jurisdiction of shares that may become detrimental to humanity.

United Nations General Assembly adopted on 15 December 1969 the Moratorium Resolution no. 2574 (XXIV) which proclaims to establish an international regime for underwater territories beyond the national

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[1] Marian Ilie, *Law of the Sea – Maritime delimitation* (Bucharest: Universul Juridic Publishing House, 2011), 210 – 211.

[2] Dumitru Mazilu, *Public International Law*, Fifth Edition, Vol. 1 (Bucharest : Lumina Lex Publishing House, 2010) 564.

[3] Dumitru Mazilu, *Law of the Sea– Concepts and institutions established by the Convention Montego-Bay* (Bucharest : Lumina Lex Publishing House, 2002), 167.

jurisdiction of states that "Member and natural or legal persons are obliged to refrain from all mining activities in the territories resources submarines, including related basement "and that" no claim to a part of this area and its resources will not be recognized "

On 17 December 1970 the United Nations General Assembly adopted Resolution no. 2749 (XXV), which was adopted the "Declaration of Principles that govern submarine territories, including subsoil beyond the limit for the national jurisdiction", according to which "submarine territories, including related basement located beyond the limits of national jurisdiction and its resources constitute the common heritage of humanity."

Although some developed countries argued that the Declaration of Principles is not mandatory and that it does not create a temporary system for these territories, most states have argued that recognizing and formulating the principle - the common heritage of humanity - by adopting Resolution 1970 is a presumption ,, juris de jure " that such a rule and principle is part of positive international law, and combat thus, these texts have a tendency worth a mere recommendation.[4]

Negotiations on the legal regime applicable area and international mechanisms have to be established for the exploration and exploitation of its proved increasingly difficult, and actually a confrontation between two orientations conceptual world or between the Group of 77 and states highly developed capitalist.

Third UN Conference on the Law of the Sea, has developed works between 1973 - 1982, during the 11th Session through negotiation committees and groups.

The conference succeeded, after complex negotiations, sustained and prolonged harmonize a new law of the sea, enshrined in one Convention - United Nations Convention on the Law of the Sea.

The text of the Convention was adopted on 30 April 1982 and was opened for signature on 10 December 1982 in Montego Bay, Jamaica.

The Convention entered into force on 16 November 1994. Entry into force of the Convention, however, was possible only after the adoption on 28 June 1994 in New York Agreement on Implementation of Part XI of the 1982 Convention which brings substantial changes legal regime of submarine territories beyond the limits of national jurisdiction (set of Convention of 1982).

Romania signed the Convention on 10 December 1982, and by Law no. 110 of 10 October 1996 has ratified and acceded to the 1994 Agreement on implementation of Part XI of the 1982 Convention.

3. Legal Regime of the initial provisions of the Convention Areas 1982

The Zone initial regime was established by the provisions included in Part XI of the Convention.

In pursuit of the business in the area, the Member shall comply with the provisions of the Convention and principles of the Charter of the United Nations and other rules of international law, showing concern for the maintenance of peace and security, promote international cooperation and mutual understanding.[5]

The principles underlying the definition of the legal status of the area can be grouped into 3 categories:[6]

The fundamental principle that defines the legal status of the area - the area and its resources are the common heritage of humanity

- General principles and specific principles

General principles legally binding on the entire area of the area and its resources, and on all States and other entities involved in activities in this area are:

a) The principle of national non-closeness

b) The principle of inalienable resources Zone

c) The principle of using Zone in the legitimate interest of all Member

d) The principle of using exclusively peaceful purposes Area

e) The principle of effective participation of developing States in the work done in the area.

The specific principles whose application is only on certain specific issues of the area or its resources are:

a) The principle of respecting the legal status of the area;

b) The principle of liability for damage Zone

c) The principle of respect for the rights and legitimate interests of coastal States

d) The principle of protection of the environment and to human life and activity in the area correlation with other activities in the marine environment.

3.1.1 Common heritage of humanity in the area

The 1982 Convention sets out a series of articles and essential elements of legal contents.

Thus, art. 136 provides concise and unequivocally that "the area and its resources are the common heritage of humanity". This concept is developed in art. 137 para. 2 of the Convention which states that "all rights belong to all humanity Resource Area" and in art. 140 para. 1, which states that "the activities of the area will be carried out in the interest of all humanity".

The concept of common heritage of humanity has produced two significant changes in international law: on the one hand exclude the idea of freedom of the sea-bed mining, and on the other hand resulted in

[4] Dumitru Mazilu, *International Public Law*, Fifth Edition (Bucharest : Lumina Lex Publishing House, 2010), 565.
[5] Art. 138 of the 1982 Convention on Law of the Sea.
[6] Laura Magdalena Trocan, *The legal regime of submarine territories* (Bucharest: "CH Beck" Publishing House, 2008), 89 – 90.

the internationalization of these spaces and the institutionalization and internationalization system established for mineral resources exploitation of underwater territories.[7]

3.1.2. The principle of national non-closeness

Convention of 1982 enshrine this principle in art. 137 para. One saying that no state or person or entity is not entitled to claim or exercise sovereignty or sovereign rights over any part of the zone and its resources or to acquire a part of it. The Convention also reiterates that any such claim, no exercise sovereign rights and no approximation act will not be recognized.

3.1.3. The principle of inalienable resources of the Zone

The 1982 Convention states in art. 137 par. 2 that all resource rights belong to the Area of the entire community to act on behalf of the Authority. These resources are inalienable.

This character inalienability apply to all mineral resources solid, liquid or gas that can be found on the seabed or the subsoil thereof, including polymetallic nodules.[8]

3.1.4. Principle areas using legitimate interests of all states

Activities will be carried out in the interest of all humanity, be it the riparian countries or countries with no coastline and especially considering the interests and needs of developing States regardless of their geographical situation, whether it's peoples who have not attained full independence or autonomy regime recognized by the United Nations. For this purpose, the Authority will ensure equitable sharing, on a nondiscriminatory basis, the financial benefits and other economic benefits derived from activities in the Area, through an appropriate mechanism.[9]

3.1.5. The principle of using exclusively peaceful purposes Area

The area is open to use exclusively peaceful purposes, returning absolute obligation of all States, coastal or landlocked.[10]

On this point the emphasis emphasize the exclusively peaceful nature of the Activities of States in area, unlike the provisions applicable to other actions in the high seas waters.

The consecration of this principle has been prepared by a series of measures agreed by the international community before deployment of the 3rd UN Conference on the Law of the Sea.[11]

Marine scientific research in the area will also perform exclusively peaceful purposes and in the interest of all humanity (Art. 143 para. 1 of the 1982 Convention).

3.1.6. The principle of effective participation of developing States in activities in the Area

In the process of developing the system of exploitation of the common heritage argued thesis setting up preferential rights in favor of developing countries. In art. 140 para. 1 of the 1982 Convention states that "activities in the area will be carried out (...) and taking into account in particular the interests and needs of developing States (...)". Pursuant to Article 148 "effective participation of developing States in activities in the Area is encouraged (...)", taking due account of the special needs and interests of these states. ".

3.1.7. The principle of respect for the legal regime Zone

According to art. 139 para. 1 of the 1982 Convention, States Parties are obliged to ensure that activities in the Area, either by themselves or by public enterprises or by natural or legal persons possessing their nationality or effectively controlled by they or their citizens to comply with the provisions of Part XI.

Under the provisions of art. 153 paragraph 4 of the Convention, the Authority shall exercise the necessary control activities undertaken in the area to ensure that the relevant provisions of Part XI and the corresponding Annexes, as well as rules, regulations and procedures of the Authority and work plans approved.

3.1.8. The principle of liability for damage in the Zone

In art. 139 para. 2 stipulates the principle of liability for damage caused as a result of non-compliance related to activity in the area.

As for responsibility for how respected the legal regime of the area, identify two different situations: Liability for breach of an international obligation in accordance with art. 139 of the 1982 Convention and the nature of civil liability of the contractor for damage caused by unlawful acts committed by him in carrying out operations, as shown in art. 22 of Annex III to the Convention of 1982 and of art. 229 of the 1982 Convention.[12]

[7] Ibidem art. 93.
[8] Art. 133 letter A Convention of 1982.
[9] Ibidem art. 140.
[10] Ibidem art. 141.
[11] As the 1963 Treaty prohibiting nuclear experiments in the atmosphere, in outer space and under water and the Treaty of 1971 to prohibit the installation or placement on the soil and subsoil seas and oceans to the limit of 12 nautical miles from the shore of nuclear weapons and other weapons of mass destruction.
[12] Laura Magdalena Trocan, *op. cit*., p.114.

3.1.9. The principle of respect for the rights and interests of coastal States

In accordance with Art. 142 para. 1 of the 1982 Convention in case of resource deposits areas that extend beyond its limits "activities in the area will be held duly taking into account the rights and legitimate interests of coastal states under whose jurisdiction such deposits lie.

In order to avoid any infringement of such rights and interests, establish a system of consultation with the State concerned, including the procedure prior notice. Moreover, where activities in the Area may result in the exploitation of resources that are still in limiting national jurisdiction of a coastal State is required prior consent of it.[13]

Bringing harm the interests of coastal states and the violation of the Convention of 1982, which also have obligations for the contractors carrying out activities in the area, punished by those responsible, including related causes, such as damage or threat of pollution of the marine environment, as result of such activities.[14]

3.1.10. The principle of protection of the environment and human life and activities in the area correlated with other activities undertaken in the marine environment

Marine Environment Protection Zone is an obligation for both Zone users and for system administration charge of Institutional Area.

Duties consist users adopt the most effective measures to prevent and reduce polluting factors, and the Authority (the mechanism that manages the area and its resources) consist in adopting rules, regulations and procedures appropriate to prevent, reduce and control pollution of the marine environment, including coastline, including the face and other risks that threaten the marine environment, paying particular attention to the need to protect against the harmful effects of certain activities such as drilling, dredging, excavation, waste disposal construction and operation or maintenance of installations, pipelines and other devices used for these activities.[15]

Similar obligations incumbent on the same subjects and in terms of marine flora and fauna.

Protection of human life and it is an important issue of the legal regime of the area. In this way users are required to adopt the most effective measures to ensure the protection of human life and the Authority is required to adopt rules, regulations and procedures in addition to the regulations of international law.[16]

Activities in the area must be consistent with the other activities undertaken in the marine environment, which is why the 1982 Convention stipulates in art. 147. Two conditions that must be fulfilled facilities used for activities in the area. Among other conditions, noted that facilities for activities in the area will comply with certain rules, will be surrounded by "security zones" will be used exclusively for peaceful purposes and does not have the status of islands.

Convention of 1982 in art. 147. Three retained to address any compatibility issues, using reasonable criteria states that other activities undertaken in the marine environment will be carried out taking into account reasonably activities in the area.

It should be noted that in terms of objects of archaeological or historical nature found in this protected maritime sector, the 1982 Convention requires that they be stored or disposed of in the interest of all humanity, taking into account in particular the preferential rights of the State or country of State of origin or cultural origin or the State of historical or archaeological origin.[17]

3.2. The institutional structure Area

The institutional structure exploration and exploitation Area consists of[18]:

1. A specialized international organization - the International Authority Territories Submarine

2. An operational body of authority - Enterprise

3. A specific mechanism for settling disputes - Room for regulating differences on teirtoriile submarine, which is included in the structure of the International Tribunal for the Law of Sea

3.2.1. International Submarine Authority Territories

Authority appears to represent the organization through which Member - Party organizes and controls activities in the Area for administering and managing their resources, according to the provisions of Part XI of the 1982 Convention and the Agreement in 1994.

From the Convention of 1982 and the Agreement of 1994 on the following features of Authority[19]:

- is a specialized intergovernmental organization with universal
- uses jurisdiction over an internationalized space and on operators Zone
- has international legal personality;
- is based on the principle of sovereign equality of Member States
- has tripartite structure

[13] Art. 142 paragraph 2 of the Convention, 1982.

[14] See par. 3 of art. 142 of the Convention of 1982, which refers to the relevant provisions of Part XII of the Convention of 1982 and especially art. 235, which covers "expresis verbis" to a liability of international law of the Member.

[15] Art. 145, letter A of the Convention 1982.

[16] Ibidem art. 146.

[17] Ibidem art. 149.

[18] Raluca Miga – Besteliu, *Public international Law*, Vol. I, 3rd Edition (Bucharest: C.H. Beck, 2014), 227.

[19] Laura Magdalena Trocan, *op.cit.*, 133.

- National And its property as persons acting in here, in each State enjoy the privileges and immunities necessary for the performance of functions.

Authority has the responsibilities: to ensure that activities in the area, to promote the harmonious development of the world economy; adopt regulations needed to conduct business in the area, its exploitation, protection and preservation of the marine environment.[20]

Activities in the area will be conducted either by the company or by States Parties or natural or legal persons having the nationality of a State Party, but in combination with the Authority. (Art. 153 para. 2 of the Convention of 1982).

In the area any activity can take place only by permit, issued by the Authority, which supervises the exploitation of local resources according to the principles of a "healthy commercial basis".[21]

Authority is the principal organs of an Assembly which meets general functions corresponding to the type of duties vested in the normal legislative bodies of other international organizations, a restricted composition Council, with executive functions and a Secretariat whose status and functions differ from those of other international organizations.

Assembly consists of all members of the Authority and is considered the supreme organ of it. Assembly in collaboration with the Council establishes the general policy of the Authority.

For the implementation of the general policy of the Authority, the Assembly meets regulatory functions, functions of administrative, financial functions - economic and other functions of operational nature (regulated by art. 160 of the 1982 Convention).

The Council is the executive body of the Authority anticipates general policy and ensure achieving the goals set by the Assembly.

The 36 members of the Council are elected component based on the criteria established by the 1982 Convention, taking into account the principle of ensuring an equitable geographical distribution of seats in the Assembly Council of the investments and the catches made in the area of mineral resources, the status developed country or developing the rule that the representation of Member States landlocked and geographically disadvantaged to be approximately proportional to their representation in the Assembly.[22]

In order to achieve, in cooperation with the Assembly, the general policy of the authority, the Council meets regulatory functions, functions of administrative, financial and economic functions, functions of supervision and control and other functions of operational nature (governed by Article 162 of Convention 1982)

The bodies referred to function structure of the Board are: Planning Commission Economic, Legal and Technical Commission, established under the provisions of Article 163 paragraph 1 of the 1982 Convention.

The Authority shall comprise the organizational structure authorized to provide a permanent Secretariat and perform administrative tasks of this organization.

Secretariat shall comprise a Secretary General and the staff of the Authority needs. The Secretariat is headed by a Secretary General elected by the Assembly from among candidates proposed by the Council for a period of 4 years. He is the chief executive of the Authority and shall act in that capacity in all meetings of the Assembly, Council and its subsidiary bodies have.

1982 Convention entitling the Secretary General to conclude, with the approval of agreements, to ensure consultation and collaboration with other international intergovernmental organizations and NGOs.

3.2.2. Company

The **Company** International Authority is the entity that runs directly exploration activities, mining of minerals extracted from the area in accordance with the 1982 Convention and the Agreement of 1994 and the general policy established by the Assembly and Council directives Authority.[23]

The activities of the Enterprise consist of transport, processing and marketing of minerals extracted[24]

The activity of the company is managed by a Board of Directors and a CEO. The governing bodies of the company are aided by qualified personnel.

Director General of the enterprise is its general representative and chief administrator.

Featuring legal personality distinct from that of the Authority, Company may enter into contracts and other agreements with the State or international organization or you could sit and separate justice authority.

3.2.3. Dispute Resolution Chamber on submarines territories

It is composed of 11 judges elected by the International Tribunal for the Law of the Sea, among its members, for a period of 3 years.

The room has a double competence, both contentious and advisory.

The Chamber has jurisdiction to consider and resolve, mainly the following categories of disputes resulting from activities in the Area: disputes between States Parties concerning the interpretation or application of Part XI and Annexes which refers to it; disputes between a State Party and the Authority

[20] Raluca Miga – Besteliu, *op.cit*., 227.
[21] Ibidem, 228.
[22] Marian Ilie, *op. cit.*, 224.
[23] Art. 170, paragraphs 1 and 2 of the 1982 Convention.
[24] Art. 1 paragraph 1 of Annex IV of the 1982 Convention.

concerning the acts or omissions attributable to the Authority or of a State Party or acts contrary to the Convention Authority; differences of the parties to a contract; disputes between the Authority and an applicant for a refusal to contract or juridical problems arising out of the contract negotiations and any dispute for which the competent Chamber is expressly provided for by the 1982 Convention.[25] Regarding the competence of the Chamber by the provisions of Article 189 of the 1982 Convention, are set some limitations.

Chamber judgment is final and shall be binding only on the parties resolved the dispute and only, which must be suppressed from the date of its delivery.

The camera also has the power to give advisory opinions at the request of the Assembly or the Council on legal issues that may arise during the development of their activity.[26]

4. The current legal regime of the Zone, according to the 1994 Agreement.

United Nations Convention on the Law of the Sea, adopted in 1982 although it was not entered into force only after approval by the UN General Assembly Resolution 48/263 by 28 June 1994 Agreement on the Application of Part XI on such terms and conditions exploration and exploitation of resources in the international area of submarine territories.

The peculiarity of the current regime Zone resource exploration is that the provisions of the 1994 Agreement and Part XI of the Convention Against din1982 be interpreted and applied together as a single instrument.

Resources of the area can be explored and exploited in accordance with the principles governing the area, according to the 1982 Convention, Part XI, Annexes III and IV thereof, and according to the provisions and provisions of the 1994 Agreement.

This Agreement states that although refers to the application of Part XI of the Convention, in reality has functions of an agreement amending the provisions of Article 2 resulting from the Agreement of 1994 provided that in the event of any inconsistency between any agreement and Part XI of the 1982 Convention shall prevail provisions of the 1994 Agreement and the provisions of Article 4 which refers to the expression of consent of States or other entities to become parties to the 1982 Convention or the Agreement.

The provisions of this Agreement shall be brought substantive changes to the initial provisions of the 1982 Convention, meaning[27]:

a) conferring additional powers in administering Authority on other resources in the area. Powers and functions of the Authority shall be those expressly conferred on its mos, by convention, giving the subsidiary will be invested with powers compatible with the Convention, which necessarily involve the exercise of those powers and functions relating to activities in the Zone[28]

b) alteration zone management decision making mechanism. Thus, if according to the 1982 Convention, the Assembly was considered the supreme organ of the Authority and is authorized to establish its overall policy, as agreed in 1994 (Section III of the Annex), the general policy of the Authority will be established by the Assembly, in collaboration with the Council, which is reflected in the increased role for the Council in making decisions.

c) minimizing the expenditure of States Parties based on "savings requirements" measure that affects the functional capacity of the Authority and the mechanisms established by the Convention.

d) introducing the concept of "pioneer investor" that are preserved substantial rights of exploitation in the area, for companies in industrialized countries that have explored and exploited subsea fields before adoption of the Convention. According to the Agreement, pioneer investors will be provided with 36 months instead of 6 months from the entry into force of the 1982 Convention, in order to apply for approval of a plan of work on mining.

e) ensure technology transfer to business and developing states, only on the basis of fair and reasonable commercial terms or agreements concluded only by joint ventures.

Also, although the 1994 Agreement Preamble reaffirms the principle of the common heritage of humanity, the regime established institutional framework provides a modest, with little chance of reaching the exploitation of resources in favor of developing countries. Therefore it is estimated that common principle of humanity on the international area is in recession.[29]

Certain provisions of the 1982 Convention and the annexes are simply removed by the Agreement.

Thus, if in the 1982 Convention spoke of a fair sharing of the benefits of financial and other economic benefits derived from activities in the Area, the Agreement no longer refers to such a division.

Establish a system of compensation in order to help our developing member of the 1982 Convention, not appearing in the 1994 Agreement, limiting it only to nurse.

[25] Marian Ilie, *op.cit*., 226-227.
[26] Art. 159, paragraph 10 of the 1982 Convention.
[27] Marian Ilie, *op.cit*., 232.
[28] Section 1, paragraph 1 of the Annex to the 1994 Agreement.
[29] Ion Diaconu, *Manual of Public International Law* (Bucharest: Lumina Lex, 2007), 232.

The Convention of 1982 on the limitation of production, were eliminated by the 1994 Agreement and have been replaced by general principles[30]

The Agreement has been removed and a number of provisions relating to the procedure for selecting applicants for authorization of production which, according to the regulations of the Convention of 1982 attributed Authority discretion.

According to the 1994 Agreement, the provisions of Article 155 paragraph 1, 3 and 4 of the Convention of 1982 was repealed and the provisions of Section IV of Annex thereof, states that, in terms of reviewing seabed mining regime, the Council make recommendations to the Assembly.

1994 Agreement but also brings some new elements. Thus potential investors will be able to request the Authority to approve a work plan on exploring a mining site in reasonable conditions (which were not found in the Convention of 1982)

Another novelty refers to the fact that the application for approval of a plan of work must be accompanied by an assessment of the potential impact of proposed activities on the environment.

Section IX of Annex to the Agreement contains provisions required for setting up the structure of the Board of "Finance Committee" composed of 15 members, of which, necessarily, a representative of each of the five states with the most great contribution to the administrative budget of the Authority.[31]

Given the above data, we estimate that the provisions of the 1994 Agreement correspond to a great extent the objectives pursued by industrialized states, but also diminishes the benefits of developing states.[32]

With all its imperfections 1994 Agreement allowed the materialization of one of the most magnificent works ever made legal, but constiuie and an acceptable alternative to a situation that would not have led nonexistent than the uncertainty, tension and confrontation in international relations.[33]

5. Conclusions

Entry into force of the Convention on the Law of the Sea on 16 November 1994 following the adoption of the Agreement, determined in addition to the establishment of a specific legal regime submarine territories, as authority for the international seabed - the piece de resistance of this new regime to take birth among other international organizations, with the assurance that almost all countries, especially the major industrial powers, she will ensure existence.

The exploration and exploitation of the area, appears to be a genuine compromise between those who wanted to reserve exploitation of ocean and sea bottoms, private companies and those belonging to developing states that, in turn, wanted all activities in The area to be conducted by a single entity - authority - so the operation to be performed on behalf of the entire international community.

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[30] Section 6 of the Annex to the 1994 Agreement.
[31] Section 9 of Parts 3 and 4 of the Annex to the 1994 Agreement.
[32] See Marian Ilie, *op. cit*., 233; Laura Magdalena Trocan, *op.cit*., 65 – 66.
[33] Laura Magdalena Trocan, *op. cit*., 67.

RECONCILIATION OF LANGUAGE VERSIONS WITH DIVERGING MEANINGS IN THE EUROPEAN UNION

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Abstract

As emphasized in a study published last year, when multiple legal orders and languages co-exist within a single legal regime, there is potential for divergences between the legal texts. The European Union gives rise to such divergences, having in mind that it integrates 28 Member States and 24 official languages. After discovering how the multilingual and multicultural environment of the European Union affects its legislative and judicial processes and arguing the problem of translation divergences between the authentic texts of the European Union, it is nowadays our concern to analyse the reconciliation of language versions with diverging meanings in the EU legal order.

The present study is part of a more complex research on this theme and it is meant to approach certain important points of the master thesis prepared in Switzerland for a LL.M. program.

Keywords: *European Union, translation, divergences, conflicts, reconciliation.*

1. About Language and Multilingualism

Language is "a companion to culture, as the essential core of national or minority group identity".[1] Multilingualism can be seen as "a democratic value to be protected, a fundamental right of minority groups, an obstacle to deliberative democracy and a hindrance to legal certainty and the possibility of uniform law, a cultural asset of Europe to be promoted and protected, a competitive advantage of businesses on the market and a prerequisite for the free movement of EU citizens".[2]

But why the EU does not agree on a common language?

As from the 1st of July 2013 "the European Union has 28 Member States, the last Member State entering the European family being Croatia. Each Member State has its own legal system, which can be classified under the criteria of René David in civil law countries or common law countries. Almost every Member State has its own official language, in the EU being recognized 24 languages per total.[3] Moreover, "depending on how languages are defined and what inclusion criteria are used, more than 100 regional and minority languages are spoken in Europe".[4]

However, despite *the struggle* of Europeans to keep their linguistic diversity, we noticed that the number of languages spoken in Europe has certainly dropped: "[m]any languages have disappeared, and some European states gave even managed to impose an almost perfect linguistic unity on their territory: English in the UK, German in Germany, French in France or Italian in Italy. Some states even share the same official language".[5]

As some authors point out "there is an important difference in the way multilingualism and multijuralism play out: while it is entirely possible and, indeed, necessary for individual participants in the legislative and adjudicative processes of the EU to act sometimes or even regularly in a language that is not their mother tongue", it is rather difficult and generally not required to forget one's legal background and to adopt a foreign one".[6]

The concept of "multilingualism" can be strong, meaning that all official language versions are equally authentic, or week, meaning that one language version is authentic, while the others are official translations. In the history of the European construction, we can find both strong and weak multilingualism. For example, the EU adopted the strong multingualism, because all language versions of an act are authentic, while the European Coal and Steel Treaty adopted the weak multilingualism, because the French version was considered to be authentic. An example of today's weak multilingualism would be the case law of the European Court of Justice, because the authentic version is the language-of-the-case version.

From the doctrine and from the ECJ's case law, we notice that by adopting the strong multilingualism,

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[1] Anne Lise Kjaer and Silvia Adamo, "Linguistic Diversity and European Democracy: Introduction and Overview" in *Linguistic Diversity and European Democracy: Introduction and Overview*, eds. Anne Lise Kjaer and Silvia Adamo, (London: Ashgate, 2011), 1.

[2] Kjaer and Adamo, *Linguistic Diversity*, 2.

[3] However, it must be emphasized that until 2007, Irish was an authentic language of the Treaties but was not included among the official and working languages of the EU. Irish became, with the accession of Ireland, an authentic language of the Treaties but it did not acquire the status of an official language under Regulation No. 1 until 2007 when the regime was extended to Irish with some limitations.

[4] Kjaer and Adamo, *Linguistic Diversity*, 4 (footnote omitted).

[5] Magali Gravier and Lita Lundquist, "Getting Ready for a New Tower of Babel" in Kjaer and Adamo, *Linguistic Diversity*, 75.

[6] Theodor Schilling, "*Multilingualism and Multijuralism: Assets of EU Legislation and Adjudication?*, German Law Journal, vol. 12, no. 07, 2011, 1461 (footnote omitted).

the EU faces many problems, leading to contradictions or variations between the language versions of the EU acts.

In many ECJ cases, it was underlined that multilingualism is essential to the EU legal order. For instance, in the case *Kik v. OHIM*, it was said that:

Multilingualism is an indispensable component of the effective operation of the rule of law in the Community legal order, since many rules of primary and secondary law have direct application in the national legal systems of the Member States.[7]

Another example can be discovered in the *CILFIT* case, where the Court stated:

It must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.[8]

2. Reconciliation of Language Versions with Diverging Meanings

The meaning of the EU law cannot be derived from one version of the official languages, therefore the languages are interdependent and "[h]ence EU citizens cannot purely rely on their own languages when they want to know what the EU law says on a particular issue. In principle, the EU citizens must know the law in each and every official language because the meaning of the law is anchored not in one single language version, but in all the language versions taken together".[9]

The differences between the languages are inevitable because they are not absolute copies one of each other. In this case, the EU multilingualism leads to "legal miscommunication, misinterpretation, incoherent and divergent texts and, ultimately, an obstacle to achieving what lies at the very core of the rule of law, namely legal certainty".[10]

But to what extent must language be regarded as *a barrier* to the development of a uniform European law?

If the EU legislator wants to legislate, therefore to communicate despite the diversity, translators and interpreters are required. They are the ones who can bridge the gap between different nationalities, facilitating the passage from one river bank to the other. Can we speak just in one language? Or what is the language of democracy in Europe? Habermas suggested that the common language in Europe should be English.[11]

"Legal translation is a special form of translation where linguistic signs are closely related to the legal systems to which they originally belong".[12] It is special because the legal language is a specialised sub-language used by jurists and the legal norms found in legal texts are enforceable. Because law is not an exact science, its language is polysemantic. For example, depending on the context, by the word *law* (in other languages, *drept, derecho, droit, diretto*) we can designate the objective law or the subjective law. Moreover, law contains legal concepts specific to a legal culture or system, for which there are no other equivalents in other legal systems (*e.g. common law, consideration, equity*).

"To be imbued with life and full meaning, the word/term must be used in conjunction with quasi-legal vocabulary (collocations) in addition to general vocabulary".[13]

But which European institution intervenes when translation conflicts arise? Well, the European Court of Justice (formed by the Court of Justice, the General Court and the Civil Service Tribunal) is the judicial authority of the multilingual European Union, ensuring the uniform interpretation EU law in 24 of the official languages. It ensures the observance of law "in the interpretation and application" of the treaties. It has to ensure that the Member States comply with their obligations, reviews the legality of the EU institutions' acts and interprets the EU law at the request of the national courts.

In the last year's study[14], we have analyzed the ECJ's case law on translation conflicts between the authentic texts of the European Union and the legal consequences of such judge-made definitions.

A normal continuation on the divergences between language versions problem is the reconciliation of the texts. It is obvious that there are diverging meanings between all 24 official languages versions, but the problem is how do we reconcile the diverging meanings?

The European institutions are familiar with this question. During the years, several methods of reconciliation have been discussed and observed in the ECJ's case law, among which the preference for the majority meaning, the preference for the clear meaning, the preference for the liberal meaning. *Unfortunately, the Court did not prefer and adopt just one method.*

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[7] Judgment of the Court in Case C-361/01 P *Christina Kik v. Office for Harmonisation in the Internal Market* [2003] ECR I-8283.

[8] Judgment of the Court in Case C-283/81, *Srl CILFIT and Lanifacio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415, par. 18.

[9] Kjaer and Adamo, *Linguistic Diversity*, 7.

[10] *Ibidem.*

[11] Please see Kjaer and Adamo, *Linguistic Diversity*, 9.

[12] European Commission, Directorate-General for Translation, *Studies on translation and multilingualism. Lawmaking in the EU multilingual environment*, 1/2010, 66.

[13] Jean-Claude Gemar, "What Legal Translation is and is not – Within or Outside the EU" in *Multilingualism and the Harmonisation of European Law*, eds. Barbara Pozzo and Valentina Jacometti, (the Netherlands: Kluwer Law International, 2006), 73.

[14] Laura-Cristiana Spataru-Negura, "*Some Aspects Regarding Translation Divergences Between the Authentic Texts of the European Union*", CKS 2014 proceedings, Bucharest, 2014, 368-387.

Sometimes, in reconciling the divergent language versions, the Court uses the context and the purpose. For example, in case *Givane v. Secretary of State*, the Court presupposed that a literal interpretation can solve the problem of diverging meanings, but underlined that it has not enough:

Since a literal interpretation of the words "for at least two years" […] does not provide an unequivocal answer to the question referred, it is necessary to place that expression in its context and to interpret it in relation to the spirit and purpose of the provision in question. [15]

Thus, we should interpret this passage as saying that literal interpretation can be used to reconcile diverging meanings, BUT that this was not possible in the respective case.

We notice that the Court regularly uses a *standard phrase* when explaining the need for multilingual interpretation, which is:

It must be borne in mind in this regard that, according to settled case-law, the necessity for uniform application and accordingly for uniform interpretation of a Community measure makes it impossible to consider one version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light, in particular, of the versions in all languages.[16]

However, there are situations when a comparison of the different official versions will not solve the interpretative problem, but it will still have an important role because it can demonstrate that a particular wording is misleading. When using the purpose to solve the interpretative problem, the Court often uses the wording of various articles of the act of its preamble. For example, in the case *Commission v. Germany*[17], the Court used in order to establish the purpose of the act the wording of Article 13 and the preamble of the directive. Of course that it is important how the ECJ finds and construes the purpose of a legal act. Apart from looking to the preamble or various articles of the act, the ECJ could also consult the *travaux préparatoires*, because the choice of the proper word could have been part of the discussions in the legislative bodies.

We consider that the teleological method used in interpreting the EU law is the most used method in establishing legal meaning by the ECJ.

But when multilingual interpretation is going to be engaged and which languages should be considered as mandatory consultation languages? First of all, we consider that English and French should be the consultation languages, because these are "*de facto* originals in the legislation process of the Union, in the sense that a crushing majority of all documents are drafted first in one of these languages. As *de facto* originals they are potentially better prepared than other language versions and better reflect the intention of the legislator".[18] Another reason would be that they represent the most important legal cultures: civil law and common law. The need for uniformity[19] throughout the European Union could be another reason to choose these languages as consultation languages. "[T]he search for their meaning [varying linguistic expression of laws] does not start out with the aim of reconciling the various language versions, but originated in the need to represent the precepts and values of the Community legal system in a uniform way".[20] The uniformity is needed because "a Union whose rules are interpreted and applied differently in each Member State is a Union on paper only".[21]

We consider that if the national courts will use their own language version, interpreted with the help of the two mandatory consultation languages (English and French), the uniformity could be achieved, because the same languages would be used in all the Member States. Although there might be critics regarding the privileged position given to French and English by this recommendation, we consider that they already enjoy a special position, being considered *de facto* originals in the legislative process of the European Union. Of course, that in the event of difficult cases, the national courts retain the possibility to refer them to the ECJ.

As regards the moment when national courts should consult other language versions, we underline that these mandatory consultation languages should be employed automatically in the interpretation process. As for the multilingual interpretation by the ECJ, this does not happen regularly. The ECJ either trusts its AGs with the performance of language comparison,[22] or it conducts its own comparison, sometimes

[15] Please see Case C-257/00 *Nani Givane and Others v. Secretary of State for the Home Department* [2003] ECR I-345.

[16] Please see Case C-188/03 *Irmtraud Junk v. Wolfgang Kühnel* [2005] ECR I-885, para. 33.

[17] Please see Case 107/84 *Commission of the European Communities v. Federal Republic of Germany* [1985] ECR 2655.

[18] Mattias Derlen, "In Defence of (Limited) Multilingualism: Problems and Possibilities of the Multilingual Interpretation of European Union Law in National Courts" in Kjaer and Adamo, *Linguistic Diversity*, 162.

[19] Please see Case 30/77 *Régina v. Pierre Bouchereau* [1977] ECR 1999, para. 14; Case C-372/88 *Milk Marketing Board of England and Wales v. Cricket St. Thomas Estate* [1990] ECR I-1345, paras. 18-19; Case C-187/07 *Criminal proceedings against Dirk Endendijk* [2008] ECR I-2115, para. 25.

[20] Favrizio Vismara, "The Role of the Court of Justice of the European Communitities in the Interpretation of Multilingual Texts" in Pozzo and Jacometti, *Multilingualism and the Harmonisation of European Law*, (the Netherlands: Kluwer Law International, 2006), 68.

[21] Derlen, *In Defence*, in Kjaer and Adamo, *Linguistic Diversity*, 163.

[22] Please see Case C-173/07 *Emirate Airline* [2008] ECR I-05237, par. 25. But sometimes, important language differences discovered by the AGs are ignored by the Court – *e.g.* Case C-265/03 *Igor Simutenkov v Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol* [2005] ECR I-2579.

including more languages[23] and arriving at different conclusions[24].

The multilingual interpretation can have two outcomes: either all the official language versions have the same meaning, or they do not. Sometimes, the ECJ understands the language comparison as looking for the literal meaning or the usual meaning of words, at least.[25]

3. Conclusions

The EU law is very special, because it is an autonomous legal order, characterized by multilingualism (24 equally authentic official languages) and multijuralism (28 national legal systems). The increase of the official languages in the EU (from 4 in 1958 to 24 in 2013), determines the multilingualism in the EU institutions to be even more complex. We have to keep in mind that with the 24 official languages, the European institutions have to manage 552 linguistic combinations both for translation and for interpretation: each of the 24 languages must be transposed in the 23 other official languages. This fact requires the recruitment of an important number of translators and interpreters.

From all the ECJ's cases mentioned in this study, it appears that the Court is compelled to apply different interpretation techniques that correspond to the nature of the actual discrepancy between the language versions of the EU legal acts that it is called upon to interpret. In order to avoid such discrepancies, a continuous effort of strengthening the quality of the drafting and the translation of the multilingual EU law is compulsory. Although the principle of equal authenticity of all language versions is incompatible with cases that result in an interpretation that gives precedence to one version over the other, the ECJ realized that solutions are needed. We have to borne in mind that these solutions do not have to overlook the principle of effectiveness, which ensures maximum adhesion to the EU objectives. Thus, in a judgment in 2000, the ECH stated that "whenever a provision of Community law was capable of diverse interpretation, preference must be given to the one which is best adapted to safeguarding its effectiveness, while preserving the principle that, in the case of disparity between the various language versions of a Community text, the provision must be interpreted as a function of the system and purpose of the legislation of which it forms part".[26] In another case[27], the Court reiterated that, when an EU provision is capable of different interpretations, preference shall be accorded to the best suited to preserve the effectiveness of that provision.

An examination of the ECJ case-law[28] highlights "how solutions to problems of interpretation of multilingual texts reflect specific characteristics"[29] of the EU's legal system. This analysis shows that the Court does not yet have a clear policy on how to solve the practical problem of authenticity of texts of all language versions of Community legislation.

Of course that the meaning of the EU law cannot be derived from one version of the official languages, therefore the languages are interdependent. In this case, the EU multilingualism leads to incoherent and divergent texts that are an obstacle to achieving legal certainty.

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[23] Please see Case C-420/98 *W.N. v. Staatssecretaris van Financiën* [2000] ECR I-2867.

[24] Please see Case C-72/95 *Aannemersbedriif P/K. Kraaijeveld BV & Others v. Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.

[25] Please see Case C-298/07 *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v deutsche internet versicherung AG* [2008] ECR I-07841. In this case, AG Colomer used the dictionary meanings of the words in question.

[26] Please see Case C-437/97 *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wein & Co. HandelsgesmbH v Oberösterreichische Landesregierung* [2000] ECR 1157.

[27] Please see Case C-434/97 *Commission of the European Communities v. the French Republic* [2002] ECR 1129.

[28] Please see Case 19/67 *van der Vecht*, Case 49/71 *Getreide*, Case 6/74 *Moulijn*, Case C-103/01 *Firefighters*.

[29] Vismara, *The Role of the Court of Justice*, 68.

- Case C-372/88 Milk Marketing Board of England and Wales v. Cricket St. Thomas Estate [1990] ECR I-1345;
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GENERAL CONSIDERATION REGARDING EU LAW IN THE DOMAIN OF CULTURAL HERITAGE

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Abstract

The cultural heritage is a rich and diverse mosaic of cultural and creative expressions, our inheritance from previous generations of people and our legacy for those to come. In the terms of the Convention concerning the protection of the world cultural and natural heritage, the cultural heritage includes: monuments, such as architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature; groups of buildings and sites, such as works of man or the combined works of nature and man and areas including archaeological sites, all of these being of outstanding universal value from the point of view of history, art or science. Because of its substantial importance for the evolution of humanity, all nations in general and the European Union in particular, should have the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage. EU law states through the Treaty on the Functioning of the European Union at article 167 that the action of the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing the action in areas such as: improvement of the knowledge and dissemination of the culture and history of the European people; conservation and safeguarding of cultural heritage of European significance and others. While policy in this area is primarily the responsibility of Member States, regional and local authorities, the EU is committed to safeguarding and enhancing Europe's cultural heritage through a number of policies and programmes. Due to the lack of such policies and programmes, the lack of consistent terminology and legal definitions, especially between EU languages, the lack of information and data on the crimes that affect cultural goods, the purpose of the essay is to emphasize the need of a rigorous legal program and policy and to observe the legislation concerning this area existing in Member States.

Keywords: *European Union; cultural heritage; EU law; Member States legislation; European Commission*.

Introduction

The subject of the study, "General considerations regarding EU Law in the domain of cultural heritage", is a matter concerning public law. Europe's cultural heritage, both tangible and intangible, is our common wealth – our inheritance from previous generations of Europeans and our legacy for those to come. It is an irreplaceable repository of knowledge and a valuable resource for economic growth, employment and social cohesion[1]. It is our responsibility as humans to respect our history and help perpetuate our most important values, which coexist in both the tangible and intangible cultural heritage. As humans we have to provide the society our better moral assets and all acts and facts relevant to our culture must stand as testimony for the future. Nowadays we live in a world that, from the point of view of technology, evolves so fast, that we are caught up in the so called "machineries", that we look forward so much for the future, that we forget to remember our past, responsible for all our gained knowledge until present. But this should not be a bad thing, because in our matter of subject it can be constructive. Society today, encompasses a diversity of cultures in a civilization based on science and technology. Whereas cultures, with their beliefs and values breathes the air of virtual, the universal civilization is more comfortable with reality[2]. Inside this civilization we find that economic, social, military and cultural dimensions have great impact and for peoples to live in a democratic system, international and regional organizations are a solution. European Union has a major role as an actor on the international stage. And because 28 states are members of this organization and others have already signed an association agreement, it seems reasonable to say that the actions of these countries should be in line with the principles and policies of EU. Our cultural heritage and way to preserve and valorize it, is a major factor in defining Europe's place in the world and its attractiveness as a place to live, work and visit. Cultural heritage is a shared resource, and a common good. Like other such goods it can be vulnerable to over-exploitation and under-funding, which can result in neglect, decay and, in some cases, oblivion. According to the Treaty on the Functioning of the European Union, heritage protection is a primarily matter for national, regional and local authorities. We understand the meaning of the principle of subsidiarity and its importance, but, after careful researches, we have come to the conclusion that the legally effective norms and policies regarding cultural heritage are not efficiently implemented. In other words, the purpose of the study is to observe the effective regulations and instruments that have the role to protect, to preserve

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[1] Communication from the Comission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards an integrated approach to cultural heritage for Europe. (Brussels, 22.07.2014)

[2] Self translation from: Mircea Malița, Homo Fraudens (București: RAO, 2012).

and to promote European cultural heritage and to state why there is a necessity of upgrading and diversifying them. The way we have chosen to respond to the undertaken objective is the examination of the opened sources and the analytical and comparison methods on the acts and facts. The element of innovation of the study is that there haven't been any specialized studies which relate to this subject. But it represents a present problem, approached by the institutions of the European Union, in 2014, the main purpose being an integrated approach to cultural heritage for Europe.

Content

Translating from the Latin "patrimonium", the word patrimony/heritage means paternal legacy. UNESCO[3] defines this concept, inserting in its meaning the duty that falls upon each one of us to pass on the legacy, which we gain from the past, to the future generations. Beyond the intrinsic wealth, the cultural heritage doesn`t represent a personal property, but a defining attribute for maintaining and perpetuating the social cohesion and identity. During the French Revolution, when the concept of nation was beginning to appear, Henri Jean Baptist Grégoire[4] (1750-1831) said that the common heritage was one of the bindings of society. The patrimony is an alive and perennial concept, which, over the time, enrichen with new meanings and extended to much more domains.

In a general way, modern law defines the concept of patrimony as all the rights and obligations that cand be measured in money, which belong to a natural or legal person[5]. During the time of Justinian, the elements of the patrimony, in the terms of what romans call them during the clasic law, were the real rights and the personal ones. The real right emanated from the legal relationship between a person and all the other member of the society and the personal right emanated from the legal relationship of two determined persons. The first classification we take a special account of lays out in Justinian`s Institutiones, which divides things in two categories: res in patrimonium and res extra patrimonium. The first ones could have made the object of a private property, but the others were considered outside the patrimony, because through their nature they couldn`t have made the object of property. In the same category were included the things, which, by their destination, couldn`t be in the property of a person and as an example, these were considered to be the temples or the walls of the castles[6].

Nowadays, in the civil law, the concept of patrimony has a technical and precise meaning, but because of its several specific meanings, this concept appears in other branches of law. For example, "the public interntional law talks about common heritage of humanity and its object is the free sea and also the mineral resources, solid, liquid or gaseous in situ[7], which are found on the bottom of the seas and in their undergrounds. It is obviously that this kind of use of the heritage concept has in view all of these resources and the free sea, belonging to the entire community." [8]

In the history of Romanian civil legislation, we come across the concept of patrimony without having a clear definition allocated to it. Over the time, the importance given to it is evolutionary. For example, if in the Romanian Civil Code from the second half of the 19th century (1864), we find only a few implicit and explicit references to the patrimony, in the civil legislation adopted after 1950, the concept of patrimony is much more invoked.

"The most general reference to the concept of patrimony – of an implicit manner – was made in the art. 1718 former Civil Code, which according to it "whoever is legally bound, is under the obligation to carry out his debts with all his assets, movable and immovable, present or future."The reference to all assets that belong to the debtor, "present and future", which were use to warrant the fulfilling of the obligations owed to the creditor, had in consideration all his goods, in their universality. The former Civil Code referred explicit to this concept, when it regulated the so called separation of property. According to art. 781 former Civil Code, the creditors of a deceased person could have demanded "a separation of property between the deceased and the heir", in order not to cause the confusion – as in the reunion – between the deceased person`s patrimony and the inheritor`s own patrimony." [9]

The examples can continue with the dispositions of art. 238 from Law no. 31 of 16 November 1990 on trading companies - republished, as they were modified through the Law no. 441/2006 and the Emergency Ordinance no. 82/2007 referring to the merger and division of trading companies[10]. Also, the Law no. 215/2001 regarding local public administration, republished[11], which states that according to art. 119, the patrimony of the territorial-

[3] United Nations Educational, Scientific and Cultural Orgazation

[4] French Roman Catholic priest, constitutional bishop of Blois and leader of the French Revolution.

[5] Self translation from: Gabriel Boroi, Carla Alexandra Anghelescu şi Bogdan Nazat, Curs de drept civil. Drepturi reale principale (Bucureşti: Hamangiu, 2013), 1. (Civil Law Course. Principal Real rights).

[6] Self translation from: Emil Molcuț, Drept privat roman, ediție revăzută și adăugită (Bucureşti: Universul Juridic, 2007), 106-107. (Private roman Law, revised and added edition)

[7] Biology term which designates the process of examination on the spot and in the same surrounding.

[8] Self translation from: Corneliu Bîrsan, Drept civil. Drepturile reale principale în reglementarea noului Cod Civil (Bucureşti: Hamangiu, 2013), 1. (Civil law. Principal real rights in the regulation of the new Civil Code).

[9] Bîrsan, Drept civil, 4.

[10] Official Journal no. 446 of 29 June 2007.

[11] Official Journal no. 123 of 20 February 2007.

administrative entity is consisted of all movable and immovable goods which belong to its public domain, its private domain and the patrimonial obligations that such administrative unit can have.

In Romania, we find the concept of patrimony in several special normative acts, intended to determine the legal regime of some categories of goods. For example, in art. 1 par. 2 from the Law no. 182 of the 20th of October 2000 regarding the protection of the movable national heritage[12], with the subsequent modifications, „the national cultural heritage includes the totality of objects identified as such, regardless of the ownership right over them, representing a testimony and an expression of the values, beliefs, knowledge and traditions in continous evolution; it comprises all the elements resulted from the interaction, in the course of time, between human and natural agents". Also, the Law no. 311 of the 8th of July 2003[13] regarding museums and public collections – republished states that "the museum patrimony represents the totality of goods, rights and duties with patrimony value belonging to a museum or, if the case may be, of the public collections. The goods that compose the museum patrimony may be subject to the public ownership right of the state and/or of the territorial-administrative entities, or, if the case may be, of the private property right". Also, Ordinance no. 43 of the 30th of January 2000 on the protection of the archaeological heritage and declaring certain archaeological sites as national interest areas – republished[14], refers to the archaeological heritage as signifying the ensemble of archaeological objects comprising: 1. the archaeological sites registered in the National Archaeological Repository, except the ones that have been destroyed or disappeared and the sites classified in the Historical Monuments List, situated underground or underwater, comprising archaeological vestiges: habitations, necropolis, structures, buildings, groups of buildings, as well as sites with located archaeological potential, as defined by the legislation in force; 2. movable objects, objects or traces of human existence, together with the ground where they were uncovered. The Law no. 26 of 29 February 2008 on the protection of intangible cultural heritage refers to the intangible cultural heritage as signifying the totality of practices, representations, expressions, knowledge, abilities – along with the instruments, objects, artifacts and cultural spaces associated with them – which the communities, groups or, if the case, individuals recognize as an integral part of their cultural heritage.

Over the time, the concept of cultural heritage has known several definitions and interpretations. The International Centre for the Study of the Preservations and Restoration of Cultural Property has found not less than 60 definitions of the cultural heritage and cultural property, the oldest one dating from year 6 AD. Keep in mind the next definition offered by UNESCO, which says that "the cultural heritage may be defined as the entire corpus of material signs - either artistic or symbolic - handed on by the past to each culture and, therefore, to the whole of humankind. As a constituent part of the affirmation and enrichment of cultural identities, as a legacy belonging to all humankind, the cultural heritage gives each particular place its recognizable features and is the storehouse of human experience." [15]

According to the Convention concerning the Protection of the World Cultural and Natural Heritage adopted by the General Conference of the UNESCO on 17 November 1972, the following shall be considered as cultural heritage: **monuments:** architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; **groups of buildings:** groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; **sites:** works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

Romania is intense implicated in the UNESCO actions, especially within the conventions that it is a part of:

- the Convention concerning the Protection of the World Cultural and Natural Heritage (1972), adopted by Decree no. 187/1990[16];

- the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), adopted by Law no. 73/1993[17];

- the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), adopted by Law no. 410/2005[18];

[12] Official Journal no. 530 of 27 October 2000.
[13] Official Journal no. 207 of 24 March 2014.
[14] Official journal no. 951 of 24 November 2006.
[15] http://cif.icomos.org/pdf_docs/Documents%20on%20line/Heritage%20definitions.pdf
[16] Official Journal no. 46 of 31 March 1990.
[17] Official Journal no. 268 of 19 November 1993.
[18] Official Journal no. 17 of 9 January 2006.

- the Convention on the Protection and Promotion of the Diversity of Cultural Expressions[19] (2005), adopted by Law no. 248/2006[20];

- Convention on the Protection of the Underwater Cultural Heritage (2001), adopted by Law no. 99/2007[21].

European wide, Romania has ratified the following conventions:

- the UNIDROIT[22] Convention on stolen or illegally exported cultural objects, adopted in Rome on 24 June 1995 and ratified through Law no. 149/1997[23];

- the European Convention on the Protection of the Archaeological Heritage (revised), adopted in Valetta on 16 January 1992 and ratified through Law 150/1997[24];

- the Convention for the Protection of the Architectural Heritage of Europe, adopted in Granada on 3 October 1985 and ratified through Law no. 157/1997[25];

- the European Landscape Convention, adopted in Florence on 20 October 2000 and ratified through Law no. 451/2002[26].

The ensemble of legal instruments that have as main purpose the protection and conservation of cultural heritage of all kind doesn`t stop here. It can be completed with a long list of legal norms. We will name only a few of them:

- Decree no. 672/2006 regarding the submission for ratification before the Parliament of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted in Hague on 26 March 1999;

- Government Ordinance no. 47/2000 establishing certain measures for the protection of historical monuments included on the World Heritage List, as approved by Law no. 564/2001 – published in the Official Journal of Romania no. 695 of 1st of November 2001;

- Law no. 6/2008 concerning the legal status of technical and industrial heritage;

- Government Decision no. 493/2004 for approval of the methodology for monitoring historical monuments included on the World Heritage List – published in the Official Journal of Romania no. 380 of 30th April 2004;

- Council Regulation (EC) no. 116/2008 on the export of cultural goods;

- the Order of the Minister of Culture no. 2436 of 8th July 2008 regarding the elaboration of the National Programme for safeguarding, protection and highlighting the intangible cultural heritage, etc. [27]

World wide, the organs and organizations specialized in cultural heritage or which take action in order to prevent and combat the crime phenomenon against art are:

United Nations Educational, Scientific and Cultural Organization (UNESCO) - UNESCO has adopted a three-pronged approach: it spearheads worldwide advocacy for culture and development, while engaging with the international community to set clear policies and legal frameworks and working on the ground to support governments and local stakeholders to safeguard heritage, strengthen creative industries and encourage cultural pluralism[28].

1. The International Council of Museums (ICOM) – in general, The International Council of Museums works for society and its development and it is committed to ensuring the conservation, and protection of cultural goods[29]

2. International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) - ICCROM is an intergovernmental organization dedicated to the conservation of cultural heritage. Its members are individual states which have declared their adhesion to it. It exists to serve the international community as represented by its Member States, which has the currently number of 134[30]. Romania is a member state since 19th January 1960[31].

3. Getty Research Institute (GRI) - The J. Paul Getty Trust is the world's largest cultural and philanthropic organization dedicated to the visual arts. The Getty Conservation Institute advances the practice of art and cultural heritage conservation worldwide[32].

4. Smithsonian Institute – the Smithsonian is the world's largest museum and research complex, consisting in 19 museums and galleries, the National Zoological Park and nine research facilities and its vision is to shape the future by preserving our heritage, discovering new knowledge, and sharing its resources with the world[33]

[19] Romania was the first country from Europe and 4th from the world which ratified the Convention on the Protection of the Diversity of Cultural Expressions.
[20] Official Journal no. 559 of 28 June 2006.
[21] Official Journal no. 276 of 25 April 2007.
[22] International Institute for the unification of private law.
[23] Official Journal no. 176 of 30 July 1997.
[24] Official Journal no. 175 of 29 July 1997.
[25] Official Journal no. 274 of 13 October 1997.
[26] Official Journal no. 536 of 23 July 2002.
[27] http://www.cultura.ro/page/49
[28] http://en.unesco.org/themes/protecting-our-heritage-and-fostering-creativity#sthash.EMI6SGNv.dpuf
[29] http://icom.museum/the-organisation/icom-missions/
[30] http://www.iccrom.org/about/what-is-iccrom/
[31] The interest of Romania regarding the conservation of the cultural heritage developed shortly before the two great powers, France and Germany, which became members later on 1964
[32] http://www.getty.edu/about/whoweare/
[33] http://www.si.edu/About/Mission

5. International Foundation for Art Research (IFAR) - The International Foundation for Art Research (IFAR) is a 501(c)(3) not-for-profit educational and research organization dedicated to integrity in the visual arts. IFAR offers impartial and authoritative information on authenticity, ownership, theft, and other artistic, legal, and ethical issues concerning art objects[34]

6. Art Loss Register - The ALR is the world's largest private database of lost and stolen art, antiques and collectables. Its range of services includes item registration, search and recovery services to collectors, the art trade, insurers and worldwide law enforcement agencies[35]

7. Association for research into crimes against arts (ARCA) - The Association for Research into Crimes against Art (ARCA) is a research and outreach organization which works to promote the study and research of art crime and cultural heritage protection. Association seeks to identify emerging and under-examined trends related to the study of art crime and to develop strategies to advocate for the responsible stewardship of our collective artistic and archaeological heritage[36]

8. Museum Security Network (MSN) - Its original aim was to be a source of information for cultural property protection professionals. Gradually, the Museum Security Network Google Group has become the main channel for the distribution of news and information pertaining to cultural property protection, preservation, conservation, and security[37]

9. Legislative institutes and agencies for the implemention of law

10.The International Institute for the Unification of Private Law (UNIDROIT) - The International Institute for the Unification of Private Law is an independent intergovernmental organization and its purpose is to study needs and methods for modernizing, harmonizing and co-ordinating private and, in particular, commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives[38]

11.The United Nations Office on Drugs and Crime (UNODC) - UNODC is mandated to assist Member States in their struggle against illicit drugs, crime and terrorism[39]

12.The World Customs Organization (WCO) - The World Customs Organization, established in 1952 as the Customs Co-operation Council (CCC) is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administrations[40]

13.INTERPOL - INTERPOL is the world's largest international police organization, with 190 member countries and its mission is to prevent and fight crime through enhanced cooperation and innovation on police and security matters[41]

14.EUROPOL - Europol is the **European Union's law enforcement agency** whose main goal is to help achieve a safer Europe for the benefit of all EU citizens. Their mission is to assist the European Union's Member States in their fight against serious international crime and terrorism[42].

For a correct and flawless approach of the subject, we must clearly establish the object of the national, European or international regulations, specifically we must establish what does the cultural heritage, in all his forms, resume at. We have observed that the cultural heritage comprises two subdomains: tangible cultural heritage, which is formed of the movable and immovable cultural heritage and the intangible cultural heritage.

According to the Romanian legislation, the movable national cultural heritage includes objects of exceptional historical, archaeological, documentary, ethnological, artistic, scientific and technical, literary, cinematographic, numismatic, philatelic, heraldic, bibliographic, cartographic and epigraphic value, representing material evidence for the evolution of the natural environment and for the relation of humans with it, the potential creativity of man and of the Romanian contribution to the universal civilization[43]. We will observe that we will find a part of this definition in the one given by the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage. The classification offered by the Romanian law has no implementation on the European Union level, the movable and immovable cultural heritage having no freestanding definition. A referrence to the types of goods that the law talks about is given by the UNIDROIT Convention on stolen or illegally exported cultural objects, which determines that "for the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention" [44]. In concrete, the convention refers to the following cultural goods:

[34] https://www.ifar.org/about.php
[35] http://www.artloss.com/about-us/our-company
[36] http://www.artcrimeresearch.org/our-work/
[37] http://www.museum-security.org/
[38] http://www.unidroit.org/about-unidroit/overview
[39] http://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop
[40] http://www.wcoomd.org/en/about-us/what-is-the-wco.aspx
[41] http://www.interpol.int/About-INTERPOL/Overview
[42] https://www.europol.europa.eu/content/page/about-us
[43] Law no. 182 of 25th of October 2000 regarding the protection of the movable national heritage.
[44] UNIDROIT Convention on stolen or illegally exported cultural objects.

(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;

(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;

(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;

(f) objects of ethnological interest;

(g) property of artistic interest, such as:

(i) pictures, paintings and drawings produced entirely by hand on any support and in

any material (excluding industrial designs and manufactured articles decorated by hand);

(ii) original works of statuary art and sculpture in any material;

(iii) original engravings, prints and lithographs;

(iv) original artistic assemblages and montages in any material;

(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

(i) postage, revenue and similar stamps, singly or in collections;

(j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments.

Continuing with the definition series, by immovable national cultural heritage we understand an ensemble of immovable goods, buildings and lands situated on the Romanian territory, significant for the national and universal history, culture and civilization. The immovable goods and the ensemble of immovable goods of archaeological, historical, architectural, religious, urban, artistic, landscaping or technical and scientific value are considered historical monuments[45]. Projections of this definition shall be found in the two European conventions regarding this domain. Thus, according to the Convention for the Protection of the Architectural Heritage of Europe it is considered that the architectural heritage comprises the following immovable goods:

- monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings;

- groups of buildings: homogeneous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest which are sufficiently coherent to form topographically definable units;

- sites: the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest.

Further more, the European Landscape Convention defines the landscape the area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors and the landscape protection means the actions to conserve and maintain the significant or characteristic features of a landscape, justified by its heritage value derived from its natural configuration and/or from human activity.

The intangible cultural heritage means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. As defined above, the intangible cultural heritage is manifested inter alia in the following domains:

- oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;

- performing arts;

- social practices, rituals and festive events:

- knowledge and practices concerning nature and the universe;

- traditional craftsmanship.

The first European community appeared in 1951 for a 50 years term, through the signing of the Treaty establishing the European Coal and Steel Community. The primary purpose of this community was the avoidance of a new world conflagration and its major objective resumed to the achievement of a supranational control over the main branches of the arms industry, namely coal and steel. Paul-Henri Spaak`s report constituted the keystone in realizing the European Economic Community and the European Atomic Energy Community, their constituent treaties being signed in Rome, entering into force from 14 January 1958. After the institutional merge of the Commissions and the Councils of Ministers from the three communities from 1965, an important stage in accomplishing the internal market within the European Economic Community, was the moment when the

[45] Law no. 422 of the July 18th 2001 on the Protection of Historical Monuments – Codified.

Single European Act entered into force (1987) [46]. According to the preamble of this treaty, the European Communities of that time were determined to work together to promote democracy and improve the economic and social situation by extending common policies and pursuing new objectives. Although, the formulation is general, it is the first time when an expansion of the community policies is wanted, at the same time with an EU extension. The most important changes and innovations were brought by the Treaty on European Union, signed in Maastricht on 7 February 1992. Firstly, the concept of European Union is introduced and it represents a sui generis entity, based on three pylons: the community pylon; foreign affairs and security policy; justice and home affairs[47]. Secondly and what`s important for us directly, a new title was introduced, Title IX, called "Culture" Thus, art. 128 stipulated:

„1. The Community shall contribute to the flowering of the cultures of the Mernber States, while respecting their national and regional diversity and at the same time bringing the comrnon cultural heritage to the fore.

2. Action by the Community 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 Community 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 Community shall take cultural aspects into account in its action under other provisions of this Treaty.

5. In order to contribute to the achievement of the objectives referred to in this Article, the Council:

- acting in accordance with the procedure referred to in Article 189b 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 shall act unanimously throughout the procedures referred to in Article I89b;
- acting unanimously on a proposal from the Cornmission, shall adopt recommendations."[48]

Through the Maastricht Treaty, the European Union undertakes some obligations referring to the cultural heritage, but what we will see is that the ambiguous formulation, used by the above art. 128, is the reason why the European Union didn't act in a concrete way regarding this domain, but until later on. On 1st of May 1999, the Amsterdam Treaty entered into force. This is the one that amends the Treaty on European Union and the treaties establishing the European Communities. The amends didn't apply to culture aspects, namely to cultural heritage. Having into consideration the extension by 10 states that was preparing to take place in 2004, an institutional reform was becoming to be necessary. So, because of that reason, the Treaty of Nice was signed in 2001 and it contributed with the needed adjustments. Content modifications were brought within the common security and cooperation policies, but also within the domain of police and judicial cooperation in criminal matters. The last one is of a distinguished importance, because the European Judicial Cooperation Unit is introduced.

Eurojust is enabled to facilitate proper coordination between Member States' national prosecuting authorities and is supporting Member States for criminal investigations in cases of serious cross-border crime, particularly in the case of organized crime, taking account, in particular, of analyses carried out by Europol. Which also implies illicit trafficking of cultural goods. Further more, the Treaty of Nice proclaims the Charter of Fundamental Rights of the European Union, which will ulterior achieve legal personality as the fundamental treaties. With regard to the Charter of Fundamental Rights of the European Union and in particular Articles 11[49], 21[50] and 22[51] thereof, the cultural and creative sectors make an important contribution to the fight against all forms of discrimination, including racism and xenophobia, and are an important platform for freedom of expression and for the promotion of respect for cultural and linguistic diversity. Last, but not least is the Treaty of Lisbon which includes the European Union among the subjects of international law, conferring to it legal personality. This status implies the achievement of a more powerful and coherent position on the external plan, the EU having now the competence to take action, in a more efficiently way, against the criminal groups that handle with the trafficking of persons and also to promote and sustain actions regarding the criminal prevention and combating terrorism. Acquiring legal personality means that the EU can directly get involve in promoting the conservation and protection of his cultural heritage. The Treaty of Lisbon mentions in art.

[46] Self translation from: Augustin Fuerea, Manualul Uniunii Europene (Bucureşti: Universul Juridic, 2011), 14-55. (The European Union Manual).

[47] The pylon became Police and judicial cooperation in criminal matters, after the Amsterdam Treaty entered into force(1999)

[48] http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf

[49] Freedom of expression and information.

[50] Non-discrimination.

[51] Cultural, religious and linguistic diversity.

2 that the union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe`s cultural heritage is safeguarded and enhanced". "Culture" is approached in Title XIII of the Treaty on the Functioning of the European Union and the changes that appear refer only to the last paragraph, because the European Parliament became a law-making institution along with the Council. Therefore content changes don't apply to this chapter. An interesting fact is that there is no legal definition of the European cultural heritage, as there is no list of movable or immovable cultural goods at the EU level.

The builders of Europe were the people who launched the process of European construction by founding the Council of Europe in 1949 and setting up the European Coal and Steel Community (ECSC) and the European Economic Community (EEC). We are grateful to the following persons: Winston Churchill (Prime Minister of the United Kingdom); Konrad Adenauer (Chancellor and Minister for Foreign Affairs of the Federal Republic of Germany); Robert Schumann (French Republic Minister for Foregin Affairs); Paul-Henri Spaak (Prime Minister and Foreign Minister of Belgium in the 40s and 50s); Alcide de Gasperi (Prime Minister of the Republic of Italy); Ernest Bevin (United Kingdom Secretary of State for Foreign Affairs). The Council of Europe advocates freedom of expression and of the media, freedom of assembly, equality, and the protection of minorities. A first instrument which has approached the issue of the European cultural heritage has been the European Cultural Convention, settled in Paris, on 19 December 1954. In art. 1 of the convention it is stipulated that „each Contracting Party shall take appropriate measures to safeguard and to encourage the development of its national contribution to the common cultural heritage of Europe". Nowadays, all 47 Member States of the Council of Europe, including all 28 EU Member States, have ratified the convention, plus Belarus, the Holy See and Kazakhstan. The Council of Europe is activly involved in the domain of cultural heritage and the high number of adopted conventions stand as evidence. We will enumerate them:

- Convention on the Conservation of European Wildlife and natural Habitats, entered intro force on 1 June 1982;
- European Convention on Offences relating to Cultural Property, opened to signature on 23 June 1985;
- Convention for the Protection of the Architectural Heritage of Europe entered into force on 1 December 1987;
- European Convention on Cinematographic Co-production, entered into force on 1 April 1994;
- European Convention on the Protection of the Archaeological Heritage (revised), entered into force on 25 May 1995;
- European Convention for the Protection of the Audiovisual Heritage, entered into force on 1 January 2008;
- European Landscape Convention, entered into force on 1 March 2004;
- Council of Europe Framework Convention on the Value of Cultural Heritage for Society, opened for signature on 27 October 2005.

The Lisbon Treaty increased the scope for European Union action in many areas where the Council of Europe already has significant experience and expertise. This has led to increased cooperation on issues such as fighting human trafficking, the sexual exploitation of children and violence against women. It has also opened the way for the European Union itself to sign up to the European Convention on Human Rights, and to other Council of Europe agreements. Therefore, in accordance with the objective of the European Union to supervise the protection and development of the European cultural heritage, and also with the fact that it gained legal personality, we consider that an important step towards realizing this objective, in a concrete and efficient way, should be the ratification of the conventions that regard the cultural heritage theme, under the aegis of the Council of Europe. Acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms will allow the unification of the jurisprudence regarding the protection of human rights on the European continent, thus consolidating the protection level of the EU citizens, which they should enjoy[52]. We can`t invoke the same reason to convince about the importance of EU ratifying the convensions regarding the cultural heritage, but we can establish a direction in this way by analyzing the legislation in matter.

The organs of the EU have only those competencies which have been attributed to them in the treaties (the principle of attributed powers). The regulatory capacities of the European Union are currently limited to the development of supportive measures:

- Art. 167 Treaty on the Functioning of the European Union – "…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…"
- Art. 36 Treaty on the Functioning of the European Union – "…shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value…"

[52] http://www.mae.ro/node/4492

This is the only primary legislation of EU we found on cultural heritage. Secondary legislation of EU on this domain contains:

- 2013/743/EU - Council Decision of 3 December 2013 establishing the specific programme implementing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020);
- 1295/2013/EU - Regulation of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020);
- Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods;
- 1352/2008/EC - Decision of the European Parliament and of the Council of 16 December 2008 amending Decision No 1855/2006/EC establishing the Culture Programme (2007 to 2013);
- 1855/2006/EC - Decision of the European Parliament and of the Council of 27 December 2006 establishing the Culture Programme (2007 to 2013);
- 2011/711/EU - Commission Recommendation of 27 October 2011 on the digitization and online accessibility of cultural material and digital preservation;
- 2011/831/EU - Council Decision of 1 December 2011 on the practical and procedural arrangements for the appointment by the Council of four members of the European panel for the European Union action for the European Heritage Label;
- 1194/2011/EU - Decision of the European Parliament and of the Council of 16 November 2011 establishing a European Union action for the European Heritage Label;
- 2010/238/EU - Commission Recommendation of 26 April 2010 on the research joint programming initiative Cultural Heritage and Global Change: a new challenge for Europe;
- 2001/C73/04 - Council resolution of 12 February 2001 on architectural quality in urban and rural environments;
- 94/C235/01 - Council conclusions of 17 June 1994 on drawing up a Community action plan in the field of cultural heritage;
- Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State, which was amended afterwards, but today the is a proposal from 2013, not published in the Official Journal, for a Directive of the European Parliament and of the Council on the return of cultural objects unlawfully removed from the territory of a Member State. The purpose of this proposal is to recast Directive 93/7/EEC and strengthen EU law in this field.
- 86/C320/01 - Resolution of the Ministers with responsibility for Cultural Affairs, meeting within the Council of 13 November 1986 on the protection of Europe's architectural heritage;
- 75/65/EEC - Commission Recommendation of 20 December 1974 to Member States concerning the protection of the architectural and natural heritage.

In essence, the European Commission`s recommendation from 1974 invites the Member States to ratify the convention concerning the protection of the World Cultural and Natural Heritage, justifying that since the architectural and natural heritage is generally felt to be a determining factor in the quality of life, both these initiatives are of major importance for the protection and improvement of the environment in the Community.

The Resolution from 1986 emphasizes a very important aspect regarding the approach to our subject: „...Recognizing that this resolution **does not result in any modification of the powers of the Community and the Member States regarding the protection of the architectural heritage**, but considering that they should take greater advantage of each other's experience; Agree to develop effective cooperation on aspects of Europe's architectural heritage, opening this to other European countries where appropriate; Agree to encourage the exchange of experience and the transfer of information on the architectural heritage, in particular through the **standardization of terminology and the establishment of a network of data bases prepared in this area in the Member States**…"

A very important step was made as result of the European Commission`s recommendation from 26 April 2010. This recomandation reffered to the development of a common strategic research agenda establishing medium to long-term research needs and objectives in the area of preservation and use of cultural heritage in the context of global change.

The Decision of the European Parliament and of the Council from 16 December 2011 has approached a new initiative, taking the shape of the programme named „European Heritage Label", which afterwards became an action of the Union. Through this Decision, some definitions became official on the EU area:

a. "sites" means monuments, natural, underwater, archaeological, industrial or urban sites, cultural landscapes, places of remembrance, cultural goods and objects and intangible heritage associated with a place, including contemporary heritage;

b. "transnational site" means:

(1) several sites, located in different Member States, which focus on one specific theme in order to submit a joint application; or

(2) one site located on the territory of at least two Member States;

c. "national thematic site" means several sites, located in the same Member State, which focus on one specific theme in order to submit a joint application.

The European Commission`s recommendation on the digitization and online accessibility of cultural material and digital preservation talk about the Digital Agenda for Europe which seeks to optimize the benefits of information technologies for economic growth, job creation and the quality of life of European citizens, as part of the Europe 2020 strategy. With this occasion we find out about Europeana, Europe`s

digital library, archive and museum, which was launched on 20 November 2008. The overall target for 2015 of 30 million objects is in line with Europeana's strategic plan, and a stepping stone for getting Europe's entire cultural heritage digitized by 2025.

Regarding the proposal to recast Directive 93/7/EEC, The European Commission proposes to enable Member States to recover any cultural object identified as national treasure that was unlawfully removed from their territories on or after 1 January 1993. For this purpose, the scope of the definition of cultural goods would be extended to include all those classified as "national treasures of artistic, historic or archaeological value" in line with the laws of EU countries. It would also extend the deadline for initiating proceedings, make use of the EU's internal market information system to facilitate cooperation and exchanges between countries' authorities and place the burden of proof on the possessor.

The decision of the European Parliament on establishing the Culture Programme (2007 to 2013) states that an active cultural policy aimed at the preservation of European cultural diversity and the promotion of its common cultural elements and cultural heritage can contribute to improving the external visibility of the European Union (we have a further more reason to sustain the necessity of a clear legislation in the domain). For this reason and, also beacause of the final evaluation of the impact that the cultural programmes Kaleidoscope, Ariane, Raphael and Culture 2000, set out respectively in Decisions No. 719/96/EC[53], 2085/97/EC[54], 2228/97/EC[55] and 508/2000/EC[56], had on the communities, significant funding was earmarked for establishing a Community action programme for the European Capital of Culture event for the years 2007 to 2019[57]. The specific objectives of the programme are to promote the transnational mobility of cultural players, to encourage the transnational circulation of works and cultural and artistic products and to encourage intercultural dialogue.

Since its adoption, Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods has been amended on several occasions. For reasons of rationality and clarity, it is repealed in order to be replaced by the current regulation, Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods. This regulation establishes exactly the list of cultural goods which make the object of the export rules. Therefore, in order to ensure that uniform controls are carried out on these exports at the external borders of the European Union, the categories of cultural pbjects are:

1. Archaeological objects more than 100 years old which are the products of:

- excavations and finds on land or under water;
- archaeological sites
- archaeological collections.

2. Elements forming an integral part of artistic, historical or religious monuments which have been dismembered, of an age exceeding 100 years.

3. Pictures and paintings, other than those included in categories 4 or 5, executed entirely by hand in any medium and on any material (which are more than 50 years old and do not belong to their originators)

4. Watercolours, gouaches and pastels executed entirely by hand on any material (which are more than 50 years old and do not belong to their originators).

5. Mosaics in any material executed entirely by hand, other than those falling in categories 1 or 2, and drawings in any medium executed entirely by hand on any material (which are more than 50 years old and do not belong to their originators)

6. Original engravings, prints, serigraphs and lithographs with their respective plates and original posters (which are more than 50 years old and do not belong to their originators)

7. Original sculptures or statuary and copies produced by the same process as the original, other than those in category 1 (which are more than 50 years old and do not belong to their originators)

8. Photographs, films and negatives thereof (which are more than 50 years old and do not belong to their originators)

9. Incunabula and manuscripts, including maps and musical scores, singly or in collections (which are more than 50 years old and do not belong to their originators)

10. Books more than 100 years old, singly or in collections

11. Printed maps more than 200 years old

12. Archives, and any elements thereof, of any kind or any medium which are more than 50 years old

13. a. Collections and specimens from zoological, botanical, mineralogical or anatomical collections; (as defined by the Court of Justice in its judgment in Case 252/84, as follows: 'Collectors' pieces within the meaning of heading No 97.05 of the Common Customs Tariff are articles which possess the

[53] Decision No 719/96/EC of the European Parliament and of 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, p. 20). Decision as amended by Decision No 477/1999/EC (OJ L 57, 5.3.1999, p. 2

[54] Decision No 2085/97/EC of the European Parliament and of 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, p. 26). Decision as amended by Decision No 476/ 1999/EC (OJ L 57, 5.3.1999, p. 1).

[55] Decision No 2228/97/EC of the European Parliament and of the Council of 13 October 1997 establishing a Community action programme in the field of cultural heritage (The Raphael Programme) (OJ L 305, 8.11.1997, p. 31). Decision as repealed by Decision No 508/2000/EC (OJ L 63, 10.3.2000, p. 1).

[56] Decision No 508/2000/EC of the European Parliament and of the Council of 14 February 2000 establishing the Culture 2000 programme (OJ L 63, 10.3.2000, p. 1). Decision as last amended by Council Regulation (EC) No 885/2004 (OJ L 168, 1.5.2004, p. 1).

[57] Romania was designated the European Capital of Culture in 2007.

requisite characteristics for inclusion in a collection, that is to say, articles which are relatively rare, are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value – also applies to b.)

b. Collections of historical, palaeontological, ethnographic or numismatic interest

14.Means of transport more than 75 years old

15.Any other antique items not included in categories 1 to 14

a. between 50 and 100 years old

- toys, games
- glassware
- articles of goldsmiths' or silversmiths' wares
- furniture
- optical, photographic or cinematographic apparatus
- musical instruments
- clocks and watches and parts thereof
- articles of wood
- pottery
- tapestries
- carpets
- wallpaper
- arms

b. more than 100 years old

The cultural objects in categories 1 to 15 are covered by this Regulation only if their value corresponds to, or exceeds, the financial thresholds applicable to certain categories (in euro):

Value:

- Whatever the value
- 1 (Archaeological object)
- 2 (Dismembered monuments)
- 9 (Incunabula and manuscripts)
- 12 (Archives)
- 15 000
- 5 (Mosaics and drawings)
- 6 (Engravings)
- 8 (Photographs)
- 11 (Printed maps)
- 30 000
- 4 (Watercolors, gouaches and pastels)
- 50 000
- 7 (Statuary)
- 10 (Books)
- 13 (Collections)
- 14 (Means of transport)
- 15 (Any other object)
- 150 000
- 3 (Pictures)

The Regulation of the European Parliament and of the Council from 11 December 2013 brings up a new element of interest, namely that the Union is a party of the 2005 UNESCO Convention on the Protection and Promoting of the Diversity of Cultural Expressions, which underlines that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must not, therefore, be treated as solely having commercial value. In addition, it stipulates that the Commission Communication entitled "Europe 2020 – A strategy for smart, sustainable and inclusive growth" (the "Europe 2020 Strategy") defines a strategy that aims to turn the Union into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion. This Regulation establishes the Creative Europe Programme for support to the European cultural and creative sectors. For the purpose of the regulation, new definitions are applied and, for our interest, we mention:

a. "cultural and creative sectors" means all sectors whose activities are based on cultural values and/or artistic and other creative expressions, whether those activities are market- or non-market-oriented, whatever the type of structure that carries them out, and irrespective of how that structure is financed. Those activities include the development, the creation, the production, the dissemination and the preservation of goods and services which embody cultural, artistic or other creative expressions, as well as related functions such as education or management. The cultural and creative sectors include inter alia architecture, archives, libraries and museums, artistic crafts, audiovisual (including film, television, video games and multimedia), tangible and intangible cultural heritage, design, festivals, music, literature, performing arts, publishing, radio and visual arts;

b. "SMEs" means micro, small and medium-sized enterprises, as defined in Commission Recommendation 2003/361/EC[58];

The specific objectives of Creative Europe are "to support the capacity of the European cultural and creative sectors to operate transnationally and internationally; to promote the transnational circulation of cultural and creative works and transnational mobility of cultural and creative players, in particular artists, as well as to reach new and enlarged audiences and improve access to cultural and creative works in the Union and beyond, with a particular focus on children, young people, people with disabilities and under-represented groups; to strengthen the financial capacity of SMEs and micro, small and medium-sized organizations in the cultural and creative sectors in a sustainable way, while endeavouring to ensure a balanced geographical coverage and sector representation."[59]

Regardless, the Council' Decision on establishing the specific programme implementing Horizon 2020 - the Framework Programme for

[58] Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

[59] Regulation of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020).

Research and Innovation (2014-2020) is the newest in this domain. Horizon 2020 is the financial instrument implementing the Innovation Union, a Europe 2020 flagship initiative aimed at securing Europe's global competitiveness. By coupling research and innovation, Horizon 2020 is helping to achieve this with its emphasis on excellent science, industrial leadership and tackling societal challenges. The goal is to ensure Europe produces world-class science, removes barriers to innovation and makes it easier for the public and private sectors to work together in delivering innovation[60].

Recent declarations show that the issue of protecting the cultural heritage has attracted the European Commission`s attention. The lack of a formal frame of regulations, but also the lack of a rigorous defined vocabulary, have started to make a point. The crimes against the cultural heritage are continuously increasing and, only now, when we confront ourselves with such illegal phenomenon, we realize their real value. Now, when we find ourselves in the era of advanced technologies, of robots and intelligent machines, our history seems to point out on the lack of perpetuation. Indeed, responsible are both the states and their citizens, but in a context where 28 of the Europe`s countries are a part of, what it seems to be, the world`s most powerful economic organization, having policies in all the important domains, economic, social, cultural, energetic, the only thing that remains to say is that the European Union must implement real and applicable measures regarding the protection of cultural heritage. What represents a scientific, archaeological, artistic, historical, etc. value for a Member State, must be equally for the Union itself.

The issue regarding the patrimony and the culture, in general, has remained, a long period of time, underestimated within European general policies. Not only should we show interest for the crimes against the cultural heritage, but also because of its nature, it is a very fragile patrimony and it is exposed to multiple risks due to ageing, adverse environmental conditions, and human pressure.

In July 2014, the European Commissioner for Education, Culture, Multilingualism and Youth, Androulla Vassiliou, said: "*Europe needs to maximize the intrinsic, economic and societal value of cultural heritage. It should be the centre of heritage-based innovation, seizing the opportunities created by digitization and promoting our heritage expertise worldwide. Across the EU, we need to encourage a more people-friendly approach in heritage sites and museums, using new techniques and technologies to attract visitors and reach young people in particular. In short, we need to bring history alive. I am pleased that heritage stands to gain from stronger European support over the next seven years.*"[61]

The vice president of the Commission for Education and Culture himself, the Romanian Mircea Diaconu, has elaborated a project report entitled "Towards an integrated approach to cultural heritage for Europe". The project was debated by the members of the Commission for Education and Culture since the beginning of this year and the reactions were obviously positive. The discussion emphasized the idea of participatory governance, as a democratic model and as a valuable alternative, which can be applied for the purpose of boosting the instruments of cultural policies. Also, it was taken into consideration the theme of digitizing the cultural heritage, not so much with the purpose of archiving it, but with the intention of getting in touch with the young generation about the European cultural history, through new technologies[62]. Mircea Diaconu declared that in September 2015, he will propose to the Council and the European Parliament to adopt a European normative act that will regulate the European cultural heritage.

At the same time, the Council of Europe is continuing its mission and announces the Conference of Ministers responsible for Cultural Heritage which will take place in Namur (Belgium) on 23 and 24 April 2015 in the context of the Belgian Chairmanship of the Committee of Ministers of the Council of Europe. The conference is aimed at defining the conditions for elaborating a European strategy for cultural heritage. This strategy, while confirming the role of heritage as the touchstone of European values, should also project heritage as the means of their transmission and the ideal tool for intercultural and intergenerational dialogue.

So, as the role of the EU is limited, for the moment, to promoting cooperation between the cultural operators of the different Member States or to complementing their activities in order to contribute to the flowering of the cultures of EU countries, while respecting their national and regional diversity, these are the first measures that the European Union will apply:

- The Council adopted conclusions establishing a Work Plan for Culture (2015-2018). This is a strategic document setting out the priorities for European cooperation in cultural policy-making for the next four years, focusing on topics that represent a clear EU added value and encourage cross-sectorial cooperation. And we will quote from the press release from 25 November 2014: "The Work Plan has four sectorial priorities (accessible culture; cultural heritage; creative economy and innovation; and cultural diversity, including culture in EU external relations), which are complemented for the first time by two cross-sectorial priorities (digital shift and statistics). They are all structured around the Europe 2020 strategy for growth and jobs. The focus is on topics that represent a clear EU added value and

[60] http://ec.europa.eu/programmes/horizon2020/en/what-horizon-2020.
[61] http://europa.eu/rapid/press-release_IP-14-854_en.html
[62] https://www.mirceadiaconu.eu/

encourage cross-sectorial cooperation, taking into account the dual nature - economic as well as cultural - of culture."[63]

− The Council adopted conclusions on participatory governance of cultural heritage, inviting member states to promote a more active involvement of civil society and of the private sector in the governance of cultural heritage, at local, regional, national and European levels. "Cultural heritage is one of the priorities of the new Work Plan for Culture. It is a common good, a shared resource that requires a collective responsibility. The involvement of all interested parties in decision-making, planning, implementation, monitoring and evaluation of cultural heritage policies and programmes can increase public awareness of the values that it represents, reinforce transparency and accountability in the use of public resources, and build trust between citizens and public authorities."[64]

In conclusion, we all understand the importance that the protection and conservation of the cultural heritage represents. The reasons are both historical and moral and also economical. As members of the European Union, which gave up to a part of their sovereignity, through the treaty, the states are encouraged to act for the purpose of sustaining and developing the cultural domain. If the Union encourages the cooperation between Member States, supporting and supplementing their action in this sector, then the Member States will do the same thing, if the Union will act directly by implementing efficient policies and adopting a rigorous legal frame.

Another reason to point out the necessity to adopt general policies, but also normative acts in the cultural heritage domain, would be the fact that the Treaty on the Functioning of the European Union also establishes citizenship of the Union, which complements national citizenship of the respective Member States and is an important element in safeguarding and strengthening the process of European integration. For citizens to give their full support to European integration, greater emphasis should be placed on their common values, history and culture as key elements of their membership of a society founded on the principles of freedom, democracy, respect for human rights, cultural and linguistic diversity, tolerance and solidarity. It is essential to promote cooperation and cultural exchanges in order to **respect** and promote the diversity of cultures and languages in Europe and improve knowledge among European citizens of European cultures other than their own, while at the same time heightening their awareness of the common European cultural heritage they share.

Finally, as an example, we will present a few statistics referring to the profile of cultural policies of some of the European Union Member States.

Romania

- Funding (2010)

- Culture as share of total central government spending: **2.10 %** ⇩
- Government expenditure on culture: **885 131 974 Euro** ⇩
- Government expenditure on culture per capita: **41.00 Euro** ⇩
- Share of spending on culture by central government: **18.87 %** ⇩

- Employment (2009)

- Share of cultural workers in total employment: **0.75 %** ⇩
- Share of self-empoyed in cultural employment: **7.80 %**
- Share of self-empoyed in total employment: **32.78 %**

- Markets (2012)

- CUPIX[65]: Cultural goods: **83 %**[66]
- CUPIX: Public cultural services: **21 %**
- Annual exp. per capita for recreation and culture: **300 USD (30 %)**[67]

- Participation

- Cinema admissions per capita/year: **0.3 times (2010)** ⇧
- Internet penetration rate: **45.2 % (2012)** ⇧

- Ratification of Key Cultural Conventions

- European Cultural Convention (1955): **19/12/1991**
- European Charter for Regional or Minority Languages (1992): **Entered into force 1/5/2008**
- European Convention for the Protection of the Audiovisual Heritage (2001): **Signed 30/5/2002. Not yet ratified.**
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005): **Acceded on 20/07/2006**

[63] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/145953.pdf
[64] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/145953.pdf
[65] Cultural Price Index on selected goods and services
[66] European average = 100%.
[67] OECD (The Organization for Economic Co-operation and Development) PPP (prices and purchasing power parities) Index = 100%.

France

- Funding (2002)

- Culture as share of total central government spending: **N/A**
- Government expenditure on culture: **12000000000 Euro** ⇧
- Government expenditure on culture per capita: **197.20 Euro**
- Share of spending on culture by central government: **51.00 %** ⇩

- Employment (2009)

- Share of cultural workers in total employment: **1.70 %** ⇩
- Share of self-empoyed in cultural employment: **16.96 %**
- Share of self-empoyed in total employment: **10.91 %**

- Markets (2012)

- CUPIX: Cultural goods: **110 %**
- CUPIX: Public cultural services: **204 %**
- Annual exp. per capita for recreation and culture: **1 924 USD (188 %)**

- Participation

- Cinema admissions per capita/year: **3.2 times (2010)** ⇧
- Internet penetration rate: **80.0 % (2012)** ⇧

- Ratification of Key Cultural Conventions

- European Cultural Convention (1955): **5/5/1955**
- European Charter for Regional or Minority Languages (1992): **Signed 7/5/1999. Not yet ratified**
- European Convention for the Protection of the Audiovisual Heritage (2001): **Entered into force 1/8/2010**
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005): **Acceded on 18/12/2006**

Spain

- Funding (2010)

- Culture as share of total central government spending: **1.36 %** ⇩
- Government expenditure on culture: **6 862 252 000 Euro** ⇩
- Government expenditure on culture per capita: **149.00 Euro** ⇩
- Share of spending on culture by central government: **15.31 %** ⇧

- Employment (2009)

- Share of cultural workers in total employment: **1.28 %** ⇩
- Share of self-empoyed in cultural employment: **19.69 %**
- Share of self-empoyed in total employment: **16.92 %**

- Markets (2012)

- CUPIX: Cultural goods: **120 %**
- CUPIX: Public cultural services: **189 %**
- Annual exp. per capita for recreation and culture: **1 589 USD (155 %)**

- Participation

- Cinema admissions per capita/year: **2.2 times (2010)** ⇩
- Internet penetration rate: **68.4 % (2012)** ⇧

- Ratification of Key Cultural Conventions

- European Cultural Convention (1955): **4/7/1957**
- European Charter for Regional or Minority Languages (1992): **Entered into force 1/8/2001**
- European Convention for the Protection of the Audiovisual Heritage (2001): **Not yet signed**
- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005): **Ratified on 18/12/2006**

Austria

- Funding (2011)

- Culture as share of total central government spending: **0.82 %** ⇧
- Government expenditure on culture: **2 298 250 000 Euro** ⇩
- Government expenditure on culture per capita: **273.00 Euro** ⇩
- Share of spending on culture by central government: **34.04 %** ⇧

- Employment (2009)

- Share of cultural workers in total employment: **1.57 %** ⇩
- Share of self-empoyed in cultural employment: **30.70 %**
- Share of self-empoyed in total employment: **13.37 %**

- Markets (2012)

- CUPIX: Cultural goods: **128 %**
- CUPIX: Public cultural services: **176 %**
- Annual exp. per capita for recreation and culture: **2 431 USD (237 %)**

- Participation

- Cinema admissions per capita/year: **2.1 times (2010)** ⇩

- Internet penetration rate: **77.7 % (2012)** ⇧

- Ratification of Key Cultural Conventions

- European Cultural Convention (1955): **4/3/1958**

- European Charter for Regional or Minority Languages (1992): **Entered into force 1/10/2001**

- European Convention for the Protection of the Audiovisual Heritage (2001): **Signed 5/6/2002. Not yet ratified**

- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005): **Ratified on 18/12/2006**[68]

Conclusions

Firstly, the study is aiming to approach general considerations regarding the EU legislation on cultural heritage. The main directions of the study are the following:

- General definitions of the patrimony/heritage;

- National Romanian legislation on cultural heritage and definitions;

- International and European Conventions regarding cultural heritage that Romania ratified;

- International organs and organizations that specialized in cultural heritage or which take action in order to prevent and combat the crime phenomenon against art;

- Comparison between Romanian and International definitions regarding cultural heritage and slight references on the subject regarding the European Union;

- A short history on the evolution of the treaties, starting with the constitutive treaties and continuing with the ones that modified them and an analysis regarding the norms on cultural heritage from each of the treaties;

- A short presentation of the European parents and the contributions brought by the Council of Europe in the domain of cultural heritage;

- A short motivation on why should the European Union involve in general policies on cultural heritage, in accordance with its new legal status, conferred by the Lisbon Treaty;

- A presentation of the primary and secondary EU legislation on cultural heritage and a short analysis of them;

- The recent interests of the European Commission on cultural heritage;

- Declarations made by some members of the European Parliament on the subject and the work of the Council of Europe in present;

- The future applying measures adopted by the European Union on cultural heritage;

- Conclusions on the presented facts

- Statistics referring to the profile of cultural policies of some of the European Union Member States

On a global basis, it is shown an evolving interest on the revolution of cultural and creative industries, based on technology, communication infrastructure, networks, but also on traditions and cultural manifestations. The biggest global centers of creativity, like New York or London, are characterized by clearly regulations on the copyright laws, local educational systems, strong transportation hubs and support from the local administration authorities. The newest programmes and initiatives that European Union has come with, are believed to have a greater impact on society, regarding the aspects of cultural heritage, but in the same time, if we look back on the programmes applied until 2013, we will find several similarities, which didn`t make a difference in the mind of European citizens. The number of criminal acts on cultural goods has been increasing and the number of reactions to these offences have been stagnated. And when we talked about reactions, we mean that individuals are directly confronted with these problems, even though the national/European authorities should be more aware of them, taking into consideration the importance and high value of these objects for humanity in general. In these words, the study emphasize the necessity of awareness in all levels, especially social, economical and political levels, with a directly projection on the European Union.

For further more research, I suggest a more extensive approach of the effects of certain policies and programmes, with an evaluation of the real impact on the civic education in the domain and on the criminal phenomenon on cultural heritage. Statistics are all the time well received and they have a certain influence on the way authorities react to this problem.

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GENERAL PRINCIPLES OF THE EUROPEAN LEGAL SYSTEM IN TERMS OF THE TREATY OF LISBON

Florin STOICA*

Abstract:

Space widening European Community by joining several new states, reveals serious problems related to legal identity, social identity, sovereignty. The aim of this article is to explore some of the new principles created by the European law system, to show the necesity of creating an unique concrete system of law, in European community, with general principles.

Even if, all the states in their accession process, knows about their required concessions, we can observe the difficulty of a new member in adapting the European principles established by treaties.

Keywords: *European Law System, European principles, Lisbon Treaty, European Union, typology.*

1. Introduction

Reflecting the unity in diversity issue, the basic principle in the European landscape, we find that, as two drops of water aren't physically identical, there cannot exist two identical legal systems, and also no universally valid legislation, however, similarities exist between these systems, at the level of general principles and values.

Every state has enacted its law, in line with its own social and political demands, its legal traditions and with its eigenvalues. Each law system reinvents himself, according to its own identity, Savigny highlighting that "law is therefore not an absolute measure, which might be applied indiscriminately everywhere, as it is moral".

Creating a single European state, a United Europe, puts a delicate problem, namely that of the relationship between the national and the unique European identity, more specifically, congruence between national values and those of the European Union. The issue brought, is that states are ready or not to give up specificity elements and become a whole with common principles, whether or not, or could be, a European law system in the true meaning of the concept.

In order to succeed the alignment of the national law systems at a supranational law system, it is necessary to take into account the peoples socio-cultural variables.

Although we cannot talk about a universal timeless law system , we can conclude that there are a number of elements of continuity in law preceding ages and history.

Therefore, we can identify a number of legal principles and values, that are rooted in Roman law, and which survived. These principles will be listed and comparatively presented.

The existence of a single European law system, of a European law typology, can be built upon these principles and values, but they do not imply unification, but rather a harmonization of the national principles and values[1]. Therefore, in the content of the article, we will try to prove that European common values and principles can be the basis of a single law system and of the creation of new law types, the typology of European law.

In order to achieve the proposed objectives, in the following, we will start from the origin of the single European principles, we will determine their role in creating a new law system, we will try to prove the existence of a new law typology, and also we will try to show the Union current perspectives as a federal type state.

2. General Principles of the European legal system in terms of the Treaty of Lisbon

2.1.The European Union, a new legal typology

Integrating an over nationalized legal order, connecting to supranational interests, sovereignty reconfiguration, synchronizing the national values with those of the EU and harmonizing the legislation, are some of the topics that are on the discussion table at the European Community level. However, on the road to a United Europe, a delicate problem is raised – the compatibility between national values and those of the European Union. Therefore, the twenty-eight national identities are threatened by this process, so that we ask ourselves, on the other hand, if the European peoples are prepared to give up at their specific elements and embrace their "unity in diversity".

It is possible that European Union law, which is characterized by multilingualism and multijuridism, be considered a new type of law, emerged in the panorama of the world law systems?

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[1] Augustin Fuerea, *European Union Manua*l 3rd edition revised and added, Publisher. Universul Juridic, Bucharest, 2006, page. 228

We consider that only if the European Union is based on an independent legal will and on principles and values, that are within the legal eternal, for both the individual reason and as well for the national identity of the Member States, the "unity in diversity " is possible and so the existence of a new legal family.

The general law principles which are imposed to the European institutions, represent a legality pillar of the European Union, and are situated on a higher place in the hierarchy of secondary EU regulations. It should be noted that these principles are applied also to the Member States, when and to the extent that they act in European law.

In the discussion about the European Union law, as a new legal typology, first requires the existence of an autonomous will[2] which control the legal decision-making process of the EU, will that does not represent a simple arithmetic sum of individual wills of the Member States; thus, States shall undertake to submit separate legal demands of their own. Besides an independent will which controls legal creation, the new typology also implies the existence of some general principles that control the building and the development of the essential directions of the European legal order.

Regarding globalization, which is considered a new factor of the right configuration, currently it is observed a trend toward harmonization or approximation of the law in the world. Doctrinally, "the most sensitive" law harmonization is carried out at the regional level, where the European Union represents the best example (regulations and directives are applied in 28 states). Likened by Jacques Delors as an "unidentified political object", the European Union is largely a sui generis construction, borrowing from different types of institutional construction[3].

Referring us to the European Union, it can be noted that, since it was not founded by a nation or a people, it could not be assimilated to a nation, a State or to a constitutional structure. It is a sui generis international organization, created on the basis of some treaties concluded between sovereign States who have decided that this jointly exercise some competencies for an indefinite period of time. It is also interesting the classification pronounced by Germany's Federal Constitutional Court, the European Union being classified in the Staatenverbund category (from German, "union of states"), following the Maastricht decision from October 1993. In the Maastricht Decision, it is underline that the objective behind the Union was to create a "union of states ... as a union as close as possible to the peoples of Europe (organized as member states), and not as a state based on the people of a single European nation"[4].

International legal order is based on the states cooperation, without prejudice to specific powers of state sovereignty, the law of the European Union is a common right of the Member States, the Court of Justice of the European Communities interpreting that this right constitutes a "its own legal order, integrated in the legal system of the Member States"[5]. In the same decision, the Court emphasizes that under the rules adopted was established Community of indeterminate duration equipped with its own institutions, with its own legal personality, legal capacity, and the ability to representation and with powers international real springing from a limitation of powers or a transfer of powers of the Member States to the Community".

By analyzing the original and derived law of the European Union, I have noticed that the Union's regulatory process has evolved significantly, from the rules of mostly economic nature, at the present European new legal regulations have "specific features[6]", which enriching their meanings and their significations. It can be noted that an institutional law of the EU has been created, with all that this implies: sources of law, defining principles and regulations that outlines a specific legal order.

The union law is governing the legal relationships within the European Union, but also between the Union and the Member States, underlines the Union institutions' status, defining also its functions and competencies.

Through various legislative instruments and creative jurisprudence of the European Union's Court of Justice, gradually, have been created:

- An *institutional union law* that includes all legal reglementations governing the European Union components' structure and functioning;
- A *material union law* that covers all legal rules that secure EU's objectives and the measures by which they are carried out;
- A *procedural* union law *that covers* all legal procedures governing the European Union's law.

Thus, another argument for the creation of a new legal order is the fact that the institutional, material and procedural law, of the European Union outlined a specific legal order.

The Union's legal will represents the Union law's essence and it should not be seen as a simple

[2] Nicolae Popa, General Theory of Law , 4th edition , Publisher CH Beck, Bucharest, 2012, p. 63.

[3] Bruno Alomar, Sébastien Daziano, Christophe Garat,. Grandes questions européennes - 3e éd. - Concours administratifs - IEP Broché, page. 121.

[4] *Maastricht decision* in October 1993 issued by the Federal Constitutional Court of Germany , par. 89

[5] *Case 6/64 M. Flaminio Costa v. ENEL* [1964] . Is there a principle enshrined Costa essential in the relationship between Community law and national law of the Member States; where there is a conflict between a Community rule and a national rule contrary , the Community rule will always take priority , so a higher legal force. See Dan Vătăman , *European Union Law* , university course , Publisher Universul Juridic, Bucharest, 2010, page 24.

[6] Dumitru Mazilu , European integration . Community law and European institutions , Bucharest , Publisher Lumina Lex, Bucharest,2006, p.55

arithmetic sum of the individual wills of the states, but as a separate legal will. This fact is normal, because we are talking about a Union, so the typical features' problem arises, even if there are special features.

Within the complex process of implementation and application of the European law regulations, the general law principles occupy a very important place. The majority of the general law principles are not enshrined in the European Union's legal order, but in some cases we have encountered references in the Treaties. The reference to these principles can only be made where the Union's law is lacunar, because if there are provisions in this respect, their application is mandatory.

Also, general law principles acquire authority within the Union law through jurisprudential practice, "but it is always based on their consecration in a legal system organized either at the Member States' level, either common to Member States or resulting from the European Union's nature "[7].

2.2 General principles of Community law

2.2.1 Particularities of creating general law principles specific to the community law

Even if, in the ECSC Treaty, are not mentioned the general principles as a source of community law, the European Court of Justice has considered that it would be able to rule the existence of applicable general principles, based on the fact that these principles were already recognized within the Member States' legal systems. Thus, in Algera[8] business, the European Court of Justice stated that it was necessary to recognize the principles from Member States' national legislation, but also from their doctrine and their jurisprudence (12 July 1957), by using as a basis the rules imposed by those legislations, in order to establish the existence of a principle in terms of unilateral acts, which creates rights. In Article 215, of the EEC Treaty, is mentioned the use of common general principles common to the Member States' law, in order to establish the non-contractual rules of the community. However, the Court extrapolated, because the use of these principles should not be limited to this area, this type of principles being use in various fields. Subsequently, the court has established a distinction between principles, qualifying some of these general principles as "fundamental rights".

General principles applicable to the Community law come, therefore, from a jurisprudential construction. The Court has qualified at the beginning of its career, also a good rule extracted from treaties provision, or their global interpretation.

As a source of law, the general law principles have their authority from the fact that they are common to the Member States' rights and are noted in this manner by the Court, as indicated in the Hoechst decision: a general principle "will be essential in the community legal order as a common principle rights of Member States", (21 September 1989).

It is not necessary to gain authority in Community law as a general principle to exist within the legal systems of all the Member States. The Court did not proceed, in fact, never to an exhaustive examination of national rights and was bounded to establish (sometimes just to affirm) that the principle is contained in a certain number of national legal systems.

But, not at all insignificant differences between legal systems constitute an obstacle to a principle consecration as a general principle, which will be imposed in the community law (Hoechst decision).

As we have underlined above, in the European Court's existence, there are a number of general principles Member States that have been overlooked by it, in the sphere of the fundamental rights. Today they constitute the most important part of the general principles.

The jurisprudence had as start the International decision Handelsgesellschaft (17 December 1970), where the fears expressed by the German jurisdictions, which had indicated that they may not apply community law where it would not be compatible, with the persons' fundamental rights guaranteed by the German Constitution. The Court of Justice stated that "the respect of fundamental rights is an integral part of the fundamental law principles which compliance is ensured by the Court of Justice"[9]. At the same time, the guarantee of that these rights had "to be ensured within the structure and the objectives of the Community". The Court shall not be considered, therefore, being related to the compliance with National Constitutions prescriptions, but it's "being inspired from the constitutional traditions common to all Member States".

Another additional step has been consumed through Nold[10] decision, in which the Court has indicated that, in order to affirm that general law principles existence, it could be based, not just on the domestic law of the Member States, but also on other international instruments, to which the Member States have cooperated or acceded (14 May 1974). Therefore, the European Convention of Human Rights and Fundamental Freedoms was obviously the main international instrument targeted. Through a joint declaration (5 April 1977), the Assembly, the Council and the Commission underlined 'the paramount importance they attach to fundamental rights, as reflected in the Member States' constitutions, as well as from the European Convention mentioned.

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[7] Dan Vataman, , *European Union Law* , university course, Publisher Universul Juridic, Bucharest, 2010, p. 18.

[8] R. M. Chevalier, J. Boulouis, *Grands arrêts from Cour de justice des Communautés Européennes' (1994)* Dalloz 6th edn. 84 - Cleanup operation. op. , page 59

[9] J Boulouis et RM Chevallier, *Grands arrêts from Cour de justice des Communautés Européennes' (1994)* Dalloz 6th edn. 84, Page 124

[10] Clarence J. Mann, "*The function of Judicial Decision in the European Economic Integration* ",BRILL, 1972, page 275

The posterior jurisprudence of the Court of Justice has shown that this Convention constitutes the primary reference tool in terms of fundamental rights (15 May 1986, Johnston). In fact, the Court doesn't hesitate to make reference to the European jurisprudence of the Human Rights Court.

Subsequently, through Maastricht Treaty is confirmed what was resulted from the Court's jurisprudence, the Article F2 states that "the Union respects fundamental rights as guaranteed by the European Convention of Human Rights, signed in Rome on 4 November 1950, and as they result from the constitutional traditions, common to the Member States, as general principles of Community law".

Thus, fundamental rights have acquired a double foundation: The treaty which obliges the Union to respect them and a double external source, the European Convention on Human Rights or constitutional traditions common to the Member States.

Since January 1981, the Council of Europe has stated a favorable position, for joining the European Convention of Human Rights, which supposed in any case an adaptation of this Convention, but the Court of Justice, notified with a request for an opinion, has estimated that in the present status of the treaties, the community was not competent to dictate it rules in the matter of human rights or to conclude international agreements in this area[11]. Subsequently, in Nice, in December 2000, has been solemnly adopted the U. E's fundamental rights Charter, moment from which the Court started to have as bedside book the fundamental human rights. Today, the European Court of Justice, the fight assiduously to protect fundamental rights.

2.2.2. The general principles content

The European Convention contains fundamental rights within the meaning of Community law, rights that give a sense to its general principles.

But, other general principles are or will be applicable in Community law only because they are common to the States' constitutional traditions (fundamental rights) or common to their fundamental legal systems, applicable in Community law:

- The equal treatment principle ;
- The property's respect ;
- Free exercise of economic and professional activities
- Respect for private and family life , home and correspondence (26 June 1980, National Panasonic; 5 October 1994 /Commission);
- Freedom of association;
- Respect right to defense[12] (13 February 1979, Hoffmann-La Roche (205), Roche);
- Religious freedom;

However, at institutional level, we identify other principles:

Principles underlying the organization and functioning of the European Union institutions

-The principle of legality

-The autonomy of the European Union toward internal legal order

-The principle of subsidiarity

-The principle of conferral

-The principle of proportionality

-The principle of institutional unity or single institutional framework

-The principle institutional balance

2.2.3 Principle of legality

The principle of legality is unanimously considered as one of the fundamental principles of the legal European civilization, being included for a long time ago under the legal systems of all European states and in the international criminal matters treaties, fact that explains the very low volume of judgments of the Court that target this fact. Part of *ius congens, the* legality *principle* has an absolute character, statement that cannot be contradicted by the paragraph's 2 provisions.

Aborted to the judge appreciation, the punishment has become indefinite and random. This uncertainty was even more worrying as the punishments were of a very wide variety and, for serious offenses, of a high cruelty. First affirmed by Montesquieu, reloaded by Beccaria, the idea has found consecration once with its inclusion in the Declaration for human rights, in 1789, and French Criminal Code in 1810, after which it was integrated in the legal systems of all European states. The principle was also adopted by Romanian criminal law, with the criminal legislation from 1864, since then being permanently present in our criminal regulations, except for the period during the communist regime. Nowadays, in the Romanian law, the legality principle is guaranteed both by the provisions of Article 23 of the Constitution as well as by those of Article 2 of the Criminal Code.

The existence of this principle is based on both justifications related to the criminal policy of the states, as well as for reasons of criminological nature. The legality of criminalisation is one of the essential guarantees of the right to the liberty and legal security. At the same time, if the penalities are determined only by law, the legality principle is justified by the fact that social values protected by criminal law can be determined only by the social exponents of society from which it become.

To determine the concept of "criminal punishment" we must refer to of Article 6. The concept of "criminal matters" is determined by three criteria: the internal qualification, the nature of criminal act and of the nature of punishment, the Article 7 shall apply only to those sanctions are punishments in the normal sense of the term, excluding

[11] Philippe Manin *Les Communautes europeennes: L'Union europeenne : droit institutionnel (Etudes internationales) (French Edition., 1999. page 275*

[12] I. P. Filipescu, A. Fuerea, *Private international law*, Universul Juridic, Publishing House, 2012, page 49

any other measures to be taken in criminal matters, as well as for parole.

The principle of legality can be summarised in the formulation, which was launched by Beccaria: *nullum crimen sine law, nulla poena sine lege. As a result*, the principle of legality imposes obligations also to the legislator and to the legal power.., However, we should highlight that the principle of legality is viewed as a fundamental right of the person. As a result, there is no breach of the principle of when apparent infringement of the rules which involves creates the relevant person a more favorable situation.

To understand the principle of legality that we must start from definition of law, in Court vision, must be distinguished between a formal aspect and one material involved in European concept, stand-alone, the "law".

When we think of concept of formal law, the Court emphasizes the fact that it corresponds to that is used in other texts of the Convention and enclose both legislative law of origin, as well as the origin case law. From several points of view the solution of the Court is logical, in the first place, one of the aims of this COURT is to ensure uniform interpretation and application of the provisions of the Convention on Human Rights. In Europe there are countries in which the main source of law is the precedent, as well as the United Kingdom or Ireland. Furthermore, in almost all member Continental Europe's there are various categories of judicial decision which are sources of law, and binding on all courts.

In the process of creating law, are involved both components of executive power, as well as those laws, in addition, by interpretation carried out in the court rooms are developing the bill abstract, adding, in many cases, whole new. Case-law of the Court has been folded to this new reality. The Court has avoided to prioritize these powers of the state, refusing to impose only formal law, adopted by legislator, as well as source of law. Therefore, the Court said that it is not possible requires Member adoption of legal rules which does not need to be a certain degree of interpretation specialized, so that they can be applied to concrete situations. But, under the circumstances in which this interpretation shall be carried out by[13] courts of law and in a good measure of doctrine reduction concept of law from those laid down by supposing it would lead to the need to reduce, to a large extent, the role of judge. Thus, the cancellation of his posibilities to interpret the law contravenes legal tradition of European states, and the Court may not compromise such traditions.

From the formal point of view, the term "law", within the meaning of Article 7, shall be able to understand not only the law in the strict sense of the word, but the applicable law in a given situation, including the law created by judicially way.

The Court considers that, in the fields covered by the law writing, "the law" is the text in force, such as it was interpreted by competent courts.

The principle of legality requires, in the first place, a limit on the exploiting of criminal law as regards both acts by which they incriminate certain facts, as well as with respect to acts by which shall be determined and imposed.

The Court accepts that and sources of law only the law and judicial decisions, stating that the latter may have, in principle, only the role of interpreting the law. The idea Court comes from its general attitude as to limit the maximum role executive power, suspected of the temptation standing different kind.

The principle of legality implies an obligation on Member to adopt rules of grief set out in terms that are sufficiently clear to ensure predictability. If determinations which it entails the obligation of clarity we've presented by analysis potentiality matter. For instance, in the case law French it was considered that a rule which penalize them *contrary to the provisions of Article 16 of the social security code, it is not sufficiently* clear, whereas it is impossible to be deducted exactly what type of infringement of those provisions should be penalized. European Court for Human Rights in the case law, with the same qualification that has been discussed in relation to the Greek law to prosecute "proselytism", without determine exactly what acts shall enter into this concept. The Court was based on its findings and on the fact that there was a Greek courts fluctuating case-law in respect of certain acts - as well as distribution of religious literature - which does not have anything abusive in them. However, the European court considered the law inside have a sufficient degree of predictability.

Case-law of the Court has rarely been confronted with the retroactivity of criminal law. Because this area is covered by any manual of criminal law, we will be limited to Court presenting solutions in a few situations, that you had, to solve them. Thus, the Court found a breach Article 7 when a person has been penalized for an omission continues, which has been incriminated only at a certain point in the course was committed.

Article 7 (2) provides: This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.. All doctrine is convinced by conjectural origin of this provision, driven by the desire to editors Convention cannot be called into question convictions promulgated by the Nuremberg Tribunal, given that this court has ignored the principle of legality, sanctioning unpunished acts of legislation German from the time they were committed. Recently, the Court applied the same mood and disputes in relation

[13] Costica Voicu, a general theory *of the right*, university course, Publisher Universul Juridic, Bucharest, 2006, page 145.

to the former Yugoslavia Criminal Court, which confirm the ordinary term of the clause.

2.2.4. The autonomy of the European Union toward internal legal order

By changing the Lisbon Treaty, Article 2, paragraph 5 of Treaty on European Union, EU is hereby established an obligation to fulfill the requirement set out in international law.

By amendment to the Treaty of Lisbon, Article 2, paragraph 5/TEU becomes an key article in the interests of small and medium-sized countries which have the status of EU member "one of the legal guarantees established by the Treaty of Lisbon to the observance of national identity not only Member States but also the national, sovereign, unitary, independent and indivisible nature of those Member States which, like Romania, are enshrined in the Constitution those national legal character of their state.

When EU expressly assumes, through Article 2 (3), Parag.5/T[14]EU in the Lisbon Treaty modification , the obligation to " strictly comply and develop international law, including to respect the UN Charter's principles " shall mean a recognition by the Union (as original political entity[15], with *some state elements*, but endowed with legal personality and becoming so, *a subject of international law*, although a *derived one*, born out of the Member States' will) of the coordinator and interstate character, of contemporary international law[2] (where the state is the only topic of international, sovereign and originating law), but also a fundamental principle of the state's sovereignty[16] , inscribed in the United Nations Charter , on which it is based the international legal order.

An explicit reference to "strict observance of international law" is, according to art. 2 / TEU, paragraph 5 is a direct obligation of the Union to refrain from any action which would harm the rights of states as reflected in international law and as protected by the principles of the UN Charter. Even though art. 2, para. 5 / TEU refers to relations between the EU and the "wider world" (ie third countries, regardless of their status, the candidate countries for EU membership, the countries that have started accession negotiations, to countries that do not have vocation, according to the Copenhagen criteria / 1993 to become EU member states), we consider it necessary, by applying legal argument a fortiori, a respect for international law and the principles enshrined in the UN Charter, the Union and in its relations with EU Member States.

Thus, art. 2, paragraph 5 / TEU, the amendment introduced by the Lisbon Treaty, should be seen as a logical continuation of a legal relationship initially (in connection with Art. 3.a and art. 3.b / TEU) between the EU and Member States based on specific legal principle of European integration, namely the principle of conferral (plus, according to art. 3.b/TEU the principle of subsidiarity and proportionality). But this legal principle "integration" (as the legal foundation of progressive failure of powers by the states of the EU institutions) should not be considered a legal principle opposed to the principle of state sovereignty. In other words, even if ECJ case law sees "Community law" as a distinct orders both in relation to national legal orders of the Member States[17], but also in relation to the international legal order, this should not be interpreted as a "isolation" of the Community legal order (now by the Lisbon Treaty, an "order of law Union") to international law.

On the contrary, the two types of legal systems remain interconnected, since the quality of EU membership does not exclude participation, as a sovereign state, these states, international legal relations nor make them disappear quality sovereign subject of international law and that the original EU Member States have in relation to international law. Moreover, we believe that the existence of a "Community law" can not exclude international law relations established between EU Member States and between them and third countries (not EU membership).

The existence of the EU as a legal entity under the Lisbon Treaty of, we cannot speak of a disappearance of nation - states or a loss of their national character and sovereign. Moreover, the Union implies forms (CFSP, for example, police cooperation, intergovernmental cooperation, cooperation in civil matters, energy) the member states are the primary decision holding role, but also in terms of implementation of the measures established. In addition, article. 3 parargraph a /TEU in the Lisbon Treaty change, it makes clear that the decline hypothesis national - state sovereignty and the principle is rejected. Even in areas subject integration (or empowerment Union exclusively or shared), Member States that have freely decided to give a series of sovereign powers to the Union. The very existence of the Union as such is due to the free and sovereign Member States that have completed the realm of international law, a multilateral treaty to that effect.

Far from being a historical concept, obsolete, sovereignty remains the foundation of modern international law and its consequence (legal equality of all states) is a legal guarantee to protect fundamental states (in particular SMEs) in relations with other states. As stated Titulescu (the "diplomatic documents", Bucharest, Ed. Politics, 1967), "the abolition of sovereignty is not only impossible to predict a solution but if we embarked on this path, take

[14] Treaty of European Union
[15] Luciana- Alexandra Ghica (coord.), *The European Union Encyclopedia*, (Bucharest: Ed. Meronia, 2005), page 25.
[16] Ludovic cling, Martian.I. - Leads, *public international law*, (Bucharest: Ed. Educational and pedagogical), pages 33- 35.
[17] Augustin Fuerea, *European Union Manua*l 3rd edition revised and added , Publisher. Universul Juridic, Bucharest, 2006, page. 164-165

the world into chaos and anarchy ".The essential character of sovereign equality for all international law emerges from the opinions of experts who believe that "denying the sovereign state is to deny international law" between the international legal order and the principle of state sovereignty there is a mutual conditionality[18]. Permanent Court of International Justice highlight the fact, in the interwar period, the importance of sovereignty to international law, stating that "we must recognize and apply this principle that underpins international law itself."

We must consider the principles of Community law applicable in the relations between the Union and the Member States (cf. Art. 3.a, para. 1, para. 3 / TEU, Art. 3.b, paragraph.1-4 / TEU, amendment Treaty of Lisbon) like legal principles laid down by Member States (and not the Union, which is a sovereign state) by international treaties (although with a specific aspect of integration) under their own free and sovereign. Therefore, these principles of Community law are not only superior (not required, not relativize and does not remove the application) principles of sovereignty and equality of states, but I can not even make the existence and the scope in any way.

3.5. The principle of proportionality.

Proportionality principle acquires multiple meanings, these are identified in legal doctrine and especially in the Romanian legal doctrine in modern and contemporary period, emphasizing the idea of continuity in understanding this principle. The main connotations of this principle found in doctrine, ideas are expressed through fair balance, proper ratio, reasonableness, fairness and logical plan through dialectical reasoning of proportionality. Analysis of doctrine reveals the importance of this principle, whose purpose is to translate legal rules to substantiate the concept of legitimacy in law and to constitute as an essential criterion that allows the boundary between legitimate manifestations of state power and on the other hand excess power in the activity of the state.

Argues that the doctrine of proportionality is not only a simple legal instrument but also a principle of law.

Proportionality is seen a modern synthesis of classical principles of law. This principle is right outside the home and won the state and legal system rather late. As a principle of proportionality law involves ideas reasonableness, fairness, tolerance, and appropriateness of the measures necessary to state the facts and the legitimate aim pursued.

That principle appears enshrined in EU law legal instruments in the constitutions of states, and the Constitution explains research increasingly common concerns and especially the identification of its size. Proportionality is not only a principle of rational law, but at the same time, it is a principle of positive law, a principle with normative value. The proportionality is a legal criterion which considers the legitimacy of state power interference in the exercise of fundamental rights and freedoms.

This principle is explicitly or implicitly enshrined in international legal instruments[19], or most constitutions of democratic countries. Constitution expressly governing principle in art. 53, but there are other constitutional provisions that it involves. In constitutional law, the proportionality principle also applies in particular to protect human rights and fundamental freedoms. It is considered as an effective criterion for assessing the legitimacy of state intervention by limiting certain rights situation. The principle of proportionality is present in the public right of most EU countries. However, some distinctions must be made:

a) countries which establish the principle was made explicit in the constitution and legislation (Portugal, Switzerland, etc.), and

b) countries where it is not expressly mentioned in legislation or case law. The latter can include: Greece, Belgium, Luxembourg etc;

c) countries where this applies to public law as a whole (ex. France and Switzerland), on the other hand

d) the countries in which its use is limited to the scope of EU law. Moreover, even if the principle of proportionality is not expressly enshrined in the constitution of a state doctrine and jurisprudence considers as part of the concept of rule of law.

The principle of proportionality is applied not only constitutional law but also in other branches of law. Administrative law is a criterion that allows delineation of discretion, the administrative authorities in respect of the excess power that is made judicial review of administrative acts of abuse of power. It is also expressly provided by law as a criterion for individualization of administrative sanctions Application of the principle of proportionality exists in criminal law or civil law.

In European Union law, the principle of proportionality is expressly provided by Article 5 para. 4 of the Treaty on European Union and regulated, along with the principle of subsidiarity "Protocol on the application of the principles of subsidiarity and proportionality", in the sense necessary adequacy of resources and decisions of European institutions to the legitimate aim pursued.

Case law has an important role in analyzing the principle of proportionality, applied in concrete cases. Thus, the European Court of Human Rights is

[18] Raluca Miga-Beşteliu, *International law , Ch. All beck, publisher, 2007, page* 90-91

[19] Article 29 , paragraphs 2 and 3 of the Universal Declaration of Human Rights , Article 4 and 5 of the International Covenant on Economic, Social and Cultural Rights; Article 5, paragraph 1, article 12, paragraph 3, article 18, article 19, paragraph 3 and Article 12 paragraph 2 of the International Covenant on Civil and Political Rights; Article 4 of the Convention - Framework for the Protection of National Minorities; The AVA art.G European- revised Social Charter; Articles 8, 9, 10, 11 and 18 of the European Convention on Human Rights and Fundamental Freedoms.

designed as a ratio proportional fair, equitable, between the facts, means limitation on the exercise of rights and legitimate aim pursued or that a fair between individual interests and the public interest. Proportionality is a criterion that determines the legitimacy of interference Contracting States in the exercise of rights protected by the Convention.

Therefore, it is necessary proportionality increasingly more as a universal principle enshrined in most modern legal systems, explicitly or implicitly found in constitutional and recognized by national and international jurisdictions.

As a general principle of law, proportionality requires a considered fair relationship[20] between legal measures adopted social reality and the legitimate aim pursued. Proportionality may be considered at least as a result of the combination of three elements: the decision, its purpose and the facts to which it applies. Proportionality is correlated with the concepts of legality, opportunity and discretion. In public law, breach of the principle of proportionality is considered excess freedom of action left to the authorities, and, ultimately, abuse of power. There is interference between proportionality and other general principles of law, namely: the principles of legality and equality and the principle of fairness and justice.

The essence of this principle is considered fair relationship between the components. The question then is whether the phrase "fair relationship" is synonymous with that of "appropriate relationship" doctrine sometimes used. We believe that there are some differences, because the concept of "just" can have a moral dimension, while "adequate" and not necessarily mean this.

Summarizing, we can say that proportionality is a fundamental principle of law enshrined explicit or inferred from constitutional regulations, laws and international legal instruments, based on the values of rational law, justice and equity and expressing the existence of a balanced and appropriate, between actions, situations and phenomena limiting measures taken by government authorities to what is necessary to achieve a legitimate aim in this way are guaranteed fundamental rights and freedoms, and avoid abusive litigation.

There are significant concerns contemporary Romanian doctrinarians to establish proportionality connotations[21]. The author noted that proper proportionality is the phrase "right balance". It expresses the idea that "proportionality or the right balance is as cutting objective in concreto legal situation determined. It can appear and in the abstract, but such remains essentially or exclusively formal requirement without practical effect "Answering the question what are the structures constituting the proportionality same author stresses the idea of" respect "that is specific proportionality. Unlike mathematics, law, proportionality is not a problem of quantity but also qualitative, "expressing the requirement of adequacy between a legitimate aim ... means employed to achieve this objective and the result or effect produced by the installation of these means . Proportionality transition from a judgment based on binary logic to a logic-based gradual reasoning ".[22]

So we can talk of a "dialectical reasoning, consubstantial proportionality" or as we called us "proportional reasoning" based on a comparative report of a qualitative nature, specific legal value of a syllogism formalism designed to overcome specific abstract and impersonal dimension of legal standard and thus raise the particular to the universal concrete. For example, the principle of equality enshrined as one of the foundations of any democratic society and law, the proportionality which performs a logical relation, value of different elements in their concreteness, exceeds its abstract nature and inevitable trend smoothing, being found as universal concrete dialectical relationship between legal norm and diversity abstract reality. Applying "proportional reasoning" can be said that the principle of equality, looked quantitative dimension is only a particular case of the principle of proportionality.

At the end of this brief analysis on the principle of proportionality mention doctrinal conclusion that Professor Ion Deleanu to subscribe: "Thus said and briefly, the installation of proportionality - contextualized and circumstantial - the shift from rule to metarule from normativity to normality, the the legal norm hypostasis before the discovery and appreciation of its meaning and purpose. Benchmark in such reasoning which is, above all, the ideals and values of a democratic society, as the only political model considered by the Convention (Convention "European" Human Rights and Fundamental Freedoms) and, otherwise, only one compatible with it ".

3.6. Principle of institutional balance

It is assumed that each institution must act in accordance with the powers conferred on it by the Treaties, so as not to affect in a negative manner tasks other EU structures.

Brings together institutional balance on the one hand the separation of powers and competences on the other institutions and collaboration and cooperation between the same institutions of the Union.

With the Lisbon Treaty classic institutional triangle, Council, Commission, Parliament, undergoing a comprehensive reform.

If in 1951 the Treaty of Paris which established the European Coal and Steel Community brought to the fore the High Authority (now the Commission), and since 1957 the Rome Treaties debut long period

[20] M.Guibal, *De la proportionnalité,* în L'Actualite juridique Droit administratif, nr.5/1978, pg.477-479.
[21] Ion Deleanu, The fundamental rights of parties in civil, Universul Juridic Publisher, Bucharest, 2008, pp.365-406
[22] Ion Deleanu, The fundamental rights of parties in civil, Universul Juridic Publisher, Bucharest, 2008, pp.366

prevalence of the Council, as last treated to increase successive powers of the European Parliament are at present, with the Treaty of Lisbon, the exponential growth of these powers. PE peer adopted EU legislation with the Council. Mr Jerzy Buzek, EP President emphasizes that the function runs "advantage of the new powers received in a serious, responsible and constructive". Moreover, voters and political controls the European Commission has an important role in adopting the EU budget and conflicts including the High Representative for Foreign Affairs and Security Policy of the Union on organizational setting new institution.

All this translates into a lobby and increasingly powerful interest groups in addition to PE. But after the scandal MEPs receiving money for amendments, institutional transparency and the need for a correct relationship between lawmakers and lobbyists should be emphasized more than ever. Given the new institutional dynamics Lisbon instituted based on a delicate relationship between Parliament and Council, the scandal may affect the inter-institutional balance and their relationship with the European Commission on the quality of European legislation. This relationship fragile egos threatened by political and institutional suspicions, was affected by the scandal "money for amendments", as he called in the press, and worsened to Member States and cooperation between representatives of Parliament.

European Union Council was unbalanced but even its internal operation. Thus, there Councils have a permanent president (CAGRE and ECOFIN) and there Councils who rotating presidency. There was no political will at the time of Lisbon for the establishment of permanent presidents of all Councils of Ministers, thus rotating presidency now has a more symbolic value and lead to tensions between state representatives and delegates of the permanent representatives of the Union.

The delicacy of the new institutional balance it best reflects the position of the European Union High Representative for Foreign Affairs and Security Policy. The relations that it will establish its surrounding institutions depends on the success of this function.

In describing the institutional balance after the Lisbon Treaty Araceli Mangas argues that "there is a new constitutional model. Basic coordinates are maintained even if evolve in the same way that previous reforms have added or changed and held balances[23], 2005. In practice the last two years, however, how the Council and European Parliament relate to each other has changed considerably. The decision process was difficult and the task of reaching a consensus has become a real art. In this process, considerably increased role of Parliament rapporteurs and informal meetings attended by representatives of the Commission. Council remains first violin in the legislative process and the Union's decision, while Parliament is the political message wearer.

The Lisbon Treaty unfinished process? Conclusions can only be preliminary and only time will prove whether the current perception of the legal and institutional ambiguity Union is just a step to be exceeded or the premise of a new treaty.

3.7. Principle of subsidiarity

Under the shared competence between the Community and the Member States, the principle of subsidiarity as set by the Treaty establishing the European Community, defines the conditions under which the Community has a priority for action in relation to the Member States.

General spirit and purpose of the subsidiarity principle lies in providing a degree of independence of an authority subordinate to a superior authority, especially a local authority to the central power. There is, therefore, a division of powers between the various levels of government, institutional principle is the foundation of states with a federal structure. When applied in a Community context, the principle serves as the criterion governing the sharing of competences between the Community and the Member States. On the one hand, it excludes Community intervention when a material can be regulated effectively by Member States at central, regional or local level. On the other hand, the Community exercises its powers when Member States are unable to sufficiently fulfill the objectives of the Treaties.

For the purposes of art. 5 par. (2) EC, intervention by Union institutions principle of subsidiarity requires fulfillment of three conditions:

a. not be a subject under exclusive Community competence;

b. the objectives of the proposed action can not be sufficiently achieved by the Member States;

c. the action can be better achieved its scale or effects, through a Community intervention.

The scope of the subsidiarity principle has not been clearly defined, he continued to lead to divergent interpretations. However, the Community aims to clearly limit its action to the Treaties' objectives and providing new measures at a level as close as possible to the citizen. Also, in the preamble of the EU Treaty are a particular focus on the links between the subsidiarity principle and rule closer to the citizen. Once in force, the Lisbon Treaty should put an end to differences of interpretation regarding the scope of the principle of subsidiarity. In fact, the new Treaty defines the areas falling within the exclusive competence and shared competence of the Union. Art. 4 Parag. (2) TFEU contains the following list belonging shared competence: internal market; social policy; economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of

[23]Araceli Mangas, *La Constitucion European*, 2005,pag. 98.

marine biological resources; the environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety concerns in public health.

The subsidiarity principle applies to all EU institutions. The rule has practical significance, especially for the Council, Parliament and Commission. The Lisbon Treaty enhances both the role of national parliaments and that of the Court of Justice in controlling the subsidiarity principle.

Treaty of Lisbon introduces an early warning mechanism, whereby national parliaments have eight weeks to submit the opinions on draft legislation, which sent them necessarily at the same time with the European Parliament and the Council. If a third of national parliaments challenges the conformity of a draft legislative act with the principle of subsidiarity, reasoned opinions, the Commission must review its project and motivate potential to maintain (procedure "yellow"). This threshold must be one quarter of national parliaments, if it is a legislative draft act on the area of freedom, security and justice. In addition, if a simple majority of national parliaments challenges the compliance of a draft legislative act with the principle of subsidiarity ('orange card') and the Commission maintains its proposal, the matter shall be referred to the Council and the European Parliament, which shall act in a first reading. If it considers that the proposal is not compatible with the subsidiarity principle can reject a majority of 55% of the Council or a majority.

3.8. Principle of award of powers in the European Union

The principle governing the award of delimitation of competences in the European Union, according to art. 5 paragraph. 1 TEU. The principle of conferred powers has its counterpart in public international law principle of specialty called international organizations. The principle of conferred powers was established, initially, by the Treaty establishing the European Economic Community (CEECs), later confirmed by the Treaty establishing the European Community (TEC) in art. 5, which was translated by the Lisbon Treaty in the European Union's Treaty on (TEU).

Under the principle of conferral, the Union shall act only within the powers that have been assigned by the Treaties Member States to achieve the objectives set out therein (Art. 5 TEU). Therefore, Member by their willingness to transfer skills Union objectives. Still the same article provides that ,, competences not conferred upon the Union in the Treaties remain with the Member States "(Art. 5 TEU). From this last provision means another principle, that the jurisdiction is not conferred upon the Union by the Member States treated as a residual jurisdiction3. With special reference to the power of attribution of Union institutions are provisions art. 13 TEU, which provide that each institution ,, act within the powers conferred by the Treaties, in accordance with the procedures, conditions and objectives set by them. " The Court of Justice, confers jurisdiction - according to art. 5 TEU (Art. 5 TEU) - has the nature of an irreversible transfer, further stating that it is "a community room with own tasks and more specifically, with real powers arising from a limitation of competence or transfer powers from the States to the Community; transfer that occurs in states of their legal, internal Community legal order for the benefit of the rights and obligations corresponding provisions of the Treaty and drives (...) a final limitation of their sovereign rights ". Irreversible transfer the concept of the Lisbon Treaty, however, should be viewed subject to the provisions under which any Member State may decide ,, (...) to withdraw from the Union "(Art. 50 TEU). Therefore, the transfer is irreversible, possibly during the State of the Union is a member.

Prerogative powers are divided according to several criteria.

1.According to TFEU and the Court of Justice, as the scope and nature of the powers conferred Communities / Union that are unprecedented in international law, prerogative powers are divided into: a) control skills and competencies of action; b) international skills and competencies internal type state.

2. Depending on the relations established between national competence of Member States and Union (institutions), Treaties confer on: a) an exclusive competence of the Union; b) a shared competence with the Member States.

3. After the award of technical skills in doctrine emerged following classification task skills:

a) express powers (explicit);

b) subsidiary skills (complementary);

c) implied powers (by extension).

Powers of control resulting from the fact that every time treaties binding on the Member States, they granted simultaneously Union institutions, mainly the Commission, the general power to control their execution (Art. 258 TFEU). Also, the Court of Justice of the European Union Commission supervises, it fulfills its function of supervising the application of EU law (Art. 17 TEU). In a number of cases, special institutions of the Union Treaties confer jurisdiction derived authorization, which authorizes, approves or denies the acts adopted by Member States (Art. 428, 1309, 1310, all TFEU). In particular, the Commission has the responsability to implement the safeguard clause authorizing states to derogate from their obligations. Power control is exercised through non-binding acts (eg the Committee which draws attention to the risks for the offenses or conduct recommendations suggesting complies with applicable law) or mandatory (Commission decisions in matters of authorizations or derogărilor13).

Powers of action.

In certain areas and under the Treaties, the Union shall have competence to carry out actions to support,

coordinate or supplement the actions of Member States, without thereby superseding their competence in these areas (art. 2 para. 5 TFEU).

The Union shall have the following competences:

- to carry out activities in research, technological development and space, in particular to define and implement the programs, the exercise of those powers may have the effect of preventing Member States to exercise its jurisdiction (art. 4 par. 3 TFEU);

- to take action and conduct a common policy in the areas of development cooperation and humanitarian aid, the exercise of those powers may have the effect of depriving the Member States of the opportunity to exercise its jurisdiction (art. 4 par. 4 TFEU);

- to carry out actions to support, coordinate or supplement the actions of Member States (Art. 6 TFEU).

At European level, these actions relate to the following areas:

a. to protect and improve human health;
b. industries;
c. culture;
d. tourism;
e. education;
f. civil protection;
g. administrative cooperation.

A construction element of originality Community / Union led and it determines the exercise of international type and type of internal - state.

International Union competence is brought to light by:

- the power of information and consultation. For example, according to art. 337 TFEU (ex 284 TEC) "to the tasks entrusted to them - so in a general way - the Commission may request and receive information and carry out all necessary checks" and in T EURATOM are considered those provisions specific obliges Member States to inform or consult the Community institutions, especially before adopting measures which they consider to be taken (article 34);

- the power of coordination of policies and behaviorsof the Member States. Thus, according to art. 5 paragraph. 1 TFEU, Member States shall coordinate their economic policies within the Union. In this Union:

1. take measures to ensure coordination of the employment policies of the Member States' labor, in particular by defining guidelines for these policies;

2. may take initiatives to ensure coordination of Member States' social policies.

This power is exercised through recommendations, which calls for a certain behavior, but "not binding" of the Member States (Art. 288 para. Last TFEU). Another example is that the Commission, in specific cases provided for in the Treaties, shall adopt recommendations (art. 292, last sentence, TFEU). Also, the Council adopted the recommendations (according to Art. 292 para. 1TFUE, or under Art. 168 TFEU).

Coordination can take and binding form, for example, in the form of a directive, Member States of destination linking the outcome to be achieved, leaving to the national authorities in respect of form and methods.

The Directive is therefore a specific instrument for coordinating national laws (under Art. 50 TFEU, the European Parliament, Council and Commission, and Art. 53 TFEU, the European Parliament and the Council). Another example of coordination is achieved proficiency in some cases, through the Member States' decisions to the Council (art. 126 § 9 TFEU). Through internal type powers, the Union has, in particular, the power that it exerts direct impact on citizens of Member States. They shall be performed by:

• Regulation, which is obviously the legislative power of the Union. Has general, impersonal, is directly applicable in the Member States, giving rise at the same time, the rights and obligations not only for Member States but also for their citizens (art. 288 para. 2 TFEU);

• decisions (Council or Commission) that "binds" addressed by individuals (Art. 288 para. 4 TFEU);

• Court open to individuals who may act under the action for annulment (Art. 263 TFEU);

• international agreements which the Union may conclude with third countries or international organizations, through which creates legally rights and obligations for individuals on the Member States territory of the (according to Art. 216 TFEU).

• Special agreements with neighboring countries, according to art. 8 paragraphs 1 and 2 TEU, the Union develop a special relationship with them, in order to establish an area of prosperity and good neighborliness, founded on the Union's values , characterized by close and peaceful relations based on cooperation. These agreements may contain reciprocal rights and obligations and the possibility of undertaking activities jointly. Their implementation is subject to periodic consultation.

3. Conclusion

European Union as a state, as a political and legal construction, will be a subject of controversy doctrinal level. This controversy revolves around the idea of the existence of a new typology, legal, namely European Union law. Legal identity of the European Union is a reality, maturity are general principles, principles adopted and brought together in each member state.

In creating a legal order, the order European Union law, are required more formal sources of law, while they exist, are subject to the social context and realities.

Thus, general principles have become essential parts being used in processes being put forward by general advocates but also European judges. General principles represent any derivatives with primary law

or the European Union. The role is to ensure cohesion principles of Union law and adaptation to change European realities.

Treaty of Lisbon was a step forward in terms of Union constitutionalization, the European Union has gained a valences of a federal state[24] with a constitution and supranational institutions.

The general principles of law U.E. ensure the functioning of Union institutions generating, also, the separation of powers. They will easily lead easily to a homogenization of the law, homogenization, which debuted at security and justice.

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- *Case 6/64 M. Flaminio* Costa v. ENEL [1964]. Is there a principle enshrined Costa essential in the relationship between Community law and national law of the Member States; where there is a conflict between a Community rule and a national rule contrary, the Community rule will always take priority , so a higher legal force.

[24] Jean-Sylvestre Bergé, Sophie Robin-Olivier, Introduction au droit européen, ediţia a II-a, Themis/ Droit, PUF, 2011, p. 43.

DISPUTED MATTERS ON THE CONCEPT OF PUBLIC AUTHORITY

Elena Emilia ȘTEFAN*

Abstract

The issue on the submitting of the statement of assets and interests is a subject of great interest within the Romanian society. Starting from this subject, this study aims to analyze which are the legal entities required under the legislation in force to submit the statement of assets and interests and the penalty incurred for the failure to do so.

Furthermore, we consider relevant, in order to have an overview on the set out issue, to establish the significance of the concept of public authority. Not incidentally, we understand to discuss these two concepts, respectively the statement of assets and interests and the public authorities due to the fact that they were closely related within the judicial practice. Therefore, the qualification of a legal entity as a public authority leads to the obligation of the employees of the respective entity to submit the statement of assets and interests.

Keywords: *contentious administrative law, public authorities, statement of assets and interests, Financial Surveillance Authority, civil servant.*

1. Introduction

Following the occultism practiced by the totalitarian regime removed on December 22nd, 1989, the transparency became an imperative matter for the public life[1]. *De facto*, this means that the public offices and functions fulfilled for personal scopes, generally material scopes, shall be avoided[2].

According to the accepted legal principle, the statement of assets is usually analyzed under the name of obligation of disinterestedness and makes part of the category of the duties which equally aim both the professional and the private life of the civil servant[3]. The statement of assets and the statement of interests represent personal deeds and they can be revised only under the terms of this law[4]. (...) Another author showed that the law seeks to prevent the cases of abuse, corruption, the use of the service in order to achieve outstanding material advantages[5].

Each and every state has its own enacted law according to its social and political demands, to the traditions and values that it defends[6]. Therefore, the activity of the public administration bodies is governed by a mandatory set of rules and principles of conduct which aim to ensure it a social utility as high as possible[7]. As shown in the accepted legal principle, „the characteristics of any society and form of social power are the following: a particular regulatory system and a set of conduct rules".[8]

According to art. 1 par. (5) of the reviewed Constitution, in Romania the observance of the Constitution, of its supremacy and laws is mandatory, therefore, all the categories falling under the scope of the law shall be bound to submit the statement of assets and interests due to the fact that, as shown in the Constitution in par. (2) of art. 16:"*No one is above the law*". Along with the same lines, as the accepted legal principle noted, the compulsoriness of the rules of law is ensured, if necessary, by the coercive power of the state[9].

The following concepts shall be discussed within this study: public authority, civil servant and then the categories bound to submit the statement of assets and interests shall be analyzed. Therefore, the procedure of investigating the civil servants and/or high officials, performed by the integrity inspector shall be presented, and in the end we shall present a case study.

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[1] **Mihai Constantinescu, Ioan Muraru**, *Drept parlamentar (Parliamentary Law),* Gramar Publishing House, Bucharest, 1994, p.55

[2] **Mihai Constantinescu, Ioan Muraru**, *op.cit.,* p.101

[3] **Verginia Vedinaș**, *Drept administrativ (Adminitrative Law),* 4th edition reviewed and updated, Universul Juridic Publishing House, Bucharest, 2009, p. 482

[4] Art. 3 paragraph (1) of Law no. 176/2010 on the integrity in exercising the public offices and functions, for the amendment and supplementation of Law no. 144/2007 on the establishment, organization and functioning of the National Integrity Agency (...), published in Official Journal no. 621/2010

[5] **Verginia Vedinaș,** *Drept administrativ*, (*Administrative Law),* 4th edition reviewed and updated, Universul Juridic Publishing House, Bucharest, 2009, p. 482

[6] Refer to **Elena Anghel**, *Constant aspects of law*, in CKS - journal 2011 proceeding, Pro Universitaria Publishing House, Bucharest, 2011, p. 594

[7] **Dumitru Brezoianu, Mariana Opricanu**, *Administrația publică în România (Public Administration in Romania)*, C.H.Beck Publishing House, Bucharest, 2008, p. 12.

[8] **Ion Deleanu**, *Instituții și proceduri constituționale, în dreptul român și în dreptul comparat (Institutions and constitutional procedures in Romanian law and comparative law)*, C.H. Beck Publishing House, Bucharest, 2006, p.35.

[9] **Roxana Mariana Popescu**, *Introducere în dreptul Uniunii Europene (Introduction in the law of the European Union)*, Universul Juridic Publishing House, Bucharest, 2011, p.12

2. Content

2.1. The public authority concept

The main meaning of the concept of *public authority* is that of public body, namely an organized group of people performing public powers, within the state or the local level, or within another form, an organizational structure which acts as a public power in order to achieve a public interest.[10] According to another opinion, the concept of public administration has a double meaning: organization and activity.[11]

According to the legislation, in what concerns the concept of *public authority*, art.2 par.(1) letter b) of Law no. 554/2004[12] of the contentious administrative, the private legal entities which, according to the law, have obtained the public status or are authorized in order to provide a public service under the public power regime are assimilated to the public authorities.

The Constitution of 1991, as well as the reviewed version of 2003 established and maintained several autonomous central administrative authorities and the legislation fully developed this special category of bodies without combining them in a separate unitary system, such as the local public administration which is also autonomous[13]. By means of being autonomous authorities which fulfill administrative tasks, they are not subject to the administrative custody regime, such as the autonomous authorities of the local public administration (county councils. local councils, city halls, etc.)[14].

2.2. The civil servant concept

The meaning of the *civil servant* concept results from the case law of the Romanian Constitutional Court. Therefore, one of the decisions is read as follows: "as shown in the legal literature, according to the criminal law, the concept of civil servant and office holder has a broader meaning that the one awarded in the administrative law, due to the nature of the social relations protected by the incrimination of certain actions which are dangerous in social terms and to the fact that the actions of protecting the assets and promoting the community interests require a better protection by means of the criminal law[15]".

According to the status of the civil servants, the public office represents all the duties and responsibilities established under the law in order for the public power prerogatives to be achieved by the central public administration, local public administration and the autonomous administrative authorities.[16]

1.3. The obligation to submit the statement of assets and interests

"Upon the assignment of a public office and the termination of the service, the civil servants shall be bound to submit, under the terms of the law, the statement of assets, to the head of the public authority or institution. The statement of assets shall be annually updated, according to the law."[17]

The recent accepted legal principle showed that (...) this obligation is incumbent on all the civil servants and high official and for a while it was regulated by Law no. 115/1996, currently being regulated by Law no. 144/2007 on the establishment of the National Integrity Agency, as further amended and supplemented.[18] The provisions of this normative act (Law no. 176/2010) are applicable to the category of persons "who are bound to declare their personal assets and interests", among them being placed the civil servants, including the ones having a special status, namely they perform their activity within all the central or local public authorities, or as the case may be, within all the public institutions".[19]

According to the aforementioned Law no. 176/2010, art.2, the statements of assets and the statements of interests are filled in according to the enclosed model, respectively Appendix 1 and Appendix 2 and the certified copies together with the personal numeric code of the declarant shall be submitted to the Agency. Paragraph (2) of art.3 of the law states that: "*the statements are made in writing, on own risk and include the rights and obligations of the declarant, his/her spouse and dependent children*".

Law no. 176/2010 expressly shows in art. 4 the following: "the statements of assets and interests shall be submitted within 30 days as of the date of the designation or appointment, or as of the date of entering the service".[20] The persons provided in this law shall be bound to annually submit or to update the statements of assets and interests, no later than June 15th.

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[10] **Dana Apostol Tofan**, *Drept administrativ (Administrative law)*, vol.1, 2nd edition, C.H.Beck Publishing House, Bucharest, 2008, p.6

[11] **Rodica Narcisa Petrescu**, *Drept administrativ (Administrative law)*, Hamangiu Publishing House, Bucharest, 2009, p. 5.

[12] Law no.554/2004 of the contentious administrative, published in Official Journal no.1154/2004

[13] **Vasile Tabără,** *Dezvoltarea capacității administrative (The development of the administrative ability)*, C.H.Beck Publishing House, Bucharest, 2012, p. 98

[14] **Ion Corbeanu**, *Drept administrativ (Administrative law)*, 2nd edition reviewed and supplemented, Lumina Lex Publishing House, Bucharest, 2009, p.291**.**

[15] Decision no. 2/2014 of the Romanian Constitutional Court, published in Official Journal no.71/2014

[16] **Ion Corbeanu**, *op.cit.*, 2009, p.210

[17] **Dana Apostol Tofan**, *op.cit.*, 2008, p.357; **Verginia Vedinaș**, *op.cit.*, 2009, p. 481; **Dumitru Brezoianu, Mariana Oprican**,*op.cit.*, 2008, p. 384.

[18] **Verginia Vedinaș**, *op.cit.*, p. 482

[19] **Cristian Clipa,** *Drept administrativ. Teoria funcției publice. Raportul juridic de serviciu- noțiune, părți, obiect și conținut (Administrative law. The theory of the public office. The service legal relation – concept, parts, scope and content*, Hamangiu Publishing House, Bucharest, 2011, p. 348

[20] Law no. 176/2010 (...)

1.4. The procedure of investigating the civil servants performed by the integrity inspector

The scope of the Agency is to ensure the integrity in what concerns the performance of the public offices and functions and to prevent the institutional corruption by means of assessing the statements of assets, the data and information on the personal fortune, as well as the modification of the assets, the incompatibilities and the potential conflict of interests that the persons referred to in art.1 may be subject to throughout the performance of the public functions and offices[21]. According to the legislation in force, the investigation of the civil servant performed by the integrity inspector, in terms of assessing the acquisition of assets, in relation to the incomes earned or the investigation of the incompatibility condition consists of several stages that we will summarize in the following lines.

In this respect, the Law grants a Section entitled: „The assessment of the conflicts of interests and the incompatibilities", namely Section III of the content of Chapter II: "Procedures of the National Integrity Agency" of Title II entitled: "*The procedures intended to ensure the integrity and transparency of the public functions and offices*" of law no. 176/2010.

A. *The assessment of the conflicts of interests and the incompatibilities*[22]

- a.1. the integrity inspector analyzes the statement of assets and interests drawn up by the civil servant (art. 20 par. 1 of law no. 176/2010)
- a.2. if the integrity inspector finds that the civil servant does not justify, in full or in part, the fortune earned, the integrity inspector informs the latter and invites it, by means of a written invitation, to provide an explanation. The invitation sent by the integrity inspector shall be delivered by registered letter with acknowledgement of receipt.
- a.3. the investigated civil servant may be present in person, according to the invitation of the integrity inspector, at the indicated hour and location, in order to provide its explanation on the situation it is investigated for. On this occasion, the investigated person shall be entitled to submit any data or information which it considers to be relevant.
- a.4. if, after the expiry of the 15 day deadline as of the receipt of the invitation delivered by the integrity inspector, the civil servant fails to respond, the law provides the possibility that the integrity inspector draws up the assessment report. It is important to mention that the integrity inspector, in the absence of the acknowledgement referred to in par.(1), shall draw up the assessment report following the fulfillment of a new procedure for the notification of the investigated person.

B. *The issuance of the assessment report*

- b.1. the assessment report has the following content, according to art. 21 par.(3) of law no.176/2010, namely it consists of four sections: the description part of the *de facto* situation; the explanation of the person subject to the investigation, if expressed; the assessment of the conflict of interests and the incompatibilities; conclusions.
- b.2 the assessment report shall be communicated to the investigated persons within 5 days as of its completion, by the integrity inspector, and as the case may be, to the criminal investigation bodies;

C. *the appeal of the assessment report*

- c.1. the report on the assessment of the conflict of interests or the incompatibilities, according to art. 21 of law no. 176/2010 may be appealed before the competent contentious administrative court, within 15 days as of its receipt;
- c.2. if the report on the assessment of the conflict of interests was not appeal within the 15 day deadline as of its receipt, the Agency notifies, within 6 months, the competent bodies on the initiation of the disciplinary procedure; if the case may be, the agency notifies, within 6 months, the competent contentious administrative court on the cancellation of the instruments issued, adopted or drawn up on the violation of the legal provisions on the incompatibilities.
- c.3.if following the assessment of the statement of assets, as well as of other data and information, the integrity inspector founds the existence of an incompatibility condition or of a conflict of interests, it shall draw up a report to be delivered to the investigated person (...) , according to art.22 par.(4) of law no.176/2010.
- c.4. Furthermore, the law also states that in what concerns the conflict of interests, all the legal or administrative acts concluded directly or by means of intermediaries, under the violation of the legal procedures on the conflict of interests, shall be declared void. In addition to the appeal on the nullity of the respective acts, the court shall order the restoration of the parties.

2.5. Penalties for the failure to submit the statement of assets

According to art.27 of law no. 176/2010, the failure to fulfill the obligation to respond to the requests of the Agency, provided by this law, shall be sanctioned by a civil fine amounting to RON 200 for each day of delay. According to art.28 of law no. 176/2010, the action of the persons who willingly submit false statements of assets or interests represents the offense of misrepresentation and shall be punished according to the Criminal Code.

Furthermore, the law also provides civil sanctions for certain situations, as follows:

- according to art. 29, par.(1) the failure to submit the statements of assets and interests on the provided deadlines, as well as the failure to declare in the respective statement the amount of the earned income

[21] Art. 8 par (1) of Law no. 176/2010 (...)

[22] In this respect see **Cristian Clipa,** *op.cit.*, 2011, pp. 350-352

or to declare the income by reference to other documents represent an offence and shall be sanctioned with a fine amounting between RON 50 and RON 2,000.

- according to art. 29, par.(2) the failure to fulfill the obligations provided for by art.6 of the persons in charged with the implementation of the provisions of this law, represents an offense and shall be sanctioned by a fine amounting between RON 50 and RON 2,000. The same penalty shall apply to the head of the respective unit, if it fails to fulfill the obligations provided by this law.
- according to art. 29, par.(3), the failure to apply the disciplinary penalty or the failure to appeal the termination of the public function, as the case may be, if the ascertainment instrument remained definitive, represents an offense and shall be sanctioned by a fine amounting between RON 50 and RON 2,000, if the committed action does not represent a crime.

The ascertainment and the sanctioning of these offences provided by this law shall be performed by the authorized persons within the Agency according to the provisions of Government Ordinance no.2/2001[23].

3. Case study

It was shown in one case that, following the notification of the Financial Surveillance Authority, N.M was given a warning by the National Integrity Agency for committing the offence provided for by art.1 par.(1) of law no.176/2010, namely for the failure to submit the statement of assets and interests within the legal deadline.[24] The case raised several issues that the court had to clarify: if the Financial Surveillance Authority is a public authority according to the law; if the special status servants are assimilated to the civil servants in what concerns the obligation to submit the statements of assets and interests.

The Financial Surveillance Authority, under the provisions of art.1 par.(2) of Government Emergency Ordinance no. 93/2012 [25] is an autonomous administrative authority, with legal personality, independent, which fulfills its duties by means of taking over and reorganizing all the duties and prerogatives of the Securities National Commission, Insurance Surveillance Commission and Private Pension System Surveillance Commission.

Furthermore, according to the provisions of Government Emergency Ordinance no. 93/2012 the members of the council of the Financial Surveillance Authority are designated by the Parliament and the annual report of the Financial Surveillance Authority is discussed within the joint meeting of the two Chambers. According to the law, the Financial Surveillance Authority is an authority under the provisions of art.1 item 31 of law no. 176/2010, in connection to its certification, regulation, surveillance and control duties.

In what concerns the qualification of the special status servants as civil servants, the court noted that according to art.1 item 31 of law no. 176/2010: „the provisions of this law shall be applicable to the following categories of persons who are bound to submit the statements of assets and interests: 31. *The persons with management and control functions, such as civil servants, including the special status civil servants who perform their activity within all the central or local public authorities or, as the case may be, within all public institutions*". Furthermore, on the date of applying the penalty, the court noted that, the applicant had the capacity of a management and control person, even if it was not a civil servant. Therefore, the court considered that the applicant's claim on the absence of its capacity of civil servant was truth, but not likely to remove the penalty since the provisions of the aforementioned article state the punishment of both the civil servants and the persons with management and control functions – even if they do not have the capacity of civil servants.

4. Conclusions

The submission of the statement of assets and interests is contemplated by a special regulation, as presented in this study. As shown on other occasions, the legislative amendments occurred at a certain point in time raise serious issues for a certain field in what concerns the construction and implementation of the normative acts[26]. Therefore, in our opinion, an important factor for the compliance with the law is on the one side, the legislative coherence and on the other side, the unification of the legislation on fields, so that the legislation is no longer subjectively construed[27].

The judicial practice notes that, despite the lack of the capacity of civil servant, the persons are bound to submit the statement of assets and interests, if they perform their activity within an assimilated public authority, under the law.

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[23] Government Ordinance no.2/2001 on the legal regime of the offences, published in Official Journal no. 410/2001

[24] Civil Ruling no. 13964/2014 District 1 Bucharest Court, unpublished

[25] Government Emergency Ordinance no. 93/2012 on the establishing, organization and operation of the Financial Surveillance Authority, published in Official Journal no. 874/2012

[26] **Elena Emilia Ștefan**, "*Contribuția practicii Curții Constituționale la posibila definire a aplicabilității revizuirii în contenciosul administrativ"(The contribution of the Constitutional Court practice to the possible defining of the applicability of the disputed claims office revision)*, published in Drept Public Magazine no.3/2013, Universul Juridic Publishing House, Bucharest, pp.82-83.

[27] See **Elena Anghel**, *The reconfiguration of the judge`s role in the romano-germanic law system*, published in LESIJ.JS XX – 1/2013, Pro Universitaria Publishing House, Bucharest, 2013, pp. 65-72

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OPINIONS ON THE RIGHT TO NON-DISCRIMINATION

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Abstract

This study aims to analyze the non-discrimination concept, as regulated by the national and foreign legislation. It is important to know that there are international documents which protect the right to non-discrimination, so that these documents will also be contemplated by this study.

In Romania, the competent authority established in order to investigate and to apply civil sanctions for the deeds or acts of discrimination is the National Council for Combating Discrimination. In this respect, this study shall be focused on the presentation of the role and the activity of this institution in fighting against discrimination.

Keywords: *discrimination, law, National Council for Combating Discrimination, plaintiff, contentious administrative.*

1. Introduction

The right of all persons to equality before the law and protection against discrimination represents a fundamental right recognized by the Universal Declaration of Human Rights, by the United Nations Conventions on the elimination of all forms of discrimination against women, by the International Convention on the elimination of all forms of racial discrimination, by the United Nations Treaties on the civil and political rights and on the economic, social and cultural rights and by the Convention for the protection of human rights and fundamental freedoms, which all member states have signed.[1] As the foreign accepted legal principle noted, "the discrimination principle suggests that individuals in equal situations or equivalent circumstances, to be subject to an equal treatment"[2](...). In what concerns Romania, the recent accepted legal principle, the accession to the European Union also implied the establishment of the constitutional grounds[3]. According to the provisions of art. 148 par.(4) of the Constitution, the authorities of the Romanian state have undertaken to ensure the fulfillment of the obligations under the treaties establishing the European Union, the mandatory community regulations and the act of accession[4]. According to art. 1 of the reviewed Constitution, Romania is a state subject to the rules of law[5]. The Romanian Constitutional Court, under the construction of this text, noted that: "the state subject to the rule of law is a mechanism of which operation involves the establishing of an order where the recognition and valorization of the individual's rights cannot be conceived in an absolute and discretionary way, but only in relation to the compliance with the rights of the others and the community as a whole".[6]

One author noted that article 4 par. (2) of the Constitution lists the criteria of the non-discrimination[7]. Art. 4 par. (2) reads as follows: "Romania is the mutual and indivisible country of all its citizens, irrespective of the race, nationality, ethnic origin, language, religion, gender, opinion, political affiliation, wealth or social origin". Furthermore, art. 16 par.(1) of the content of the fundamental political and legal settlement of the Romanian state sets out the following: "the citizens are equal before the law and the public authorities, without any privilege or discrimination."[8]. Decision no. 164/2010 of the Romanian Constitutional Court approaches the same subject: "paragraph 1 of art. 16 is correlated with the constitutional provisions of art. 4 par.(2)". On the other side, the Constitutional Court provided that: the text of art. 16 par.(1) in conjunction with the text of art. 4 par.(2) of the fundamental law, concerns the prohibited discriminations and not the permitted discriminations,

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[1] Directive 2002/73/EC of the European Parliament and Council on the amendment of Directive 76/207/EEC of the Council on the implementation of the principle of equal treatment for men and women, par.(2) of Preamble,http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:32002L0073, accessed on February 17th, 2015

[2] **Frederic Sudre,** *Drept european şi internaţional al drepturilor omului (European and international law of human rights)* (translation by R.Bercea coord., V.I.Avram, M.Roibu, F.N.F Stârc-Meclejan, A.Verdeş-Olteanu), Polirom Publishing House, Bucharest, 2006, p. 202 apud. **Cristian Clipa,** *Drept administrativ.Teoria funcţiei publice. Raportul juridic de serviciu- noţiune, părţi, obiect şi conţinut*, (*Administrative law. The theory of the public office. The service legal relation – concept, parts, scope and content)*, Hamangiu Publishing House, Bucharest, 2011, p. 172

[3] **Roxana Mariana Popescu**, *Introducere în dreptul Uniunii Europene (Introduction to the law of the European Union)*, Universul Juridic Publishing House, Bucharest, 2011, p. 178

[4] Decision no. 1596/2009 of the Constitutional Court, published in Official Journal no. 37/2010

[5] For a more detailed analysis of the state subject to the rule of law, see **Elena Anghel**, *The lawfulness principle*, the CKS - journal proceeding 2010, vol. I, Pro Universitaria Publishing House, Bucharest, 2010, ISSN 2068-7796, p. 799

[6] Decision no. 659/2010 of the Constitutional Court, published in Official Journal no. 408/2010

[7] **Dan Claudiu Dănişor**, *Fundamentul statului şi criteriile de nediscriminare (The basis of the state and the non-discrimination criteria)*, Revista Drept Public (Public Law Magazine no. 1/2008, C.H.Beck Publishing House, Bucharest, p. 53

[8] **Cristian Clipa,** *op.cit.*, p.171

therefore it does not concern the positive discrimination, but the negative discrimination(...).[9]

2. Content

2.1. The general status of the legislation on discrimination

Internationally, several normative acts create the general framework of the non-discrimination and we selectively present them herein. For example, art. 14 of the Convention for the protection of human rights and fundamental freedoms is entitled: „the prohibition of the discrimination" and provides the following: "the performance of the rights and freedoms recognized by this Convention must be ensured without any distinction, especially on the following grounds: sex, race, color, language, religion, political opinions or any other opinions, national or social origin, the affiliation to a national minority, wealth, birth or any other situation".[10]

Furthermore, art.1 of Protocol 12 to the protection of human rights and fundamental freedoms entitled: "the general prohibition of the discrimination" provides the following:

"1. The performance of any rights provided by the law must be ensured without any discrimination, especially on the following grounds: sex, race, color, language, religion, political opinions or any other opinions, national or social origin, the affiliation to a national minority, wealth, birth or any other situation.

2. No person shall be discriminated by a public authority based on grounds referred to in paragraph 1".[11]

The Charter of Fundamental Rights of the European Union provides in art. 20 entitled "the equality before the law" that all persons are equal before the law and art. 21 fully approaches discrimination[12]. Therefore, according to par.(1) of art. 21: "the discrimination of any kind, on the grounds of gender, race, color, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other nature opinions, affiliation to a national minority, is prohibited (...)." and according to par.(2) „in what concerns the scope of the Treaties (...) the discrimination on the grounds of nationality is prohibited".

Another document that relates to the concerned subject is Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[13]. We find in this document several provisions, such as:

- Art. 1 „The scope: this Directive has as main scope the establishing of the 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".
- Art.2 The discrimination concept defines the direct discrimination and indirect discrimination, as follows:

„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 (...)

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 (...)."

Directive 2002/73/EC of the European Parliament and Council for the amendment of Directive 76/207/EEC of the Parliament on the implementation of the principle of equal treatment for men and women[14] is another document which falls under the scope of the discussed subject.

2.2. National legislation

Nationally, the legislation on the right to non-discrimination was also drawn up. For sure that each and every inventory of the normative acts firstly begins with the nominalization of the fundamental law which includes several articles on the right to non-discrimination, such as: art. 4, art. 16, etc.

Following the Constitution, Government Ordinance no. 137/2000 on the prevention and sanction of all forms of discrimination[15] is the next document that we refer to. This normative act defines the **discrimination** as being: "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,

[9] Decision no. 27/1996 of the Constitutional Court, published in Official Journal no. 85/1996

[10] http://www.echr.coe.int/Documents/Convention_RON.pdf, accessed on February 17th, 2015

[11] http://www.echr.coe.int/Documents/Convention_RON.pdf, accessed on February 17th, 2015

[12] For issues related to the compliance with human rights, prior to the entry into force of the Charter of the Fundamental Rights, see **Roxana-Mariana Popescu,** *Scurte consideraţii privind evoluţia consacrării juridice la nivelul UE a respectării drepturilor fundamentale (Brief opinions on the EU legal consecration of the compliance with the fundamental rights),* Revista Română de Drept European (European Law Romanian Magazine), supplement, 2013, Wolters Kluver Publishing House Romania, pp. 153-157.

[13] http://www.anr.gov.ro/docs/legislatie/internationala/Directiva_Consiliului_2000_78_CE_RO.pdf, accessed on February 17th, 2015

[14] http://eur-lex.europa.eu/legal content/RO/TXT/?uri=CELEX:32002L0073, accessed on February 17th, 2015

[15] Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination, published in Official Journal no. 431/2000

on an equal footing, of human rights and fundamental freedoms or of the rights recognized by the law (...)".

Another extremely important document nationwide is Law no. 202/ 2002 on equal opportunities between men and women[16] which regulates the measures to promote equal opportunities and equal treatment between women and men, in order to eliminate all forms of discrimination on the grounds of gender, within all the fields of the public life of Romania. The concept of *equal opportunities* is defined as follows: „the taking into account of the different abilities, needs and aspirations of both men and women and respectively, their equal treatment".

According to the international legislation, the types of discrimination are defined in art. 4 of this normative act, as follows:

- the 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 the grounds of gender.
- the indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular gender at a particular disadvantage compared with other persons of other gender, except the case when this provision, criterion or practice is objectively justified by a legitimate scope, and the means of achieving this scope are appropriate and necessary (...)".

References on the right to non-discrimination are also found in the criminal legislation, both in the old Criminal Code and in the current Criminal Code[17], as follows:

- art. 317 of the previous Criminal Code (normative act currently repealed) entitled „incitement to discrimination" provided that the "incitement to hatred on the grounds of race, nationality, ethnicity, language, religion, gender, sexual orientation, political opinion and affiliation, beliefs, wealth, social origin, age, disability, non-contagious chronic disease or HIV/AIDS infection" was punished with imprisonment between 6 months and 3 years or with fine.
- art. 369 of the current Criminal Code entitled "incitement to hatred and discrimination" provides that the "incitement of the public by any means to hatred and discrimination against a certain category of persons" shall be punished with imprisonment between 6 months and 3 years or with fine.

3. The Case Law of the Constitutional Court

In what concerns the principle of equality[18], the Constitutional Court, in its constant case law reflected by means of Decision no. 148/2001 or Decision no. 685/2012, provided the following, by means of general mandatory considerations: "the violation of the principle of equality and non-discrimination exists when a 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.[19]" The discrimination is the result of a different legal treatment applicable to the same categories of legal subjects or situations that do not differ objectively and reasonably.[20]

On another occasion, the Constitutional Court showed that: "The legal situation of several categories of persons justifies the implementation of a different treatment, in order for a better fulfillment of the justice".[21]

In what concerns another case, the Constitutional Court provided that: „The cultural traditions and social realities are still in progress towards achieving a factual real equality between genders, so that it cannot be concluded that currently, the social conditions in Romania support an absolute equality between men and women. Beyond the normal changes which occur within the society in terms of mentality, culture, education and in what concerns the traditions, the provision of an equal treatment between genders is more and more necessary in the context of the European trend which requires the states to comply with the standards of the non-discriminatory equal treatment between men and women".[22] The violation of the principle of equality and non-discrimination exists when a 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.[23]

4. The National Council for Combating Discrimination

The National Council for Combating Discrimination (C.N.C.D.) is the public authority, under parliamentary control which performs its activity in the field of the discrimination. It was established in 2002 under Government Ordinance no.137/2000. The activity performed by it is in accordance with Government Resolution no.

[16] Law no. 202/ 2002 on equal opportunities between men and women, published in Official Journal no. 150/2007

[17] The new Criminal Code was adopted by means of Law no. 286/2009 on the Criminal Code published in Official Journal no.510/2009 and entered into force in 2014

[18] **Elena Comșa**, *The principle of freedom and equality*, in Lex et Scientia no. 1/2009, Prouniversitaria Publishing House, Bucharest, 2009, pp. 263-265.

[19] Decision no. 2/ 2014 of the Constitutional Court, published in Official Journal no. 71/2014

[20] Decision no. 263/2009 of the Constitutional Court, published in Official Journal no. 170/2009

[21] Decision no. 553/2004 of the Constitutional Court, published in Official Journal no. 40/2004

[22] Decision no. 1237/2010 of the Constitutional Court, published in Official Journal no.785/2010.

[23] Decision no. 107/1995 of the Constitutional Court, published in Official Journal no. 85/1996.

1194/2001 on the organization and operation of the National Council for Combating Discrimination[24] The dedicated web page of this state authority is the following: http://www.cncd.org.ro/. Government Ordinance no. 137/2000 is the one establishing that the C.N.C.D. is held liable for the implementation of the legislation in the field of discrimination, that it ascertains and sanctions the offences falling under its scope. C.N.C.D. has the material competence in all the fields for the actions of discrimination, as well as the territorial competence, namely a nationwide competence.

In connection with the activity report on 2013[25]**,** compared to previous years, as of the establishment of C.N.C.D., 2013 stands out due to the following: "the highest number of petitions (858); the highest number of petitions on the grounds of nationality (61) and sexual orientation (13); the highest number of resolutions issued by the Ruling Council (824); the highest number of ascertainments of discrimination actions (135); the highest number of fines (110) amounting to RON 267,800 (compared to 2012 when the 35 fines amounted to RON 114,000)".

The activity report of 2013 showed that C.N.C.D. carried out an opinion survey: „Perceptions and attitudes on discrimination" with the support of the Romanian Institute for Assessment and Strategy. The opinion survey was carried out throughout October-November 2013 on 1,415 persons over 18 years old of the rural and urban area and who were distributed questionnaires.[26] The conclusions of the survey were the following: 67% of the respondents believed that the discrimination occurs „often" and „very often"; 46% believe that the discrimination would remain the same in the following years; only 11% hoped the discrimination would decrease and 28% expressed their concern that the discrimination would be more common.

The activity report of C.N.C.D. of 2012 showed that, in relation to the previous years, in 2012, a series of discrimination criteria recorded a percentage increasing dynamics[27]. Therefore, the non-contagious chronic disease, HIV infection, nationality, gender, beliefs and language are the criteria which record an increase in the total number of complaints, in relation to the latest 4 years.

In what concerns the cases settled by C.N.C.D. or submitted directly to the court, having as scope the ascertainment of the discrimination, the practice improves yearly. According to the activity report of 2012, under art. 27 of Government Ordinance no. 137/2000 C.N.C.D. was party in 556 civil cases (...). We hereby present selectively, several cases of C.N.C.D. which were settled and sanctioned with fine.

Case no. 1. Therefore, a press release was posted on the Cuțu-Cuțu Association, which was subsequently modified and entitled as follows: „Câinii nu sunt evrei ca să fie duși la Auschwitz" (Dogs are not Hebrew, so they cannot be taken to Auschwitz). Under resolution no. 207/July 4th, 2012, the Ruling Council ascertained the violation of the provisions of art. 2 par.(1) in conjunction with art. 15 of Government Ordinance no. 137/2000 and punished the plaintiff with fine amounting to RON 1,000. The Council showed that the comparison between the Holocaust and the stray dogs is degrading.

Case no. 2. The Ruling Council took notice of the allegations of plaintiff G.B made on GSP TV tv station addressed to the Muslim people and people from Arab countries, throughout January 8th-18th 2012: „I was disgusted to see that thousands of Romanian people took the streets to defend an Arab against President T. B. (...) How is it possible to defend an Arab against the president of my country. An Arab minister should never be designated". Under Resolution no. 88/February 29th, 2012 the Ruling Council ascertained that the plaintiff's allegations represent a differentiation on the grounds of nationality, ethnicity (the Arab) and religion (the Muslim) which results in the violation of the dignity, therefore, they fall under the scope of the provisions of art. 2 par.(1) of Government Ordinance no. 137/2000 and G.B. was punished with civil sanction amounting to RON 3,000.

According to the provisions of art. 20 of Government Ordinance no. 137/2000 in conjunction with art. 6 of law no. 554/2004[28] of the contentious administrative, the resolution of the Ruling Council may be appealed before the contentious administrative within 15 as of the pronouncement of the ruling. In what concerns the legal nature, the Decision of the Ruling Council of C.N.C.D. is a jurisdictional administrative act. Furthermore, the law provides the possibility of the persons who consider themselves to be victims of discrimination to resort directly to the court of law and to request damages and restoration.

5. Conclusions

Within the actual society, we often witness cases of discrimination. C.N.C.D. is the national authority specially established in order to supervise the compliance with the law in the field of the discrimination and, as we showed, it is an extremely active authority in punishing and preventing the actions of discrimination. In a society that wants to be democratic, it would be ideal if the actions of discrimination did not exist. We do not lack

[24] Government Resolution no., published in Official Journal no. 792/2001
[25] http://www.cncd.org.ro/files/file/Raport_activitate_CNCD_2013.pdf, accessed on February 17th, 2015
[26] http://www.cncd.org.ro/files/file/Sondaj%20de%20opinie%20CNCD%202013.pdf
[27] http://www.cncd.org.ro/files/file/Raport%20de%20activitate%20CNCD%202012.pdf,
[28] Law no. 554/2004 of the contentious administrative, published in Official Journal no. 1154/2004

legislation, but we lack reaction, as the presented survey showed.

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- www.echr.coe.int/Documents/Convention_RON.pdf, accessed on February 17th, 2015
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THE RELATIONSHIP BETWEEN EUROPEAN UNION LAW AND ROMANIAN LAW IN THE CONTEXT OF THE LAW UNIFORMIZATION AT EUROPEAN LEVEL

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Abstract

Taking into account the specific of the European Union law, which was synthesized by the Court of Justice of the European Union as "an own legal order integrated into the legal systems of the Member States", the aim of this study is to highlight the peculiarities of EU legal order, especially with regard to implementation of European legislation into national law of the Member States. For a full understanding of way in which the EU law is applied into Romanian law, a particular emphasis was given to the actions taken by the Romanian authorities to fulfil the commitments assumed in the Accession Treaty, especially with regard to the transposition and application of Union law. Also, were analysed the constitutional provisions and those contained in the four new codes concerning the application of EU law in the Romanian law.

Keywords: *applicability of European Union law, Romanian law, legal order, implementation of legislative acts, law uniformization.*

1. Introduction

The complexity of the European Union and its legal order are not easy to understand, this difficulty is due, in part, even to the wording of the Treaties themselves, especially that certain concepts which are used in the Treaties are unfamiliar to the general public.

For this reason, in the research activity I have focused on the EU legal order through the prism of its peculiarities, with a focus on the process of adopting EU legislation and implementation of legislative acts into national law of the Member States. Thus, I emphasized the direct applicability and priority of EU law into national law of the Member States and the obligation for Member States to transpose and implement EU legislation, in this connection being analysed the relevant jurisprudence of the Court of Justice of the European Union.

Given Romania's status as a full member of the European Union and, especially, the fact that this goal has required extraordinary efforts from both the Romanian authorities and the Romanian citizens, I considered that is necessary to deepen the relationship between European Union law and Romanian law in the context of the law uniformization at European level, with the ultimate aim of accurate understanding the two systems of law. As a result, for a full understanding of way in which the EU law is applied into national law, in the first stage of research I have focused on the actions taken by the Romanian authorities to harmonize the national legal system to the provisions of the Community acquis for the accession of Romania to the European Communities / European Union. In the second phase of the research activity I have highlighted the efforts of Romania to fulfil the commitments undertaken by the Accession Treaty, especially with regard to the transposition and application of Union law. Further I analysed the constitutional provisions and those contained in the four new codes concerning the application of EU law in the Romanian law, taking into account the views expressed in the doctrine.

2. General aspects concerning applicability of EU law into national law of the Member States

According to specifications of European Court of Justice, EU law is distinct from national legal systems and however it is imposed to Member States and their nationals, being an internal law of the European Union which is integrated into national law of each Member State.

Thus, between the legal order of the European Union and the legal order of Member States are developed relations based, on the one hand, on the principle of integrating EU law into national law of the Member States (principle that is translated by building at EU level of an autonomous and independent legal system, absorbed in the law systems of the Member States) and on the other hand, the principle of primacy of EU law over national law of the Member States. As a result, for the EU law are defining the following features: direct applicability and supremacy/priority of application.[1]

The direct applicability or direct effect means that EU law confers rights and imposes obligations directly not only on the Union institutions and the Member States but also on the Union's citizens. The principle of direct effect of European law was enshrined by the Court of Justice of the European Union in the judgement of Van Gend en Loos of 5

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[1] Dan Vătăman, *European Union Law*, Bucharest, "Universul Juridic" Publishing House, 2010, pp. 9-10.

February 1963[2], occasion on which the Court states that European law not only engenders obligations for Member States, but also rights for individuals. As a consequence, any individual or legal person may therefore take advantage of these rights and directly invoke the provisions of the Treaties and EU legislative acts adopted by institutions on the basis of the Treaties (regulations, directives and decisions) before national and European courts.

Regarding the supremacy or priority of EU law, the Court of Justice of the European Union formulated the so-called "communautaire" thesis according to that in relationship between national law of Member States and Community law, the latter must be supreme in the event of any conflict. This principle was first enunciated in the Case Costa v. ENEL[3] when the Court stated that by creating a Community of unlimited duration, having powers stemming from a limitation of sovereignty, or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and thus have created a body of law which binds both their nationals and themselves. The principle of EU law supremacy was consolidated by judgment of the Court in the Case Simmenthal[4], where the Court stressed that Community law would take precedence even over national legislation which was adopted after the passage of the relevant EC norms. Thus, the existence of Community rules rendered automatically inapplicable any contrary provision of national law, and precluded the valid adoption of any new national law which was in conflict with the Community provisions.

3. The obligation of Member States to transpose and implement EU legislation

The European Union is founded on law and pursues many of its policies through legislation and is sustained by respect for the rule of law. Therefore, the success in achieving EU goals as set out in the Treaties and in legislation depends on the effective application of EU law in the Member States, this because laws do not serve their full purpose unless they are properly applied and enforced. According with European Commission the application and enforcement of EU law involves many actors – the European institutions, the Member States, including local and regional authorities and courts.[5]

With the entry into force of the Lisbon Treaty were established powers of the European Union and were attributed to European Commission some monitoring and enforcement functions. Thus, in accordance with provisions of Treaty on European Union (TEU) was maintained fundamental obligation of Member States to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union[6]. At the same time, the European Commission is responsible for ensuring the application of the Treaties and of measures adopted by the institutions pursuant to them, for this purpose overseeing the application of EU law under the control of the Court of Justice of the European Union.[7]

As shown in the provisions of TEU cited above, while Member States have the responsibility to implement timely and accurately the EU legislation and to apply and implement correctly the entire acquis, the European Commission has to monitor the efforts of Member States and to ensure that their legislation is in conformity with EU law.

For this purpose, the Commission may contest on their own initiative the way in which the Member State implement the EU law but it also acts on the basis of petitions received from the European Parliament and complaints from citizens, businesses, NGOs and other stakeholders that reveal potential violations of EU law, for instance incorrect transposition or bad application of EU law.[8]

According to Article 258 of Treaty on the Functioning of the European Union (TFEU), the European Commission has the power to initiate the formal infringement procedure by referring the case to the Court of Justice of the European Union, with the possibility to request financial sanctions.[9]

I highlight that according to the case law of the Court of Justice of the European Union, the European Commission has the authority to decide whether it is necessary an infringement procedure[10] and, when it takes this decision, the time at which initiates the

[2] Judgment of the Court of 5 February 1963, Case 26/62 – NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration.

[3] Judgment of the Court of 15 July 1964, Case 6/64 – Flaminio Costa v. ENEL - Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy.

[4] Judgment of the Court of 9 March 1978, Case 106/77 – Amministrazione delle Finanze dello Stato v. Simmenthal SpA - Reference for a preliminary ruling: Pretura di Susa – Italy.

[5] Communication from the Commission, A Europe of Results – Applying Community Law, COM(2007) 502 final, OJ C 4/13 of 9.1.2008.

[6] Article 4(3) of TEU.

[7] Article 17(1) of TEU.

[8] Report from the Commission – 31st Annual Report on monitoring the application of EU law (2013), COM(2014) 612 final.

[9] The infringement procedure can be initiate on the basis of other provisions of the Treaty, for example Article 106(3) of TFEU, corroborated with provisions of Articles 101 and 102 TFEU.

[10] Judgment of the Court of 6 December 1989, Case C-329/88 – Commission of the European Communities v. Hellenic Republic, Failure by a Member State to fulfil its obligations - Failure to transpose a directive; Judgment of the Court (Sixth Chamber) of 21 January 1999, Case C-207/97 – Commission of the European Communities v Kingdom of Belgium, Failure of a Member State to fulfil its obligations - Council Directive 76/464/EEC - Water pollution - Failure to transpose.

procedure[11]. The Commission also has the freedom to decide if and when refer the case to the Court of Justice[12].

4. Relationship between European Union law and Romanian law

4.1. The process of legislative harmonization with the European Union law before Romania's accession to the European Communities / European Union

The harmonization process of Romanian legislation with the Community acquis represented a legal obligation under the Europe Agreement Romania-European Union, ratified by Romania by Law no. 20/1993[13]. The negotiations started with a preparatory phase or a screening of the acquis which was conducted by the Commission, and afterwards was necessary to adopt the basic legislation in order to harmonize national legislation with EU law before the Romania's accession to the European Communities / European Union.

In the first years, the process of approximation of the Romanian legislation with Community norms was carried out according to the National Program for Accession of Romania to the European Union, this document included clear responsibilities, divided on the acquis chapters.

Starting with 2003, this programme has been replaced with other Romanian internal programmatic documents. Thus, in 2003, the process of legislative harmonisation was carried out according to the Legislative Programme for Supporting the European Union Accession Process for the period November 2002 – December 2003, which was part of the Priority Action Plan for European integration (November 2002 – December 2003). The Programme essentially aimed at fulfilling the requirements expressed by the European Commission in the Country Report 2003.[14]

The next year marked important progresses in the harmonization process of the Romanian legislation with the Community legislation. In order to assure a fluid and effective legislative process, which would allow Romania to meet the deadlines of the measures it had assumed in the preparation for accession, the Ministry of European Integration, following consultation with other ministries and responsible institutions in the field, drew up The Priority Legislative Programmes (at law level) for the Accession to the European Union, for the first and second semesters of 2004. The two programmes contained the relevant legislation for both the negotiations chapters and the political and economic criteria that Romania had to meet. The adoption of these laws is necessary to finalise the negotiations by the end of 2004.[15]

The Brussels European Summit (16-17 December 2004) endorsed the closure of negotiations and "noted with satisfaction that progress made by Romania in implementing the acquis and commitments entered into as regards, in particular, Justice and Home Affairs and Competition, has made possible to close formally all the outstanding chapters with Romania on 14 December 2004 and accordingly looked forward to welcoming it as a member from January 2007". The European Council also considered that Romania will be able to assume all the obligations of membership at the envisaged time of its accession, provided that it continues its efforts to that end and completes in a successful and timely way all necessary reforms and commitments undertaken in all areas of the acquis, in particular the important commitments regarding Justice and Home Affairs, Competition and Environment. [16]

Therefore, the process of legislative harmonisation continued in 2005, too. At the proposal of the Ministry for European integration, the Government adopted up The Priority Legislative Programmes (at law level) for the Accession to the European Union, for the first and second semesters of 2005. The two programmes contained implementing and legislative measures resulting from commitments undertaken by Romania in the accession process.

The year 2006 was crucial for Romania's accession to the EU, whereas the Commission has closely monitored the fulfilment of commitments in the process of negotiation and preparation for accession, an essential aspect being the further harmonization of Romanian legislation and adoption of laws fully compatible with the Community acquis.

Consequently, the Romanian authorities have taken measures to ensure a fluid and efficient legislative process and, at the same time, to allow meeting deadlines for completion of the measures undertaken in preparation for Romania accession to EU and to avoid registration of delays. In this respect, were finalized The Priority Legislative Programmes (at law level) for the Accession to the European Union, for the first and second semesters of 2006.

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[11] Judgment of the Court of 1 June 1994, Case C-317/92 – Commission of the European Communities v. Federal Republic of Germany, Medicinal products and medical instruments - National rules on the indication of expiry dates - Barrier to the free movement of goods - Failure to notify the Commission; Judgment of the Court of 10 May 1995, Case C-422/92 – Commission of the European Communities v Federal Republic of Germany, Failure of a Member State to fulfil its obligations.

[12] Judgment of the Court (First Chamber) of 6 October 2009, Case C-562/07 – Commission of the European Communities v. Kingdom of Spain-Failure of a Member State to fulfil obligations.

[13] Law no. 20/1993 was published in the Official Journal of Romania, Part I, no. 73/12 April 1993.

[14] http://www.mdrl.ro/_documente/arhiva_mie/en/relatiile_ro_ue/armonizare_legislativa.htm, accessed on 23 January 2015.

[15] Ibid.

[16] Presidency Conclusions of the Brussels European Council (16/17 December 2004) - http://www.consilium.europa.eu, accessed on 23 January 2015.

In its report of September 2006, the Commission stated that Bulgaria and Romania have made further progress to complete their preparations for membership and they have reached a high degree of alignment. However, the Commission also identifies a number of areas of continuing concern and areas where will initiate appropriate measures to ensure the proper functioning of the EU, unless the countries take immediate corrective action.

In the case of Romania, the Commission showed that our country have made far-reaching efforts to adapt their legislation and administration to the laws and rules of the European Union. However, the Commission stressed that further efforts were needed in several areas, such as social policies and employment including public health, genetically modified organisms, motor insurance, capital requirements for credit institutions and investment firms, money laundering and the fight against fraud and corruption, financial management and control of future structural funds and animal diseases. Taking into account the progress made by Romania with regard to the political, economic and acquis criteria, the Commission considered that Romania has demonstrated their capacity to apply EU principles and legislation and will be able to assume the rights and obligations of membership of the European Union from 1 January 2007. [17]

4.2. The efforts of Romania to fulfil the commitments undertaken by the Accession Treaty

As a result of the progress made, on 1 January 2007, Romania became a member state of the European Union, this quality involving not only rights but also obligations. Thus, Romania's accession to the European Union has meant an integration to a space of well-defined rules, a failure in applying these rules can generate corrective measures such as: safeguard measures, financial corrections of EU funds, competition policy measures and infringement procedures.[18]

Along with these measures, the Treaty of Accession of Romania to the European Union includes three provisions which allow the Union to remedy difficulties encountered as a result of accession: a general economic safeguard clause; a specific internal market safeguard clause; and a specific justice and home affairs safeguard clause[19]. In addition to these safeguard clauses, there was a clause according to that the Council may, acting unanimously on the basis of a Commission recommendation, decide that the date of accession of that State is postponed by one year to 1 January 2008.[20]

Pursuant to the provisions of the Act of Accession, whilst noting the considerable efforts to complete Romania's preparations for membership, the European Commission has identified some remaining issues, in particular in the accountability and efficiency of the judicial system and law enforcement bodies, reason which warrant the establishment of a mechanism for cooperation and verification of the progress of Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption. As a consequence, by Commission Decision 2006/928/EC of 13 December 2006 has been established a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption[21].

The Co-operation and Verification Mechanism (CVM) and specific benchmarks[22] was put in place to improve the functioning of the legislative, administrative and judicial system and to address serious deficiencies in fighting corruption. The purpose of the Cooperation and Verification Mechanism is to ensure that measures are taken to provide assurance to Romanians and to the other Member States that administrative and judicial decisions, legislation and practices in Romania are in line with the rest of the EU.

Based on inputs from the Romanian authorities, complemented by expert missions, the European Commission presented a series of evaluation reports in which are presented a summary and detailed assessment of how far Romania has come in meeting the benchmarks set out in the CVM.

According to the latest report presented by European Commission at 29 January 2015, since then CVM reports have charted the progress made by Romania and have sought to help focus the efforts of the Romanian authorities through specific recommendations. The CVM has played an important role in the consolidation of the rule of law in Romania as a key facet of European integration. Monitoring and cooperating with the work of the Romanian authorities to promote reform has had a concrete impact on the pace and scale of reform. The 2014 CVM report noted progress in many areas, and highlighted the track record of the key anti-corruption institutions as an important step towards demonstrating sustainability.

[17] Communication from the Commission - Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM (2006) 549 final, Brussels, 26.9.2006.

[18] Dan Vătăman, *History of the European Union*, Bucharest, "Pro Universitaria" Publishing House, 2011, p. 110.

[19] Articles 36, 37 and 38 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded - OJ L 157/203 of 21.6.2005.

[20] Ibid, Article 39.

[21] OJ L 354 of 14.12.2006, pp. 56–57.

[22] The four benchmarks are summarized in the Annex of Decision 2006/928/EC, as follows: a) Ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the Superior Council of Magistracy - Report and monitor the impact of the new civil and penal procedures codes; b) Establish, as foreseen, an integrity agency with responsibilities for verifying assets, incompatibilities and potential conflicts of interest, and for issuing mandatory decisions on the basis of which dissuasive sanctions can be taken; c) Building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption; d) Take further measures to prevent and fight against corruption, in particular within the local government.

At the same time, it noted that political attacks on the fundamentals of reform showed that there was no consensus to pursue the objectives of the CVM. [23]

As can be seen, although the reports on the progress made by Romania in the CVM reflects the sustainability and irreversibility of the reforms implemented, to eight years after accession these reports still contain recommendations on matters related to the judicial independence, judicial reform, integrity and fight against corruption.

If we refer to the positive aspects of reform should be noted that from the date of accession to the European Union, Romania has pursued an ambitious legislative program comprising the new legal Codes, action which had a special importance to the modernisation of the Romanian judicial system. However, the challenges facing the judicial system are still numerous, these issues were approached in the "Development Strategy of the judicial system 2015-2020"[24], document which sets the directions of action, strategic and specific objectives to achieve a modern judicial system.

In my opinion, following analysis of planned measures to be taken during the period 2015 - 2020, it is clear that Romanian authorities want to eliminate the concerns expressed by the European Commission relating to the judicial independence, judicial reform, integrity and fight against corruption, and through the adopted measures pursuing the institutional and legislative strengthening of judicial system.

4.3. Provisions of the Constitution and of the new legal Codes concerning the application of EU law in the Romanian law

With regard the relationship between international law and national law, the Romanian Constitution provides that "the Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to". At the same time, the Constitution states that "if a treaty Romania is to become a party to comprise provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution".[25]

In addition to these provisions, the Constitution sets the priority of international treaties on human rights in this regard showing that "constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the convenants and other treaties Romania is a party to". More than that, "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".[26]

In addition to recognizing the priority of international treaties to which Romania is a party, the Constitution clarifies the relationship between national law and EU law. Thus, in connection with the integration of Romania into the European Union, the Constitution establishes that "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, these provisions shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union".[27]

A normal question arises, respectively if the term "national laws" includes constitutional provisions or, in other words, to what extent the priority of the EU law applies over the constitutional norms, especially the Romanian fundamental law enshrines the principle of supremacy of the Constitution, according to that "in Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory".[28]

On this subject there are several currents of thought, one claiming supremacy of the Constitution, inclusive over to European Union law, and another which claiming priority of consistent and unconditional application of all European Union law rules over all national law rules, inclusive over to constitutional provisions.

In its jurisprudence, the Romanian Constitutional Court has not yet examined the relationship between Romanian constitutional law and EU law. But, as shown in a concurrent opinion formulated to the Decision no. 1656 of Constitutional Court, "EU legal order and internal constitutional order are complementary sets of legal rules, and the relationship between them is not based on a hierarchy of norms, so the concept of ‹‹supremacy›› is replaced by the concept of ‹‹priority››. Moreover, nor the Court of Justice of the European Union in its case does not use the concept of a ‹‹lower or upper›› legal order".[29]

The principle of EU law priority was enshrined in the new Romanian Civil Code, entered into force on 1 October 2011, which states that "in matters governed by Code, the rules of EU law shall apply with priority,

[23] 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 - http://ec.europa.eu, accessed on 30 January 2015.

[24] Development Strategy of the judicial system was adopted by Government Decision no. 1155/2014, published in the Official Journal of Romania, Part I, no. 19/12 January 2015.

[25] Article 11 of Constitution of Romania, published in Official Journal of Romania, Part I, No. 758 of 29 October 2003.

[26] Ibid, Article 20.

[27] Ibid, Article 148.

[28] Ibid, Article 1(5).

[29] Concurrent opinion formulated by Judge Iulia Motoc to the Decision no. 1656 of Constitutional Court of 28 December 2010, published in the Official Journal of Romania, Part I, no. 79/31 January 2011.

regardless of the quality or status of the parties"[30]. Thus, the consecration of EU law priority in relation with national law encourages subjects of law (individuals and legal entities) to invoke European rules before national and European courts, when they consider that their rights have been violated.

In correlation with these provisions are those contained in Article 4 of the New Civil Code, according to that "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".[31]

These provisions are relevant in the context of the major legislative changes at the European level regarding human rights, and here I refer to the fact that the Charter of Fundamental Rights of the European Union has become legally binding on the EU with the entry into force of the Lisbon Treaty[32]. More than that, by the Lisbon Treaty was established that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law", reason for that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms"[33].

EU law priority was also enshrined in in the new Romanian Civil Procedure Code, which stated that "the rules of EU law shall apply with priority, regardless of the quality or status of the parties"[34]. Also, the Civil Procedure Code provides that "in matters governed by Code, the provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the convenants and other treaties Romania is a party to". In addition, the Code stated that "where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and this Code, the international regulations shall take precedence, unless the Code comprises more favourable provisions"[35].

The principle of application with priority of international treaties and EU law was also consecrated by new Criminal Code and new Criminal Procedure Code. Thus, in case of application of criminal law in space, the Criminal Code states that these "shall apply unless otherwise provided by an international treaty to which Romania is a party"[36].

Also, setting out the principles and limits of the criminal procedural law, the new Criminal Procedure Code provides that "the rules of criminal procedure are aimed at ensuring the effective exercise of judicial functions of guaranteeing the rights of the parties and other participants in criminal proceedings such a manner that to respected the provisions of Constitution, the constituent treaties of the European Union, the other EU regulations on criminal procedure and the covenants and treaties on fundamental human rights to which Romania is a party"[37].

5. Conclusions

Based on the legal provisions contained in the new codes, the Romanian juridical doctrine[38] considered that the provisions of international convenants, the EU law and other rules contained in international treaties signed by Romania are integrated in national law, with mention that through these categories of rules should understand both "primary" rules and "derived" rules from the decisions of the two European courts, European Court of Human Rights[39] and Court of Justice of the European Union[40].

Taking into account the views expressed in the doctrine and based on the results of research activity, I believe that application with priority of international treaties and EU law in national law is a fundamental requirement in the context of Romania's integration into the Euro-Atlantic structures.

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[30] Article 5 of New Civil Code, republished in the Official Journal of Romania, Part I, no. 505/15 July 2011, in the basis of Article 218 of Law 71/2011 for the implementation of Law no. 287/2009 on the Civil Code.

[31] Ibid, Article 4.

[32] According to Article 6(1) of TEU, "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".

[33] Article 6(2) of TEU.

[34] Article 4 of New Civil Procedure Code – Law 134/2010, republished in the Official Journal of Romania, Part I, no. 545/3 August 2011, in the basis of Article 80 of Law 76/2012.

[35] Ibid, Article 3.

[36] Article 12 of New Criminal Code - Law no. 286/2009, published in the Official Journal of Romania, Part I, no. 510/24 July 2009, as amended and supplemented.

[37] Article 1 of New Criminal Procedure Code - Law no. 135/2010, published in the Official Journal of Romania, Part I, no. 486/15 July 2010.

[38] Ion Deleanu, Valentin Mitea, Sergiu Deleanu, *Treaty of Civil Procedure. Revised and supplemented edition*, Bucharest, "Universul Juridic" Publishing House, 2013, p. 58.

[39] According to Article 46 (1) of Convention for the Protection of Human Rights and Fundamental Freedoms, the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties, thus being established the binding force of the Court judgements.

[40] Under Article 51 of Charter of Fundamental Rights of the European Union, the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Regarding the relationship between European Union law and Romanian law, I am convinced that in the context of Romania's status as a Member State of European Union, any recognition of the national legislation priority would be a breach of assumed obligations and also a serious violation of the provisions of the European Treaties.

At the same time, taking into account the provisions of the European Treaties consolidated through the reform realised by Lisbon Treaty, I express conviction that entire national legislation, including constitutional provisions, must be harmonized with European law. Thus, in accordance with the normative evolutions at European level, I think that at the future revision of the Romanian Constitution must be introduce a new paragraph in Article 5 (Citizenship) which should reflect the provisions of Article 2 (1) TFEU, according to that: "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". Also, should be completed Article 17 of Romanian Constitution in light of the provisions of Article 2 (2) TFEU, pursuant to which the European citizens have 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".

Moreover, taking into account the progress made by Romania in the European integration process, I am convinced that for the future revision of the Romanian Constitution must be taken into account the reform carried out by Lisbon Treaty as well as the judgments of the Court of Justice of the European Union concerning the consecration of the direct effect and priority of EU law. Thus, is urgently required that Article 148 of the Romanian Constitution to be modelled in accordance with Article 5 of the New Civil Code and Article 4 of the New Civil Procedure Code, which similarly provide that "the rules of European Union law shall be applied with priority, regardless of the quality or status of the parties".

In view of the above mentioned information, I am confident that this study represents a scientific support that allows future developments of research in the field of European Union law, thereby enabling interested parties to understand and apply the provisions of the treaties on which the European Union are founded and also the acts adopted by Union institutions in application of the treaties, allowing them to correlate theoretical knowledge with the ability to apply them in practice.

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APPLYING INTERNATIONAL HUMANITARIAN LAW TO CYBER-ATTACKS

Dan-Iulian VOITAŞEC[*]

Abstract

Technology plays an important role in everyday life. Technological advancement can be found in every field of government including the military. Because of this, new means and methods of conducting hostilities have emerged. Cyber warfare starts to represent the latest challenge at an international level. States and non-state actors have started to implement new security policies and new defences against cyber-attacks but also have embraced using cyber-attacks as a method of conducting hostilities. The question that has to be answered regarding the use of cyber-attacks is what is the legal regime that governs such attacks and if IHL can apply to cyber warfare?

Keywords: *jus ad bellum, jus in bello, cyber-attacks, cyber-warfare, Tallinn Manual.*

1. Introduction

Our world is changing at an increasing rate and this change is caused, mostly, by the rapid advancement of technology. This accelerated technological evolution has led to the development of new means and methods of conducting hostilities. Cyber-attacks represent the latest threat and states and international organizations have begun to develop new defence strategies and new methods to combat these threats. If states and non-state actors resort to using cyber-attacks what is the threshold that these attacks have to reach to trigger a response under article 51 of the UN Charter from the victim state? Also, can a computer attack or a series of computer network attacks trigger the beginning of an armed conflict? International Humanitarian Law (IHL) is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare[1]. IHL is a branch of international law and applies only to armed conflict. The question that this article wants to answer is does IHL apply to cyber-attacks? At this moment there is legislation, at a national level, that deals with cybercrimes (cracking, copyright infringement, child pornography, ID theft, fraud, etc.) but there is no international treaty that mentions the applicability of IHL to computer network attacks during situations of armed conflict. As a response to this situation in 2009, the NATO Cooperative Cyber Defence Centre of Excellence[2], invited an independent "International Group of Experts" to produce a manual on the law governing cyber warfare. In April 2013, The Tallinn Manual on the International Law Applicable to Cyber Warfare was published. Even though this is not a binding document it represents a first effort to comprehensively and authoritatively analyse this subject.

2. Content

Conflict is governed by two distinct branches of law, *jus ad bellum* which governs the situations in which states can resort to force as an instrument of their national policy and *jus in bello* which governs the conduct of hostilities. The latter applies only in situations of armed conflict. The term *attack* can be found in both branches of law but its meaning differs.[3] Due to this situation there must be a clear distinction between cyber-attack governed by the norms of jus ad bellum and those governed by jus in bello.

At this moment no definition of cyber-attacks is recognised at an international level. NATO Glossary of Terms and Definitions defines computer network attacks (CNA) as "action taken to disrupt, deny, degrade or destroy information resident in a computer and/or computer network, or the computer and/or computer network itself[4]". The Glossary also states that a CNA is a type of cyber-attack.

In the Tallinn Manual, the term cyber operations is used to *define employment of cyber capabilities with the primary purpose of achieving objectives in or by the use of cyberspace*[5]. Cyber operations are not

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[1] International Committee of the Red Cross (ICRC) – "What is International Humanitarian Law?", accesed February 20, 2015. https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf

[2] International military organisation based in Tallinn, Estonia, and accredited in 2008 by NATO as a 'Centre of Excellence'. NATO CCD COE is neither part of NATO's command or force structure, nor funded by NATO.

However, it is part of a wider framework supporting NATO Command Arrangements.

[3] For more information see Michael N. Schmitt - *"Attack" as a Term of Art in International Law: The Cyber Operations Context, PROCEEDINGS OF THE 4TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT 283-293* 2012 -https://ccdcoe.org/publications/2012proceedings/5_2_Schmitt_AttackAsATermOfArt.pdf Accessed on 27.02.2015

[4] NATO Standardization Agency, NATO Glossary of Terms and Definitions (AAP-06) (2013) at 2-C-11.

[5] Tallinn Manual on the International Law Applicable to Cyber Warfare – Cambridge University Press, Cambridge, 2013 – p. 211.

limited to cyber-attacks. While a cyber-attack is defined as a *cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects*[6]. In this case, the term cyber-attacks applies to situations of armed conflict. In this article the terms cyber operations and cyber-attacks will be understood as defined in the Tallinn Manual.

Not all cyber-operation and cyber-attacks are unlawful. There is a threshold that cyber-operations must reach to be considered use of force. Rule 10 of the Tallinn Manual states that "a cyber operation that constitutes a threat or use of force against the territorial integrity or political independence of any State, or that is in any other manner inconsistent with the purposes of the United Nations, is unlawful[7]." This rule references Article 2(4) of the UN Charter which states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." This article is now regarded as a principle of customary international law, thus is binding for all states[8]. A cyber-operation will be considered unlawful when it constitutes a threat or use of force. There are two exceptions from the prohibition set out in art 2(4) of the UN Charter – uses of force authorized by the Security Council under Chapter VII and self-defence in accordance with Article 51 of the UN Charter. The prohibition does not apply to non-state actors, organized groups, individuals and terrorist groups if the actions of the said groups cannot be attributed to a state.

According to Rule 11 of the Tallinn Manual "A cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force."[9] To understand what criteria a cyber operation has to meet to be considered use of force we must look at non-cyber operation that reach the threshold of use of force.

The UN Charter does not provide a definition for the term *use of force* and does not provide the necessary criteria to determine the situations in which actions of a state may be regarded as uses of force. During the 1945 San Francisco Conference, Brazil wanted to include economic coercion as a use of force but the proposition was rejected.[10] Due to this fact cyber-operations aimed at economic coercion will not be considered use of force. The lack of criteria by which to determine when an act could be considered use of force, the International Group of Experts took into consideration the decision of the International Court of Justice (ICJ) in the Nicaragua Judgement. The ICJ stated that the "scale and effects" are to be considered when determining whether a certain action amounts to use of force. The International Group of Experts agreed that "scale and effects" are qualitative and quantitative factors that would apply when determining if a cyber operation qualifies as a use of force. ICJ distinguished between the most grave forms of use of force (armed attack) and other less grave forms[11]. All armed attacks are uses of force and all cyber operations that reach the threshold of armed attack and could be attributed to a state will be considered uses of force. This distinction is important given the fact that an action that amounts to use of force is a violation of Article 2(4) of the UN Charter while an action reaching the threshold of armed attack could trigger an armed response from the victim state under Article 51 of the UN Charter.

Not all cyber operations are uses of force. Because the question of what actions amount to use of force remained unanswered, the International Group of Experts created a series of factors to help states in determining if a certain action reaches the threshold of use of force. These factors are not formal legal criteria[12]:

a) *Severity* – an action, including a cyber operation that causes damage, destruction, injury or loss of life is more likely to be regarded as a use of force.

b) *Immediacy* – there is a higher probability that an operation that produces immediate effects will be considered a use of force.

c) *Directness* – in the case of armed actions, cause and effect are closely related. Cyber operations in which the cause and effects are clearly linked are more likely to be characterized as use of force.

d) *Invasiveness* – refers to the degree to which a cyber operation manages to intrude the computer systems of a State. The higher the security levels of a computer system, the greater the invasiveness of the action. This rule shall not apply to cases of cyber espionage; it will only apply to actions that reach the threshold of use of force.

e) *Measurability of effects* – This factor derives from the greater willingness of States to characterize actions as a use of force when the consequences are apparent.[13]

f) *Military Character* – a link between a cyber operation and a military operation increases the likelihood of being characterized as a use of force

g) *State involvement* - The clearer and closer a nexus between a State and cyber operations, the more

[6] Idem – p. 92.
[7] Idem 5 – p. 45.
[8] Malcolm N. Shaw – International Public Law, Cambridge University Press, 2008, - p. 1123.
[9] Idem 5 – p. 47.
[10] Sergey Sayapin - The Crime of Aggression in International Criminal Law, Asser Press, 2014 – p.80.
[11] International Court of Justice, Case concerning Military and Paramilitary activities in and against Nicaragua (Merits) (1986) para. 191. http://www.icj-cij.org/docket/files/70/6503.pdf. Accessed on 28.02.2015.
[12] Tallinn Manual – p. 49.
[13] Idem p. 51.

likely it is that other States will characterize them as uses of force by that State[14]

h) *Presumptive legality* - International law is generally prohibitive in nature. Acts that are not forbidden are permitted. In the absence of a treaty or a customary rule an act is presumed to be lawful. Thus actions that are not expressly prohibited by a treaty or a customary rule shall not be interpreted by states as use of force.

The conditions in which a state, that is the target of a cyber operation that reaches the threshold of armed attack, can exercise the right of self-defence are defined in Rule 13 of the Tallinn Manual: „A State that is the target of a cyber operation that rises to the level of an armed attack may exercise its inherent right of self-defence. Whether a cyber operation constitutes an armed attack depends on its scale and effects."

The right of self-defence is reflected in Article 51 of the UN Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

ICJ, in the Nicaragua Judgement[15], confirmed the customary status of the right of self-defence. The Court held that Article 51 of the UN Charter can only apply if there is a natural[16] or inherent right of States to self-defence and this right has a customary nature. Also, the ICJ noted that a State can resort to armed force in accordance with the right of self-defence only if it was the target of an armed attack[17]. As was the case of actions that reach the threshold of use of force, actions that constitute armed attacks are not defined in any international document. There is a direct link between armed attack and use of force. All actions that reach the threshold of armed attack will be considered uses of force. However, not all uses of force will be qualified as armed attacks. This distinction was made by the ICJ in the Nicaragua and Oil Rigs case.

In the case of cyber operations the International Group of Experts concluded that certain action could reach the threshold of armed attack. The Group of Experts' opinion is based on the ICJ's view in the Legality of Nuclear Weapons Advisory Opinion "that the choice of means of attack is immaterial to the issue of whether an operation qualifies as an armed attack[18]". To reach the threshold of an armed attack, a cyber operation has to cause damage, destruction, injury or loss of life. Cyber espionage operations, information theft and cyber operation causing short term disruption of non-essential services will not be qualified as armed attacks. If a cyber operation reaches the threshold of armed attack then the victim state can exercises its inherent right of self-defence. The International Group of Experts believes that a state can exercise its right of self-defence if it is the victim of a cyber-operation that can be qualified as an armed attack, launched by a rebel or terrorist group. This view is based on the response of the international community to the situation that occurred on the territory of the United States of America on September 11, 2001. The action launched by the terrorist organization Al Qaeda was characterised as an armed attack triggering the right of self-defence of the United States.

International Humanitarian law[19] applies to all situations of armed conflict regardless of a formal declaration of war and irrespective of whether the parties involved recognise the state of armed conflict. None of the rules that form IHL explicitly deal with cyber operations. For situations of international conflict, common Article 2 of the 1949 Geneva Conventions states that the provisions of the Conventions shall apply in full "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" and "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Additional Protocol I to the Conventions states that its provisions shall apply to all situations stated in common Article 2 and to situations of "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination". Common Article 3 to the Geneva Conventions deals with situations of non-international armed conflict stating that the hostilities take place on the territory of one of the high contracting power. Additional Protocol II (AP II) to the Geneva Conventions, in Article 1 includes additional rules for application such as control of a territory by an organized armed group, under responsible command that can carry sustained and concerted military operations. AP II differentiates between situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence and armed conflicts. The

[14] Ibid.
[15] Nicaragua Judgment – para. 176.
[16] Article 51 of the UN Charter – *droit naturel*
[17] ICJ - Case Concerning Armed Activities on the Territory of The Congo (2005): "Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.
[18] Tallinn Manual – p. 54.
[19] Laws of Armed Conflict (LOAC) in some Manuals.

term armed conflict was not defined in the Geneva Conventions or in the Additional Protocols. A definition of armed conflict was given by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the Tadic case: "An armed conflict exists wherever there is resort to armed force between states or protracted armed violence between government authorities and organised armed groups or between such groups with a state. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[20]" According to the definition given in the Tadic case, resort to armed force is a requirement to be in a situation of international or non-international armed conflict. Will IHL apply if a cyber operation rises to the threshold of armed force? According to Rule 20 of the Tallinn Manual "cyber operations executed in the context of an armed conflict are subject to the law of armed conflict." The rule states that IHL will apply to cyber operations executed both in international and non-international armed conflicts. In the context of cyber operations launched against Estonia in 2007, IHL does not apply because the situation did not rise to the level of an armed conflict. The only situation were IHL could be applied to cyber operations was the 2008 conflict between Russia and Georgia but those operations could not be attributed to any party to the conflict. The International Group of Experts agreed that there must be a nexus between the cyber operation and the armed conflict for IHL to apply to the operation in question but there were two different opinions regarding the nature of that nexus. According to one view, IHL governs any cyber activity conducted by the party to the armed conflict against its opponent while the second view noted that the cyber operations must be undertaken in furtherance of the hostilities[21].

Given the way that Rule 20 was formulated one could say that a cyber operation could not be considered the start of an armed conflict. If we look closely at Rule 22[22] of the Manual that defines: "*An international armed conflict exists whenever there are hostilities, which may include or be limited to cyber operations, occurring between two or more States*" and Rule 23[23] which states that "*a non-international armed conflict exists whenever there is protracted armed violence, which may include or be limited to cyber operations, occurring between governmental armed forces and the forces of one or more armed groups, or between such groups. The confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum degree of organisation*" we can see that the International Group of Experts addressed the situations in which armed conflicts of international or non-international nature could be limited only to cyber operations, if said operations reached the required threshold. It is safe to note that a cyber operation launched by a state or a rebel group that causes physical damage to life or property could be considered the start of an armed conflict if all the necessary conditions are met.

Even though no specific instrument of IHL deals directly with cyber operations, the Martens Clause could be considered. The Clause can be found in Hague Convention IV[24], the 1949 Geneva Conventions[25] and Additional Protocol I[26]. The text in the Hague Convention IV states that: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." The Martens Clause reflects customary international law and ensures that cyber operations launched during an armed conflict are not conducted in a legal vacuum. Opinions stating that IHL should not apply to cyber operations could be dismissed by citing, in addition to the Martens Clause, Article 36 of Additional Protocol I: "In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."

It is important to remember that the role of IHL is to limit the effects of armed conflict not to prohibit the use of armed force. Jus ad bellum is the body of

[20] The Prosecutor v. Dusko Tadic – International Tribunal for the Former Yugoslavia, para. 70 - http://www.icty.org/x/cases/tadic/acdec/en/51002.htm Accessed on 2.03.2015.

[21] Tallinn Manual – p. 69, Rule 22, para.5: "*Consider a cyber operation conducted by State A's Ministry of Trade against a private corporation in enemy State B in order to acquire commercial secrets during an armed conflict. According to the first view, the law of armed conflict would govern that operation because it is being conducted by a party to the armed conflict against a corporation of the enemy State. Those Experts adopting the second view considered that the law of armed conflict does not apply because the link between the activity and the hostilities is insufficient."*

[22] Tallinn Manual – p. 71.

[23] Idem p. 76.

[24] Hague Convention IV, preamble.

[25] Geneva Convention I - art.63; Geneva Convention II, art. 62; Geneva Convention III, art. 14; Geneva Convention IV, art. 158.

[26] Additional Protocol I to the Geneva Conventions, art.1 para. 2.

law that limits the situations in which states may resort to armed force. In the opinion of Professor Yoram Dinstein[27] the usage of International Humanitarian Law as a term designated to incorporate both the Hague Law and Geneva Law, could cause the false impression that the role of IHL is truly humanitarian in nature. The use of armed attacks is permitted under IHL if the fundamental principles of this branch of law are respected. As with conventional attacks, cyber-operations are permitted during situations of armed conflict if the principles of military necessity, proportionality and the humanitarian considerations are respected. Application of IHL rules to cyber operations serves to limit the effects of the operations on the civilian population.

3. Conclusions

International Humanitarian Law applies to cyber operations launched both during situations of international armed conflict and non-international armed conflict. Fortunately, until the present time, no cyber operations reached the threshold necessary to be considered an armed attack but that moment may come sooner than imagined and the international community must be prepared to respond in a timely manner. The horrors of the Second World War should never be repeated and states and international organizations should pay more attention to emerging means and methods of warfare and, if that is the case, create the necessary legislation to protect the civilian population.

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[27] Yoram Dinstein – The conduct of Hostilities under the Law of International Armed Conflict, Cambridge University Press (2004) p.13.

HARMONIZATION OF NATIONAL PROCEDURAL PROVISIONS CONCERNING THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

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Abstract

This short paper looks at provisions concerning very specific aspects provided for at international, regional and national level and analyzes the level of harmonization between such. Given the importance of provisional measures (and especially of preliminary injunctions) for the protection of intellectual property rights, the provisions concerning this subject were the main focus of our analysis. Found in TRIPS, the EU IP Enforcement Directive and national Romanian statutory provisions, we've concluded that these are not directly applicable in disputes in Romanian courts and were therefore, as a result of multiple international obligations, supposed to be harmonized. We've looked at different aspects in parallel with the development of implementation mechanisms and found that, despite the aforementioned obligations, not even the Directive is fully TRIPS compliant, let alone the Romanian national statutory provisions. We've therefore concluded that, even if common sense would dictate that protection at more levels would equal more protection this is not necessarily true, given the fact that multiple harmonization requirements create more opportunity for divergent implementation results – influenced by either benign factors (different national legal traditions, different interpretations) or malign (lack of perspective and/or understanding, rush to implementation).

Keywords: *harmonization, intellectual property rights, provisional measures, preliminary injunctions, TRIPS, IP Enforcement Directive, procedures.*

1. Introduction

It is generally accepted that intellectual property is only protectable by legal means which makes the legal protection of intellectual property to be regarded as more valuable than its physical embodiment[1].

Without going into the details of it, we could shorthand legal protection in this case to mean the possibility of asserting a claim related to intellectual property rights against someone with a correlative duty to act (or abstain from certain acts)[2]. Therefore enforcement of intellectual property rights goes to the core of their value and is intrinsically linked with the very existence of such value.

There is no surprise therefore that provisions concerning the enforcement of intellectual property rights were inserted in acts existing at national, regional and international level.

Such provisions deal with both material and procedural aspects of the enforcement of intellectual property rights. Since for the purposes of comparison aspects of material law require a more comprehensive analysis (as they require, among other factors, that particularities of given legal systems be taken into account), for present purposes we will limit ourselves to provisions dealing with procedural aspects.

Of the procedural aspects dealt with at all levels, the ones dealing with provisional measures[3] (and especially preliminary injunctions) would appear to us as being the most salient in terms of the need of harmonization. We base this mainly (but not exclusively) on the following assumptions: (1) preliminary injunctions are the most effective tool for right-holders to maintain exclusivity, which in turn is the essence of intellectual property rights; and (2) preliminary injunctions are the first enforcement mechanism of choice since they provide relief on an urgent basis which in turn requires that foreign right-holders should be able to obtain such relief without engaging significant costs and time for researching local legal particularities in order to obtain such relief (which would no longer be reasonably fast and efficient, let alone effective).

For present purposes therefore we will focus on the procedural provisions dealing with preliminary injunctions.

The present article looks at the influences that such provisions have one on another in a unidirectional perspective, downwards from the international level in order to verify whether there is an obligation for harmonization and whether the provisions are indeed harmonized (and if so, to what extent).

We will first set out the provisions as found at the three relevant levels, analyze whether an obligation for harmonization exists in respect of the instruments where such provisions were found and, finally, check

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[1] Jeremy Phillips and Alison Firth, *Introduction to Intellectual Property Law*, 4th ed. (Oxford: Oxford University Press, 2006), 12-13

[2] „legal right", Bryan A Garner (ed.) *Black's Law Dictionary*, 8th ed. (St. Paul: Thompson West, 2004), 1348

[3] Defined by the Court of Justice of the European Union in CJUE, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v. Dresdner Bank AG* (C-261/90), decision of 26 March 1992 in ECR I-2149, par. 34 as "measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter"

whether the provisions are harmonized (and, if so, to what extent) or not.

2. The provisions at the international level

At the international level we can note the reluctance to include procedural provisions in the WIPO-administered treaties though we can find general obligations imposed to this effect in article 2 par. (1) of the Paris Convention for the Protection of Industrial Property and in art. 15 of the Berne Convention for the Protection of Literary and Artistic Works.

More specific reference is to be found in articles 14 and 23 of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, respectively. Paragraph (2) of each of those articles indicates that „Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements".

The most detailed and complex provisions concerning preliminary injunctions for infringement of intellectual property rights are to be found however in TRIPS.

Section 3 of the third part of the treaty deals solely with provisional measures. Although the section only comprises one single article (art. 50), it is both comprehensive and self-sufficient. A proper analysis however would require that attention be also paid to the provisions in Section 1 of the same part, entitled „General Obligations".

In that sense, provisions under paragraphs 1 and 2 of art. 41 would also apply in respect of preliminary injunctions. These require that members of WTO ensure that enforcement procedures as specified in TRIPS: (1) are available; (2) to permit effective action against infringement rights covered by TRIPS; (3) are to include: (a) „expeditious remedies to prevent infringements" and (b) „remedies which constitute a deterrent to further infringements"; (4) are not applied so as to create barriers to legitimate trade; (5) provide for safeguards against their abuse; (6) are fair and equitable; (7) are not unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

Art. 50, however, contains the provisions most relevant to the scope of this article.

Paragraph (1) demands that judicial authorities have the power to „order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance; (b) to preserve relevant evidence in regard to the alleged infringement".

The second and fourth paragraphs deal with *ex parte* procedures and allow enforcement provisional measures to be taken *ex parte* „where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed" but with the express requirement that „the parties affected shall be given notice, without delay after the execution of the measures at the latest" and that „a review, including a right to be heard, shall take place upon request of the defendant" to decide, in a reasonable period of time, whether the provisional measures are to be modified, revoked or confirmed.

Paragraphs 3 and 5 deal with the standard of proof in such claims (judicial authorities are to be able to demand that the applicant provide „any reasonably available evidence in order to satisfy […] with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse" as well as "information necessary for the identification of the goods concerned by the authority that will execute the provisional measures".

As further safeguards against abuse par. (6) provides that provisional measures are to cease or be revoked if a claim on the merits is not filed within "a reasonable period […] not to exceed 20 working days or 31 calendar days, whichever is the longer".

Moreover paragraph (7) indicates that upon revocation, lapse or a finding of non-infringement or inexistence of a threat of infringement "the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures".

In respect of the provisions of art. 50 TRIPS it has been stated that these are to be analyzed as implementations of art. 41 par. (1) TRIPS' call for expeditious procedures[4] and therefore any "delays and other domestic mechanisms endangering the effectiveness of provisional legal protection will thus cause concern to the extent that they cannot be justified by art. 41.5"[5].

Commentary of the provisions generally indicates that, as an effect of the provisional nature of the relief sought, such would only be justifiable where delay in imposing the measure would result in irreparable damage to the right-holder, where the

[4] Sascha Vander „Article 50" in Peter-Tobias Stoll, Jan Busche, Katrin Arend (ed.) *WTO – Trade-Related Aspects of Intellectual Property Rights*, (Leiden: Martinus Nijhoff Publishers, 2009): 740

[5] Daniel Gervais, *The TRIPS Agreement, Drafting History and Analysis*, 2nd ed., (London: Sweet & Maxwell, 2003), par. 2.422 cit. in Sascha Vander „Article 50" in Peter-Tobias Stoll, Jan Busche, Katrin Arend (ed.) *WTO – Trade-Related Aspects of Intellectual Property Rights*, (Leiden: Martinus Nijhoff Publishers, 2009): 740, note 4

measure would be warranted under a balance of convenience test and where there is considerable likelihood of a de facto infringement[6].

Also interestingly it has been argued that art. 50 TRIPS only applies "to the period after release by the customs authorities"[7] which would make the customs authorities' practice of allowing the continuing detention of seized goods subject to the mere lodging of a claim for interim relief questionable (the filing of a main claim for infringement of the right based on which the customs intervention was accepted being necessary). However, given that the provision of art. 50 par. (1) letter a) is merely exemplary, a wider interpretation could be allowed.

When read in conjunction with art. 50 par. (3) it is clear that the provision covers both actual and imminent infringements[8].

In order for measures to be taken *ex parte* there would need to be "special reasons" such as delay that would cause irreparable harm or a "demonstrable risk of evidence being destroyed" but „the presence of a special reason may in general be assumed to the extent that informing the defendant runs the danger of seriously impeding or excluding the enforcement of the claimant's IPRs"[9].

3. The provisions at EU level

At EU level the relevant provisions are included in Directive 2004/48 of 29 April 2004 on the enforcement of intellectual property rights.

The directive's preamble (par. (3)) indicates that "the means of enforcing intellectual property rights are of paramount importance for the success of the Internal Market" so as to underline the importance of these provisions.

Paragraphs (4) and (5) of the preamble mention the relationship with TRIPS provisions reminding that "all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement")" which "contains, in particular, provisions on the means of enforcing intellectual property rights, which are common standards applicable at international level and implemented in all Member States".

The preamble also indicates however that the "directive should not affect Member States' international obligations, including those under the TRIPS Agreement" and that the directive "does not aim to establish harmonized rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, or deal with applicable law".

The need for the directive has arisen, as par. (7) of the preamble indicates, since "despite the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to preserve evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures, procedures and remedies such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market".

Paragraph 22 underlines the necessity for provisions dealing with provisional measures in order to secure "provisional measures for the immediate termination of infringements, without awaiting a decision on the substance of the case", such measures being "particularly justified where any delay would cause irreparable harm to the holder of an intellectual property right". These would need however to be applied only in respect of act carried out on a commercial scale[10] (without prejudice to the possibility of Member States applying such measures also in respect of other acts).

Moreover the preamble indicates that such provisions are to observe the rights of the defense, to ensure "the proportionality of the provisional measures as appropriate to the characteristics of the case in question" and to provide "the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request".

The general obligation under art. 3 imposes that such measures are (1) available ("Member States shall provide"), (2,3) that they include measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights that are effective, proportionate and dissuasive, (4) are applied so as to avoid the creation of barriers to legitimate trade, (5) provide for safeguards against their abuse, (6) are fair and equitable and are not (7) unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

As mentioned in par. (7) of the preamble, one of the issues the EU legislator had taken with TRIPS related to the measures for the preserving of evidence.

Art. 7 of the directive therefore creates a uniform mechanism to address this.

Such measures may be requested even before the commencement of proceedings on the merits of the case by a party who has presented "reasonably available evidence to support his claims that his intellectual property right has been infringed or is about to be infringed". The court may order "prompt

[6] Sascha Vander „Article 50": 741
[7] Idem
[8] Idem: 742
[9] Idem: 744
[10] Defined as acts "carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith" – par. (14) of the preamble.

and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information". Art. 7 (1) exemplifies such measures as the detailed description of the allegedly infringing products/services (with or without the taking of samples) and the physical seizure of the allegedly infringing goods (and also, where appropriate, of the materials and implements used in the production and/or distribution of these goods and the documents relating thereto).

Article 9 deals with provisional and precautionary measures and requires that courts in Member States may either (a) issue an interlocutory injunction intended to prevent any imminent infringement, (b) forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringement and/or (c) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

An injunction as under (a) or (b) above can be entered also against an intermediary whose services are being used by a third party to infringe an intellectual property right (however the directive indicates that "injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC".

In addition to the above, where the alleged infringement is committed on a commercial scale, Member States must ensure that courts can, where the "injured party demonstrates circumstances likely to endanger the recovery of damages", order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets (to which end "competent authorities" can order the communication of bank, financial or commercial documents, or appropriate access to any such relevant information.

Just as in the case of claims for the securing of evidence, in claims for provisional measures provided by art. 9 the court may ask that the right-holder provide any reasonably available evidence as to the alleged infringement or such imminent infringement. In addition to this, in claims for provisional measures the directive specifically allows courts to demand that the right-holder furnish reasonably available evidence so as to satisfy the court with a sufficient degree of certainty that the applicant is the right-holder.

The directive provides that any of the measures mentioned above could be taken *ex parte*, "in particular where any delay is likely to cause irreparable harm to the right-holder" or, in the case of measures to secure the preservation of evidence, "where there is a demonstrable risk of evidence being destroyed". In such cases the "affected parties" shall be given notice of the measures taken at the latest immediately after execution of the measures. Moreover such parties are entitled to an *inter partes* judicial review "within a reasonable period after the notification of the measures" so as to determine whether the measures are to be modified, revoked or confirmed.

Moreover, in respect of any of the measures indicated, the directive provides that any such measure taken is to be revoked or ceases to have effect, upon request of the defendant, where the applicant does not institute court proceedings leading to a decision on the merits within a period to be determined by the court instituting the measures but not longer than the longest of either 20 working days or 31 calendar days.

Also in respect of any of the measures mentioned above, the directive allows (but does not require) the courts to make the measures subject to the right-holder lodging "equivalent security or an equivalent assurance" in order to compensate the defendant for any prejudice suffered should the provisional measures be revoked, lapse due to any act or omission by the right-holder or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right.

In such cases moreover the courts must have the authority to "order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures".

When comparing the provisions of the directive with those of TRIPS we can observe some differences, such as: the types of measures such as those enumerated by art. 7 par. (2-4) of the directive are not indicated in art. 50 TRIPS[11], the possibility to forbid the continuation of the alleged infringement by lodging of guarantees[12], the possibility of freezing assets[13].

4. The provisions at the national level

Article 978 of the Romanian Code of Civil Procedure provides that the interim measures provided therein and concerning interim measures for the protection of intellectual property rights apply in respect of both patrimonial and non-patrimonial rights (if concerning intellectual property) and that article 255 of the Romanian Civil Code provides interim measures for "other non-patrimonial rights".

The interim measures that can be requested of the court are provided for by article 979 of the Code of Civil Procedure and generally relate to a claim that the

[11] Although they are considered to be of the kind had in mind when enacting the provisions - Sascha Vander „Article 50": 742

[12] Danny Friedmann, "The Effects of the Enforcement Directive on Dutch patent law. Much Ado About Nothing?", http://ssrn.com/abstract=1706070: 22

[13] Idem: 23

court provisionally order the forbidding or the provisional cessation of the alleged breach of an intellectual property right (article 979, letter a)) and/or the securing of evidence (article 979, letter b)).

Although not expressly provided, as in the case of the 2nd thesis of letter a), pursuant to the first thesis, the forbidding of an infringing act can be ordered only provisionally, for a period of time precisely determined, this being of the essence of the provisional measures and the procedure of the presidential ordinance by which such measures are to be ordered.

This measure thus aims at provisionally forbidding the perpetration of the illicit action, if such action is imminent, while the forbidding for the future of the illicit action, which has already started and continues, makes the object of the measure provided by the 2nd thesis.

With respect to the provisional measures for the securing of evidence, provided by art. 979 paragraph (2) letters a) and b), these are those that the legislator considered as being the most frequent and useful for the provisional protection of the intellectual property rights and that is why it stipulated that the courts may order them "especially", therefore not exclusively. Consequently, the claimant may request, and the judge may order, the taking of provisional measures other than those expressly provided for in the statutory provision.

With respect to the conditions that need to be met in order for such interim relief to be granted, three such conditions are normally identified within the provisions of art. 979 par. (1) of the Civil Procedure Code: (1) that the claimant make credible proof of the fact that his intellectual property rights are the object of an illicit action. This means that the claimant has to prove both the act of breach of his intellectual property right and its illicit character[14]; (2) that the illicit action be either actual or imminent, only in this case the urgency for the taking of the provisional measures being justified. The mere evidencing of the actual or imminent character of the act is enough to show urgency since, where there is an express legal provision allowing such measures by way of presidential ordinance – as in this case – the court must no longer verify such condition, such being presumed by effect of law; and (3) the existence of a risk that the illicit action causes a prejudice difficult to recover. There needs to be a show of imminent harm (i.e. even one that has not yet occurred yet but will certainly occur, if the circumstances presented by the claimant do not change) but such damage does not include damage that is only possible. In respect of the possibility to repair such harm, the law does not require that such damage be impossible to repair but only that it be repaired with difficulty.

Par. (3) of art. 979 provides some supplementary conditions for the taking of provisional measures where damage is caused by means of the written or audio-visual press. In such cases the court can't order the provisional cessation of the prejudicial act unless: a) the damage caused to the claimant is severe; b) the act is not a clearly justified act in accordance with the provisions of art. 75 of the Civil Code; and c) the envisaged measure is not disproportionate as to the damage it causes.

The procedure for taking the provisional measures for the protection of intellectual property rights is provided by article 979 of the Code of Civil Procedure[15] where par. (4) provides that "*The court settles the request in line with the provisions concerning the presidential ordinance, which apply accordingly*".

Consequently, for taking such provisional measures, the court will apply the provisions regarding the special procedure of the presidential ordinance (art. 997 – 1002 of the Code of Civil Procedure), although these are to be applied only where they do not contradict (or as long as they "correspond") to those of art. 978-979.

Mention must be made of the fact that art. 999 of the Civil Procedure Code provides that the claim for interim relief is to be judged with the summoning of the respondent and with the providing for the respondent of the possibility to file a statement of defense. However, paragraph 2 of art. 999 provides that, upon receipt of the claim for interim relief the court may, in situations deemed as special emergencies by the court, order that the claim be ruled upon without summoning either of the parties and that the court may rule on the claim in chambers, relying solely on the claim as filed, on the very day the claim is filed.

5. Harmonization with TRIPS at EU level

Although the harmonization of national legislations of EU Member States in order to match the level of protection provided by TRIPS was indicated as one of the goals of the IP Enforcement Directive[16], there were eminent voices that indicated that the EU Member States were already bound to respect those rules[17] and that, prior to proposing the directive, the EU Commission did not undertake any study to suggest the EU Member States did not[18].

The issue of the effect of TRIPS on EU law was analyzed by the Court of Justice in its Opinion of 15 November 1994 regarding the competence of the Community to conclude international agreements

[14] Mihaela Tăbârcă, *Drept procesual civil*, vol. II, (Bucureşti: Universul Juridic, 2013), 713-718
[15] Mihaela Tăbârcă, *Drept procesual civil*, vol. II, (Bucureşti: Universul Juridic, 2013), 745-761
[16] Par. (7) of the preamble of the Directive
[17] As a result not only of their own WTO membership but also as a matter of Community law since the EU was itself a member of the WTO
[18] William R. Cornish, Josef Drexl, Reto Hilty and Annette Kur, "Procedures and Remedies for Enforcing IPRs: the European Commission's Proposed Directive", *E.I.P.R.* 25 (2003): 447

concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty[19].

There the Court has indicated that: "Some of the Governments which have submitted observations have argued that the provisions of TRIPs relating to the measures to be adopted to secure the effective protection of intellectual property rights, such as those ensuring a fair and just procedure, the rules regarding the submission of evidence, the right to be heard, the giving of reasons for decisions, the right of appeal, interim measures and the award of damages, fall within the competence of the Member States. If that argument is to be understood as meaning that all those matters are within some sort of domain reserved to the Member States, it cannot be accepted. The Community is certainly competent to harmonize national rules on those matters, in so far as, in the words of Article 100 of the Treaty, they 'directly affect the establishment or functioning of the common market'. But the fact remains that the Community institutions have not hitherto exercised their powers in the field of the 'enforcement of intellectual property rights', except in Regulation No 3842/86 [citation omitted] laying down measures to prohibit the release for free circulation of counterfeit goods. It follows that the Community and its Member States are jointly competent to conclude TRIPs".

Later, in *Dior*[20] and *Merck Genéricos*[21], the Court has decided that it itself can, despite the separation of competences mentioned in Opinion 1/94, decide on the interpretation of art. 50 TRIPS even for rights not having been the subject of harmonization.

Moreover the Court has held that, in principle, "the provisions of TRIPs, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law", however, inasmuch as art. 50 of TRIPS contains procedural provisions, which are „ intended to be applied by Community and national courts in accordance with obligations assumed both by the Community and by the Member States", in the case of „a field to which TRIPs applies and in respect of which the Community has already legislated, as is the case with the field of trade marks, it follows from the judgment in *Hermès*, in particular paragraph 28 thereof, that the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs. On the other hand, in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion"[22].

In what procedural provisions related to the interim protection of intellectual property rights there was, at first sight, a distinction to be made, when analyzing the utility of a directive, between the fields where there was prior harmonization and those where there was none. This means that the directive would have been useful in its harmonization aim, for those fields where there was an uncertainty as to the level of direct effect of TRIPS (were there no national provision to enable direct effect of the provisions in national law). In such cases, harmonization by means of the directive would have achieved the same result on account of the Member States' obligation to transpose the directive into their national law.

Objections raised by Cornish in that there was no prior analysis to this effect would still be valid nonetheless.

Despite the above the directive set out to secure a "TRIPS-plus" harmonization[23], an example of such being the mandatory right of information (which was optional under art. 47[24] or 50 par. (5) of TRIPS)[25].

Massa and Strowel have argued that this TRIPS-plus harmonization was diluted by the TRIPS-minus scope (making the remedies available just for infringements on a commercial scale)[26] even though the directive leaves Member States free to extend those remedies to other situations as well.

It is this last aspect that for Massa and Strowel the national legislator was to overcome by its approach in implementation. The authors have suggested that a commutative approach (which would mean enacting an umbrella law on procedures and remedies for all IPRs) was preferable to a distributive approach (which

[19] Opinion, 1/94, EU:C:1994:384, paragraph 102-103

[20] CJEU, *Parfums Christian Dior SA v TUK Consultancy BV* and *Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV* (joined cases C-300/98 and C-392/98), decision of 14 December 2000 in *ECR* 2000-I, p. 11307

[21] CJEU, *Merck Genéricos - Produtos Farmacêuticos Ld[a] v Merck & Co. Inc. and Merck Sharp & Dohme Ld[a]* (C-431/05), decision of 11 September 2007 in *ECR* 2007-I, p. 7001

[22] CJEU, *Parfums Christian Dior SA*, par. 44-48

[23] European Commission Press Release IP/03/144 and Explanatory Memorandum at p. 12 et seq. cit. in Charles-Henry Massa and Alain Strowel, "The Scope of the Proposed IP Enforcement Directive : Torn between the Desire to Harmonise Remedies and the Need to Combat Piracy" in *European Intellectual Property Review*, 26 (2004): 246, note 23

[24] Cornish, Drexl, Hilty and Kur, "Procedures and Remedies": 449, note 4

[25] See also Violeta Vișean, „The Implementation of Directive 2004/48/EC in Romania" in *Revista Română de Dreptul Proprietății Intelectuale*, 4 (2009): 147

[26] Massa and Strowel, "The Scope of the Proposed IP Enforcement Directive": 246

would mean interspersing amendments in each IPR law)[27].

6. Harmonization at national level

In Romania there has been little research on the compatibility of the national provisions with TRIPS[28] but significant effort has gone into analyzing the implementation of the EU IP Enforcement Directive[29].

It has been argued[30] that the national provisions, before implementation of the Directive, being already aligned with the provisions of the European act, were more favorable than the provisions of TRIPS in that they made the payment of security for the covering of the eventual liability of the respondent optional at the behest of the court, rather than mandatory as under TRIPS[31].

Köröși has also shown that the provisions of art. 50 par. (4) and (6) TRIPS were not transposed in Romanian law[32] thereby making the Romanian provisions even more favorable to the right-holder[33].

She has however argued that this disadvantage (which is also at odds with the provisions of art. 9 par. (5) of the Directive) is mitigated by the direct effect of TRIPS provisions in Romania[34].

Nonetheless, the Romanian legislator has finally opted for an apparently "commutative" approach to implementation of the Directive by adopting a stand-alone Emergency Government Ordinance (no. 100/2005) which is, as some commentators have suggested, a translation of the Directive[35]. The same author declared that, contrary to Massa and Strowel, a distributive approach would have been preferable.

The scope of the implementation act is however different than that of the Directive since the EGO applies only to industrial property rights while the Directive applies to intellectual property rights. The fact that the Romanian legislator has excluded copyright and related rights from the scope of the Directive implementation act would have been, however, appreciated by Massa and Strowel[36]. Implementation in respect of copyright has however occurred by a distributive approach implemented by means of Emergency Government Ordinance no. 123/2005[37]

Ciocea argues[38] that the imposition, by means of art. 7 of EGO 100/2005 of the lodging of security for the compensation of the defendant the Romanian legislator has gone beyond the scope of the Directive (though, as seen above, such an approach had been recommended by Spineanu-Matei in order to secure compliance with TRIPS).

The implementation act is further criticized as being too broad and not providing express procedures that would properly implement the provisions of the Directive[39].

Ionescu argues that the provisions of EGO 100/2005 do not contravene TRIPS but do go further than TRIPS in providing for the right-holder (thus being seen as TRIPS-plus) in that they allow for the measures to be taken against not just the alleged infringer but also intermediaries, that they provide for a right of information, that the measures can be taken before a claim for infringement is filed and that they provide for the possibility of asset freezing[40].

Ionescu importantly points out that the implementation act provides for the annulment of the measures where there is no claim on the merits filed within 20 working days or 31 calendar days, whichever is the longest, thus filling a gap in harmonization with both TRIPS and the Directive[41].

Another fault identified with the implementation act was the lack of clarity in respect of the court having jurisdiction to instate such measures, which made the procedures provided for even more reliant on the common procedures provided for by the Code of Civil Procedure[42].

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[27] Idem: 252

[28] Liliana-Zoleta Köröși, „Admisibilitatea ordonanței președințiale în materia proprietății industriale" in *Revista Română de Dreptul Proprietății Intelectuale*, 3 (2005): 81-113; Vișean, „The Implementation of Directive 2004/48/EC in Romania": 155-156

[29] Octavia Spineanu-Matei, "Apărarea drepturilor de proprietate intelectuală. Compatibilitatea legislației românești cu directiva 2004/48/EC a Parlamentului European și a Consiliului din 29 aprilie 2004" in *Revista Română de Dreptul Proprietății Intelectuale*, 2 (2005): 43-57; Bucura Ionescu, „Ordonanța de urgență nr. 100/2005 privind asigurarea respectării drepturilor de proprietate industrială. Nou instrument juridic de combatere a fenomenului de contrafacere în România" in *Revista Română de Dreptul Proprietății Intelectuale*, 4 (2005): 73-81; Mihaela Ciocea, „Considerații privind transpunerea prevederilor Directivei nr. 2004/48 în legislația românească" in *Revista Română de Dreptul Proprietății Intelectuale*, 4 (2006): 59-66; Alina Iuliana Țuca, „Instanța competentă să dispună măsuri de conservare a probelor, măsuri provizorii și de asigurare în materia drepturilor de proprietate industrială" in *Revista Română de Dreptul Proprietății Intelectuale*, 1 (2008): 47-65; Vișean, „The Implementation of Directive 2004/48/EC in Romania": 140-186

[30] Köröși, „Admisibilitatea ordonanței președințiale în materia proprietății industriale": 91

[31] Spineanu-Matei argues that the provisions of the Directive would require the court to order the lodging of a security before ordering a measure to secure evidence - Spineanu-Matei, "Apărarea drepturilor de proprietate intelectuală": 50; We disagree with this interpretation.

[32] Köröși, „Admisibilitatea ordonanței președințiale în materia proprietății industriale": 106-107

[33] Spineanu-Matei, "Apărarea drepturilor de proprietate intelectuală": 50-51, 54-55, 56

[34] Idem: 108

[35] Ciocea, „Considerații privind transpunerea prevederilor Directivei": 60

[36] Massa and Strowel, "The Scope of the Proposed IP Enforcement Directive": 249-250

[37] Vișean, „The Implementation of Directive 2004/48/EC in Romania": 153-154

[38] As does Ionescu, „Ordonanța de urgență nr. 100/2005": 77

[39] Ciocea, „Considerații privind transpunerea prevederilor Directivei": 63

[40] Ionescu, „Ordonanța de urgență nr. 100/2005": 75-76

[41] Idem: 78-79

[42] Țuca, „Instanța competentă să dispună măsuri": 59-60

Finally, with the new Code of Civil Procedure, the provisional measures were harmonized across the intellectual property right spectrum by reducing all special provisions to a reference to the procedures provided by the Code of Civil Procedure[43].

With this new development some of the aspects previously objected to were corrected – e.g. the lodging of security was again made optional, to be left to the discretion of the court.

However, since the 'special' provisions in the Code of Civil Procedure still reference the common provisions regarding the procedure for the presidential ordinance (still in the same Code of Civil Procedure but under a different heading) while only mentioning that the common provisions are to apply "accordingly", there is even more uncertainty as to the conditions to be met by a claim for such measures, the court having jurisdiction and the application of other 'common provisions' in the Code of Civil Procedure such as the 20% cap on the security to be lodged (which is generally provided for by the Code for all the cases where the law does not specifically provide an amount).

7. Conclusions

The present short article underlines a paradox in the enforcement of intellectual property rights: although providing for protection of these rights (which is paramount for their existence, which in turn is essential for the current state of the world economy and life in general) at multiple levels is meant to insure better enforcement, in fact the multiple obligations to harmonize, the uncertainty of direct effect (or direct horizontal effect) and the differences in existing national legislation and legal traditions transform even genuine harmonization efforts into opportunities to uneven the scales even more, creating significant differences in the level and efficiency of enforcement of intellectual property rights.

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[43] For a general analysis see Ligia Cătuna, "Procedura măsurilor provizorii în materia drepturilor de proprietate intelectuală din noul Cod de procedură civilă. Prezentare generală" in *Revista Română de Dreptul Proprietății Intelectuale*, 4 (2012): 63-72

APPROPRIATING CREATIVE WORKS PROTECTED BY INTELLECTUAL PROPERTY RIGHTS

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Abstract:

The ownership, either public or private, is an expression for appropriating goods. Consequently, the appropriation takes the form of private (i.e. private property) and common forms (i.e. public property). The common law property defines appropriation as „a deliberate act of acquisition of something, often without the permission of the owner", but the intellectual property rights do not protect goods. Particularly in this case „the object" of appropriation does not represent a „res nullius" simply because the intellectual property right arises from the act of creation, therefore the appropriation of somebody else's creation becomes equivalent with stealing (plagiarism). Consequently, if we are to admit that the authors have a right of ownership over them, then ownership in intellectual property law has (it must have) other manifestations than those known and accepted in the common law of property.

Keywords: *appropriation, goods, intellectual rights, property, authors*.

1. Difficulty of properly qualifying intellectual property rights and its consequence on the „ownership" and control over intellectual creations

Trying to determine and clarify the legal nature of the rights the authors have over their intellectual creations, we should firstly consider the concept of „appropriation" and treat it with special attention. First of all we should draw attention to the fact that most of lawyers/jurists use the concept as a default one, not taking into consideration any particular explanation or demarcation. This comes from the customary use of „appropriation" in the common law of property. However, considering „ appropriation" within the frame of the special right of authors over their intellectual creations, we must delineate special uses of the concept.

Accordingly, „intellectual property law" is seen as a particular kind of law because its nature is difficult to be determined and stated categorically despite the fact that it has been enshrined as such in both conventional law and legal systems of the countries in continental Europe. The intellectual property law is still referred to as controversial as long as disputes relating to it have never ceased or been exhausted not even nowadays - neither in terms of recognizing its existence, legitimacy and necessity, nor in terms of its legal nature. There are opinions that it should not be recognized at all for the reason that copyright is the enemy of access to information and knowledge and, therefore, is an enemy of freedom[1].

From its early beginning, in France, the country that speaks and writes the most about it, copyright was considered among the rights of property, even if it was referred to as a particular kind of property, different than the concept of property which the common law deals with[2]. Meanwhile, this status came to be denied by jurisprudence[3], in order to reaffirm it again nowadays, quite categorically[4]. However, since there are cases when the Contemporary French doctrine still challenges this qualification, most often than not the current doctrine qualifies intellectual rights of the authors as property rights.

It is worth mentioning the contribution of those specialists that considered the rights of the authors over their intellectual creations as property rights, apart from the real estate property rights and obligations; moreover, their attitude must be positively assessed as they had that perspective on copyright long before the adoption of the first international

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[1] This is the case of The Libertarians, The Pirate Party in Germany and the Nordic Countries, but also of many challengers, quite vocal lately, supporting the current known as „copyleft", in opposition to copyright, as shown.

[2] Le Chapelier, in its report to the Law of Representation, on the 17th of January 1791, referred to the intellectual right as "**A property of a kind quite different from other properties**"; more than that, even the authors of the French Civil Code of 1804 avoided to regulate about this kind of property in their monumental legislative work - the reasons for this state of facts being understandable.

[3] For example, in a Decision of the Court of Cassation in France (the case of Grus, Sirey, 25 July 1887) it was recorded that „the rights of the author and the monopoly which they confer are unjustly designated as *property*, either in common language or in legal parlance". Therefore, the Court stated that, „far from being that kind of property similar to the one the Civil Code defined and regulated for the movable and immovable goods, the copyright gives the holders the exclusive privilege of a temporary use and interest. This monopoly over interests and exploitation include the right of reproduction and selling copies of the work and is regulated by law, making it subject to international conventions, as well as the right resulting from the realization of inventions, industrial designs or trademarks which constitute what is known as industrial property". The problem to which judges had to answer at that time was whether or not the President of the Republic was competent to conclude commercial treaties by himself (Article 6 of the Constitution of 1852) as a consequence of the issue of copyright, or if, because it was ownership, the competence was shared with the Parliament.

[4] It is worth noticing that in France jurisprudence had a great influence over categorizing the intellectual rights of the authors; denying their legal nature and reconsidering the authors' rights over intellectual creations as property rights, is a Praetorian work to a large extend.

convention (in 1883) which was to consecrate the concept of „industrial rights". Thus, in a paper edited in 1874, entitled „***Embriologie juridique***", the Belgian lawyer Edmond Picard proposed the establishment of a new category, that of „intellectual rights", without being able neither to impose his opinion, nor to determine the adoption of a such legislative solution, not even in his own country, despite the reputation he enjoyed.[5] As a consequence, the Belgian law of copyright (1886), which is a rigorous application of the „intellectual property rights", does not use the concept advanced by Picard. They preferred instead the term „property" in order to denote the rights of authors, inventors or mark holders and not the one proposed by the above mentioned specialist. However, Edmond Picard continued criticizing the theory that assigns the nature of property rights to copyright, on the ground that „the desire to enter by force, hammering these new rights in the category of real estate rights is certainly a scientific heresy"[6].

Anyway, it is within the boundaries of the scientific research ethics to assign authorship of this idea to the one that used it first, while admitting that this matter had been previously tackled in similar terms long before Picard; for example, in a study (1869) belonging to Alfred Bertauld, professor of civil law at the University of Caen. Consequently we must say that, at the time these theories were formulated, the term „intellectual property" had not been enshrined in international conventions yet – i.e. the Paris Convention of 1883 protecting the „industrial property" and the Berne Convention of September 9, 1886 dealt with the „Protection of Literary and Artistic Works" without qualifying in any way the rights of the authors. The term „intellectual property" was to be fully recognized (internationally) once the Stockholm Convention of 1967 was adopted for the establishment of the World Intellectual Property Organization.

The same attitude (namely, denying the property nature of copyright), can be traced in the past centuries with other practitioners, such as A-Ch. Renouard, H. Desbois and P. Olagnier in France and J. Kohler and I. Kant (the latter of philosophical positions) in Germany.

Auguste-Charles Renouard, for example, criticized those opinions qualifying authors' rights as property rights, stressing the need to maintain a fair balance between the public interest and the interest of the author, while highlighting that recognition of a property right in favour of the authors does not necessarily weigh in their favour, except as a (sacred) right to reward. Thus, Renouard said: „*The author is entitled to receive from the public/society a fair price for his service*", considering that the price is an equivalent for „*the exclusive right of reproduction*". Further on, he considered that „*the immaterial world is, by its nature, rebellious to the jealous use that property involves*" because „*thinking is, by its nature, impossible to be appropriated*". We must never forget that Renouard was the one who advanced the term „copyright" as a set of prerogatives of authors and, besides that, he had an important contribution in affirming the importance of moral rights of authors! The same attitude is to be traced at Proud'hon.

Closer to modern times, Paul Olagnier, after the adoption of the Berne Convention in 1886, argued that the property right of authors can be imagined only for undisclosed works, while Henri Desbois supported, in turn, that „free public access to any creation contradicts the exclusiveness of *usus* when considering ownership".

Immanuel Kant[7] (addressing the same issue on philosophical premises, this time), discussed the relationship author/editor, on the one hand, and the relationship author/consumers, on the other hand, calling for „personal rights" of creation, awarded to the publisher not to the author, as expected, in opposition to „real rights" of the material work. Kant analysed therefore copyright as a personal right, as opposed to ownership of the tangible goods. According to the theory developed by Kant, intellectual work is a discourse that the author sends to the public by means of language, so that any impairment of the work itself represents, in fact, impairment of the author's personal rights. Kant's perspectives on „personal rights" made J. Kohler say that the „personal doctrine" (of copyright) „is the bastard child of a genius who was unfamiliar with the legal system."

Many authors have considered these „personal rights" as monopoly rights, or the rights of customers, while others determined them as rights of intangible assets, or as exclusive rights (Romanian legislative system adopting this perspective), all of which are rather preoccupied to clarify the content of this particular right than to identify its legal nature.

Thus (considering only the most important Romanian laws on the matter):

- According to art. 1(1) of Law no 8/1996 on copyright and related rights, „copyright vests in the author and embodies moral and patrimonial attributes" (similar to the complex/dual rights, not to the property rights);
- According to art. 31 of Law no 64/1991 on patents, „the patent gives its owner the exclusive right to exploit the invention over its term";
- According to art. 36 of Law no 84/1998 on trademarks and geographical indications „trade mark confers to its holder an exclusive right on the mark";

[5] Edmond Picard (1836-1924) was a lawyer, Professor at the Free University of Brussels, where he had as a PhD Candidate a Romanian (Matila Ghyka, who defended his thesis in 1909); he is also known as writer, publicist, and Senator of the Belgian Socialist Party. He was one of the most esteemed Belgian specialists in "intellectual property" rights.

[6] Andree Puttemans, *Intellectual property rights and unfair competition*, (Bruxelles: Bruylant, 2000), 21.

[7] Kant's reputation, not only in his hometown, Königsberg, today Kaliningrad, but in Prussia as well, was so great that it caused a whole industry of copyists to meet numerous requests of granting access to his courses purchased through his students.

- According to art. 30 of Law no. 129/1992 on the protection of designs „for the entire duration of the design registration, the holder has the exclusive right to use and to prevent their use by third parties not having his consent".

The reasons why the Romanian legislature adopted this solution are difficult to decipher. Our opinion is that one of the possible reasons why Romanian legislator didn't qualify this particular kind of rights as ownership could be the difficulty in considering them as such owing to the particular characteristics of intellectual creations which confer upon them features that differentiate between them and common law property and make them goods with characteristics requiring a distinct legal regime.

Taking for example concepts like appropriation and the ratio of appropriation, we can see that they are crucial in the common law of property, because the rapport of appropriation creates appropriation. Therefore, our attention is focused on analysing the case of intellectual creations, where, as we have already seen, the Romanian legislator avoided systematically qualifying them as property rights.

2. Common law property and the appropriation of goods/assets in common law

2.1. Appropriation. General terms

The meanings of the term „appropriation" (Late Middle English: from late Latin *appropriatio(n-*), from *appropriare* 'make one's own'), as it is used in common law of property, should not generate confusions as they are used as such for a long period of time. Such definitions are: „The act of taking something for your own use, usually without permission"[8] or „The action of appropriating something: *dishonest appropriation of property.*

The real question here is to what extend the „appropriation" is important for the common law of property? The answer is: extremely important! Because the appropriation rapport is the key point that generates „property rights". Moreover, the common law of property approaches the concepts of „ownership" and „property" as implicitly understood: there can be no property, at least in the classical sense of the term, without an appropriation act, the rapport of appropriation creating appropriation.

Appropriation of property by the right-holder is the act which excludes or deprives others of having free access to the same asset.

As a subjective representation, the concept of property - complex concept with historical, philosophical, sociological, and legal meanings as well - is the result of a long evolution of legal thinking in the continental law system and is constantly evolving. Therefore, in all times and in all systems of law, appropriation was and still is the legal act through which an asset (unassigned or belonging to another) is possessed; the act or fact that creates property. As a consequence, we may say that it can be no property right in the absence of appropriation.

Appropriation of assets/goods, says Valeriu Stoica, *initially manifested as simple possession, a possession which then founded the subjective religious and juridical representations reflecting the reality of this appropriation.* Both private and public property is an expression of private property, respectively a communitarian appropriation of property. Private appropriation is more than just the individual possession of the goods (personal property) and community ownership does not include any form of joint or collective possession of the goods. The relation private appropriation vs common appropriation of goods is governed, in a liberal society, by the principle of private property development[9].

Professor Valeriu Stoica, whose work we have referred to above, makes a categorical distinction between tangible and intangible assets referring to the possibility of their appropriation. Thus, he argues that „things ONLY can be appropriated, but not everything can be appropriated"; likewise, he considers that „in contradistinction to tangible goods, which are naturally likely to be appropriated, intangible assets can be appropriated only if there is a law authorizing such. In other words, in order for a tangible asset not be appropriated, a specific prohibition of the law is needed, while an incorporeal property can only be appropriates if there is a law authorizing such"[10].

The above mentioned Romanian jurist states, however, like many French jurists, that the concept of property is flexible enough to include intellectual property rights. Still we cannot but find that the Romanian legislator described the rights of authors over their creations differently, either as complex rights in relation to original creations protected by copyright, or as exclusive rights in relation to new and utilitarian creations.

Under these conditions, can we state, against the law and the qualification of these rights by special laws that the authors' rights over their creations still have the legal nature of property rights? The answer may be yes, if and only if we equate between complex rights and property rights, on the one hand and / or between the exclusive rights and property rights, on the other hand; on condition that we find all the attributes of property rights governed by special laws.

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[8] http://dictionary.cambridge.org/dictionary/british/appropriation - ! citatele trebuie in formatul indicat pe pagina asta de Internet: http://www.chicagomanualofstyle.org/tools_citationguide.html

[9] Valeriu Stoica, *Drept civil. Drepturile reale principale*, (Bucureşti: Humanitas, 2004), 15

[10] Valeriu Stoica, *Drept civil*, 15 - „*spre deosebire de bunurile corporale, care sunt în mod natural apropriabile, bunurile incorporale devin apropriabilenumai cu autorizarea legii. Altfel spus, pentru ca un bun corporal să nu fie apropriabil este nevoie de interdicţie a legii, în timp ce un bun incorporal devine apropriabil numai dacă există o autorizare a legii*".

2.2. The object of private property rights / public property rights. Methods of appropriation

The first question we have to answer nowadays is: what are the objects of property rights and which forms do they take in common law? This information is to be found in The New Romanian Civil Code: art. 553 and 557 referring to assets, objects of private property rights, respectively, art. 858-859 and art.863, referring to public property.

Thus, according to art. 553 NCC, „All the assets of private use/interest belonging to either individuals, or legal persons (private or public), including assets that make up the private domain of the state and territorial administrative units, represent the object of private property"[11]. The definition seems broad enough to include intellectual creations among the „objects" the text of the law refers to, assuming that intellectual rights over creation have the legal nature of property rights as real rights.

With reference to the object of public property, art. 859 NCC stipulates about „assets that belong to the state or territorial administrative unit, which, by their nature or by the statement of the law, are of domestic or public interest, provided they are covered by one of the ways prescribed by law". In fact, there are two categories of objects in question here:

- First category, which is the exclusive object of public property, namely: soil resources of public interest, the airspace, the waters with energy potential of national interest, beaches, territorial waters and natural resources of the economic zone as well as the continental shelf and other assets established by organic law.

And

- A second category, represented by „other assets" belonging to the state or territorial administrative units, public or private field, but only if they were acquired by one of the ways provided by law.

Our opinion is that intellectual creations belong to the second category mentioned above, as long as we admit that intellectual property rights have the legal nature of property rights. In other words, assuming that the intellectual rights over creations are property rights, they can be „object" of public property rights, representing public domain, either considered at international, or national / local level.

Special laws governing intellectual property state about „public domain" quite differently when speaking about intellectual creations. Their perspective is similar to neither administrative / financial laws, nor to the New Civil Code. Customizing the discussion to the „public domain" for intellectual creations, the law states that those works / creations which are no longer under a period of protection can be exploited freely by any user. Therefore, we are speaking about a special type of „public domain" with an open access, restricted by the condition of respecting the moral rights of authors over their creations.

As for the methods of acquiring property rights, which are in fact methods of appropriating property, art. 557 NCC states that „a property right can be acquired, under the law by convention, legal or testamentary inheritance, accession, usucapio as a result of good faith possession (for movable assets and fruits), by occupation, tradition and by court decision, when the asset is implicitly transferring property. (2) In those cases provided by law, the property may be acquired by the effect of an administrative document. (3) The law may regulate other ways of acquiring property".

Concerning the public property rights, art. 858 NCC states that „public property relates to those property rights belonging to the state / territorial administrative unit over the goods/assets which, by their nature or by the statement of the law, are of public use/interest, on condition that they are acquired as provided by the law". This statement is consistent with the principle that authorities are prohibited everything, unless specifically allowed by the law, while for individuals, the principle is that everything is allowed, unless prohibited by the law.

As far as the methods of appropriating public property assets are concerned, the legislature passed a surprising solution, thus regulating, through art. 863 NCC, as marginal „cases of public property appropriation", the following acquisition modalities:

a) By tender, made under the law;

b) Expropriation for reasons of public utility, under the law;

c) By donation or legacy, supported by law, if the property, by its nature or by the will of the disposal, becomes of public use/interest;

d) By convention for consideration, if the property, by its nature or by the will of the acquirer, becomes of public use/interest;

e) By transfer of property from the private domain of the state to its public domain or from the private domain of the administrative-territorial unit to its public domain, under the law;

f) Other means provided by law.

Therefore, in our attempt to identify methods of acquiring property rights, we should consider the following:

- In comparison to the Law no. 213/1998, „natural way" is no longer provided as a means of acquiring public property rights. Nevertheless, our opinion is that it would be worth considering due to the fact that a natural event could produce geographical changes requiring a special assessing of the state property over goods/assets ranging from those provided in art. NCC 859 (on public property);

[11] Original text: art. 553 NCC, „*sunt obiect al proprietății private toate bunurile de uz sau de interes privat aparținând persoanelor fizice, persoanelo rjuridice de drept privat sau de drept public, inclusive bunurile care alcătuiesc domeniul privat al statului și al unităților administrativ-teritoriale*".

- in case of donation, the asset can turn into public use, by the will of the disposal;
- in case of acquiring property through „Convention for consideration", the nature of the asset and the will of the acquirer are to be taken into consideration in order for the property to migrate into public domain and become of public use;
- regarding „Convention for consideration" as a way of acquiring public property rights, it seems that it is likely to undermine the principle of entitlement to public property by the state's own methods (procurement, expropriation, donation or bound) and that the domain of application, if any, must be clarified.

That is why it is worth noticing that, unlike the rules of the old Civil Code (art. 644-645), the present Romanian law does not represent, in itself, a method of acquiring property rights. Nevertheless, the law can stipulate other ways of acquiring property (either public or private), the doctrine claiming that the present solution was adopted as a consequence, under the influence of critics that were made to the former way of acquiring property. Likewise, it is to be observed that the texts that have generated the most criticism, respectively art. 5 and 20 of Law no. 15/1990 on the reorganization of state economic units as autonomous companies are still in force, even if they provide that autonomous administrations and companies established through reorganization are the rightful owner of their transferred patrimony.

The problem arising here is whether or not any of the methods of acquiring property, covered by art. 577 NCC, is applicable to intellectual creations, even assuming that their rights have the nature of property rights? The answer is obviously negative, on the premises that the new Civil Code stipulates for the qualification of copyright as property rights in art. 577 line (3) which provide ***that the law may regulate other ways of acquiring property***.

3. Categories of intellectual creations and their characteristic features

Intellectual creations are numerous and varied as gender and target and destinations. What unites these works and how to justify their grouping in the same category, putting them under the same umbrella? What distinguishes them from the goods of common law, so that they may need special laws to protect them? Why did the authors feel the need to have their creations protected by special laws derogating from the general law and why did such protection need centuries of struggles? Why did the legislature need to decouple „intellectual property" of „ordinary property"? How and why can the property rights have contents and attributes of intellectual and moral order, when property rights are patrimonial, by nature, as defined by the Civil Code?

3.1. Object of protection by intellectual property rights

In terms of the Stockholm Convention and the TRIPs, which states upon the intellectual property rights, they are property rights related to intellectual activity in the industrial, scientific, literary and artistic fields. Creations under discussion here could be: literary artistic and scientific works; performances, phonograms and broadcasts; databases; inventions in every field of human activity; industrial designs; configuration schemes (topographies) of integrated circuits, undisclosed information; trademarks and services etc.

Therefore, all these are products of creative activity, but their destination is different: some, having aesthetic or evolutionary function (i.e. literary, artistic and scientific works), others, utility functions (inventions, topographies of semiconductor products), others, hybrid products, interweaving both aesthetic and utilitarian functions (i.e. designs and patterns) and others, the function of favouring trade and protecting consumers through the information they provide about the products marked (trademarks and geographical indications). The result of these observations is that intellectual property not only differs from the common law property, but intellectual creations differ between them as well!

3.2. Characteristics of intellectual creations

First of all we may say that the intellectual property rights deals with property that is achieved through creative intellectual activity and its object is the protection of the authors 'rights. Unlike the common law of property, or the civil law, dealing with people in general and goods made by physical effort, not involving creative activity, the legal perspective on intellectual creations, however, reflects a relationship between creators and consumers, between creators and users of intellectual creations that can be both creators and non-creators of works, between the two categories of persons and goods is an important difference that justifies a difference in treatment. Some authors say, exaggerating on purpose, in order to reveal its importance and specificity, that intellectual property right is exclusively designed for scientists and artists.

i) The most obvious link between these creations is their common origin and their divergent nature (unlike the assets in common law): they are the result of a creative effort, the result of their authors' intellectual activity which is rightfully considered an extension of the personality of the authors.

ii) Intellectual creations are characterized by their nature of intangible assets, with spiritual existence (most of the time existing in the conscience of the author and its public), regardless of any retaining on/in some specific medium. Most often they are of ideal and abstract existence (computer programs are perhaps the best example to demonstrate the abstract character of creative intellectual property). They are and should be treated separately from their material

support, even when this distinction is more difficult, as it is, for example, the case of works of fine art. Nevertheless, the common law distinguishes between and tangible and intangible assets[12], but they are not products of intellectual activity. In common law, both tangible and intangible assets have economic value, being valued in money. Claiming rights and goodwill are typical examples of intangible, even if the universality may include tangible and intangible, intellectual creations as well.

iii) In common law, the distinction between an „asset" and „the right of property over that asset" is relatively simple. When speaking about intellectual property things are not so simple, because, firstly, we need to make the distinction between intellectual creation itself and the material incorporating it. Only then we can distinguish between „creation" and „the right over creation". Just so we understand why a book buyer is not the owner of the work incorporated into the book; why the holder of a painting (which, in terms of the common law, represents a movable asset and its possession equals, according to civil law, property) is nothing but the holder of the tangible, not the rightful owner of the painting; why the owner of a car (that car including several creations and intellectual property rights, such as inventions, designs etc.) does not hold rights to these works and cannot dispose of them, even if he can freely dispose of his car that comprises all the above mentioned; why the inventor or the author of a design is the right holder of the object of his invention, but not the owner of all the products that are obtained due to the exploitation of his patent or certificate. Intellectual creation is not represented by the product itself but the idea exploited, the expression of it, the way it is described to be materialized in an object.

iv) Generally accepted common law definitions of „assets" (goods of economic value that are useful to satisfy man's spiritual or material need, susceptible of appropriation as economic rights)[13] and „heritage" (universality of rights and obligations with economic value belonging to a subject of law) are not satisfactory and applicable to intellectual property, because the intellectual creation does not necessarily need to have economic value, not even to satisfy a specific material or spiritual need, in order to be protected by the law. The fact that intellectual property rights and their object (creations) have today a major economic role, implicit economic value, or spiritual status does not change their nature, because the law does not protect individual rights on condition of economic/artistic/scientific value. The real conditions that need to be met are as follows: originality, or, where appropriate, novelty, inventive step, industrial applicability, distinctiveness, etc. In other words, the economic value of the intellectual products is neither important nor required. Economic value, i.e. the value that represents quality and condition of the goods/assets in the common law[14] is not necessary when intellectual creations are involved. Intellectual creations are independently protected irrespective of any economic or artistic value. However, the economic value of an intellectual creation and the value of the creation itself are subjective and difficult to determine.

v) The result of creative work is not to be identified or confused with the product itself. Unlike other man-made goods, intellectual creations have no material substance and remain so even when they are fixed on a material (in the form of words, musical notes, lines, colours, designs etc.), or in electronic format. Property over support and property over creation are and remain distinct and subject to different legal rules, as distinct are to be treated the creation itself and the product which it materializes in The books we read are just copies of intellectual works and their purchase do not confer to the buyer any rights on the work. The copy of a paper (authorized or unauthorized) belongs to its buyer, not the work set in this paper. Thus, intellectual creations are to be treated separately from their material support, even when this distinction is difficult to be done, as, for example, in case of works of fine art.

vi) As intangible assets, intellectual creations are joined by another common feature, which is a major „fault" for them all: being spiritual products, nobody can protect them against being used by others through the means of simple possession, as it happens with tangible goods, for that they can be operated simultaneously by several people. Once the product of intellectual creation (literary, artistic or scientific, invention, design, model etc.) was made public, its creator cannot exercise, in fact, control of its use.

Consequently, materiality of the tangible good in common law (electricity being an exception, commonly invoked as an intangible good suitable to support the equivalence with the intellectual property - intangible – in order to be classified as property right) prevents possession from being exercised by several people simultaneously (except co-owners) over the same asset. In addition to that, it is noticeable that material objects having generally a well-defined functionality are unlikely to be used by several people simultaneously for the same or different purposes. We cannot speak of territorially differentiated possession over an estate, i.e. a piece Romanian land cannot be possessed, simultaneously, in Romania and in Hungary. Not even movable assets are more malleable

[12] The law knows two categories of intangible assets: firstly, the rights with a tangible object which are, in fact, intangible because they are not identified with their object (i.e. usufruct, debts, etc.); secondly, the absolute intangible assets. The latter case speaks about rights which are not attached to any tangible, such as a merchant's customers or intellectual property rights.

[13] Gheorghe Beleiu, *Drept civil român*, (Bucureşti:Şansa, 1995), 91

[14] The meaning of "good" implies economic value which is useful to satisfy man's spiritual or material need and is susceptible of appropriation as economic rights. In order to be in the presence of good, in the sense of civil law, two conditions must be met: 1) the economic value must be able to satisfy a material or spiritual need of man; 2) be capable of appropriation (attribution) as economic rights - Gheorghe Beleiu, *Drept civil român*, 97

in this regard: one and the same car, calculator, pen, etc., cannot be possessed in Bulgaria and Romania concurrently.

Possession of tangible goods involves contact between man and object, independently of the territory where such contact is made. Instead, intellectual creations, not being constrained of materiality or possession for use, can be used in different countries at the same time, by multiple users.

Moreover, what is inconceivable for material goods becomes rule with intellectual creations: the possibility of concomitant use of several people in different places without making the work/creation unavailable to others (as happens in the case of electrical energy which can be used by a consumer not independent of other potential consumers). It is somewhat similar to the use of public goods, which is, in principle, non-competitive and may be exercised concurrently by multiple people (i.e. roads, schools, hospitals etc.). In this case, concomitant use requires, as a rule, the presence in the same place, while in the case of intellectual creations; concomitant use may be exercised in different places. The possibility of concomitant use in different places by multiple users represent a characteristic feature of intellectual works, most often this being the reason for which they were created.

vii) Intellectual creations have common features with public assets and utilities, thus explaining both the subjective position of consumers towards them and their delayed protection and legislation. Similar to public assets and utilities, whose consumption by one person does not prevent another person to do the same, intellectual creations are, in principle, non-rivalrous in the sense that their use is not competitive and the result of their usage does not represent their disappearance, more than that, their appropriation by an individual, if we admit that it is possible and necessary, does not make them unavailable for another user. Instead, public utility consumption implies the presence in the same place, whereas, intellectual creations allow concomitant use in different places.

viii) Intellectual creations quality and ability to be quantitatively unlimited makes them differ from common law property which is limited. In other words, intellectual property is unlimited, while property of tangible goods is limited. Many of the intellectual creations are ephemeral – this meaning that information technology or new solutions can change so fast that some creation could be left aside before obtaining the title of protection. The Internet practice shows us that many creations (if not all) are highly vulnerable to acts of unauthorized use.

ix) The products of intellectual are extremely mobile, especially nowadays. Unlike the assets in the common law, intellectual creations are, nowadays, able to move instantly and globally, while in ancient times, they were escorting their creator, wherever they went, even though their movement was slow. As far as their ability to move is concerned, we find that boundaries are absolutely useless, works „traveling" indifferent to both territorial limitations of the law or the means by which they propagate, being, practically, impossible to control under the current state of the art when the perfect host, the cyberspace, sets no borders or limitations.

x) Unfortunately, all the intellectual creations have a major „fault": the rights over intellectual creations are, as determined by law, transferable rights. The most common forms of capitalization of creation are contracts of assignment, licensing and franchising. Likely to be used simultaneously by multiple people, assigning rights over these creations can be held simultaneously by multiple people, the transferor being able to maintain the right of using that protected work. Once the works are in circulation/use, the authors cannot control their use any more. If the work was made public, the public is subjected to the temptation of using it whenever he pleases, or whenever he can make a profit out of it, and this temptation increases as the work is more valuable. Thus the author cannot authorize each use and cannot control unauthorized uses.

xi) On the other hand, assessing rights over intellectual creations is not completely transferable (i.e. moral rights), and more than that, it is limited (as acts inter vivos) to the economic rights, not having as a result, ipso facto, the assignment of the property rights to the purchaser. In the case of copyright, for example, there operates not only the presumption of favouring the author's economic rights even if not expressly assigned, but also the failure to assign those rights regarding some unexpected usage of the work was not known at the time of the assignment of rights, even if the transfer was complete at the time of the occurring change. This means that the rights of the transferee are not identical in content with the rights of the transferring author. While, under certain conditions, the exercise of moral rights belong to the successors, them having the duty of ensuring compliance with the moral rights of their authors (authors, meaning persons whose succession they take), it means that neither the successors can be assigned with economic rights only.

xii) The moral side of intellectual rights over creations, which some authors consider to be bizarre even if it is consecrated by the law systems inspired by the Berne Convention, determines the difficulty in qualifying these rights. The law attaches moral and patrimonial attributes to the author's property, while the property is basically patrimonial in common law practice. Furthermore, the two categories of rights have distinct legal regimes. Therefore, it is highly artificial to bring together two distinct legal regimes which belong to two antithetical categories of *summa divisio* (moral rights are inalienable, imprescriptible and perpetual, while patrimonial rights are limited in time). The inalienable character of moral rights is the strongest argument in rejecting their qualification as property rights. According to art. 555 of the New Civil

Code, „private property is the right of the owner to possess, use and dispose of property exclusively, absolutely and perpetually, within the limits established by law". In this case the right of assignment is inherent to the property right, even if it is not considered a specific feature. An appropriated good may only be affected by a temporary perpetuity. Thus, attaching the moral and patrimonial prerogatives of the author to the property rights leads necessarily to a misinterpretation of this right.

3.3. Necessity and opportunity of appropriation

Since the Romanian legislator did not qualify the authors 'rights as property rights, we can conclude that appropriation of such rights is neither possible nor necessary. Therefore, art. 577(3) has not to be considered by authors with respect to their works; as a specific feature of the intellectual creations.

At this point we agree that intellectual creations should not be appropriated, at least not in the classical sense of the concept of appropriation. According to common law, appropriation represents the act of taking something for your own use, while an intellectual creation belongs to its author through the act of creation. In other words, the author cannot appropriate something that rightfully belongs to him simply because he is the holder-creator and it would be pointless for him to make such an action. Appropriation is worth discussing only for the work of others, but in this case the act of appropriation would constitute a violation of the rights of the true author.

If we assume, however, that appropriating creations protected by intellectual property rights is possible in some particular ways for these kind of assets which are not at all similar to the ones in common law, then we find that there are assets (such as: registered as a trademark, the same sign can be registered by more applicants for different goods and/or services) that can be appropriated by more people at the same time. Then, there are cases (geographical indications/signs, for example) that cannot be appropriated by any private or public person because they are, by definition, available to any producer in the designated geographical indication and exclusion from the use of any manufacturer is unthinkable. At the same time, it is important to mention that, speaking about indications, the manufacturer has a right of use, not a property one.

While the common law refers to appropriation (at least so it happened in the beginning) in terms of taking into possession something that does not rightfully belong to you, when speaking about „intellectual property", the asset which represents the exercise of the right is the creation of the author himself; it is an asset that never existed before it was created by its author. That is why an intellectual creation is so personal that it seems part of the author himself or an extension of its author. How to say then that the author is not, naturally, „master" of his own creation? That it does not naturally belong to him, needing an act of appropriation, while the ties between author and his work are so close that their separation is impossible and meaningless?!

Consequently, when speaking about „intellectual property rights" and only about them, we do not deal with things from the outside world within the meaning of the common law; we deal with the author's own spiritual creation. Therefore, the creation is so inseparable from its author that it makes it impossible for the associated rights to be transmitted and the appropriation to be assumed by third parties. This means that none other than the true author can be expected and can claim for himself the authorship of a work. In case the work was made by somebody else, the act of appropriation has to have legal consequences, unless this happens any time after the author's death or when the work has fallen into the public domain and can be freely used. The author of an intellectual creation, and only he alone can claim anytime and anywhere, authorship of the work and to him only the property rights recognized and granted by the mere act of creation. The successors of the author, as holders of real rights, will never have all the rights the true author used to have over his creation. Another category of users of the creations, the third parties (customers, holders) have the right to freely use a creation after the author's death or when the work has fallen into the public domain, but they will never be assumed as authors, provided they are usurpers, plagiarists or pirates. Moreover, the true author cannot transmit his authorship as „paternity" over an intellectual creation is inalienable.

Exception to the rule of inequality between the authors' rights and the intellectual rights transmitted to third parties are the trademarks and geographical indications/signs. This happens due to the fact that, most often, trademarks are likely to be chosen only from those in the public domain (that are available because they have been registered as provided by others), and the right over trademarks is more like an occupational right than a copyright in itself. In case trademarks are protected by copyright the intellectual work protected this way will belong to its author forever.

Classifying intellectual creations as „intangible assets", we may state another distinction between them and the goods/assets in common law. There is an opinion that the common law speaks only about the appropriation of tangible assets, while the intangible can be appropriated only for the cases when the law provides so, or, in the words of one of the specialist in the domain: „In order for a tangible asset not to have the ability of being appropriated, a special provision of the law is requested, while, for the appropriation of an intangible asset authorization of the law is required"[15].

[15] Valeriu Stoica, *Drept civil*, 128.

If that were the case, then the copyright (free of formalities) could not be generated by the mere fact of producing a certain work, the same as patent right, arising from the invention itself, should also be authorized; instead, they are considered distinct rights and are not subject to authorization.

Moreover, if special authorization from the law would be required in case of „appropriating" own creations, for which the author is a priori considered the rights holder, quality provided by the law since the eighteenth century, this would represent a step back in time before 1586, when the lawyer Marion Simon, baron of Druy, obtained the cancelation of a bookstore privilege from the Parliament of Paris, on the claims that: „people recognize to each other the property over works they made or invented, and following the example of God, who is the master of both heaven and earth / day and night, the author of a book is its master and as such he may have free dispose of it". Otherwise, if we accept that the rights of authors over their intellectual creations are natural rights, it is pointless to discuss the problem of appropriation in this respect. Therefore, those assets belonging naturally to an individual do not need appropriation, they only need recognition and, eventually, special protection of the law in case of abuse.

The common law of property, art. 557 NCC, stipulates that „property rights may be acquired under the law, by convention, legal or testamentary inheritance, access, adverse possession as a result of good faith possession of movable and fruit, by occupation, tradition, and by court decision, when the property itself is being transferred. (2) In the cases provided by law, the property may be acquired by the effect of an administrative act. (3) The law may regulate other ways of acquiring property". However, apart from law, none of these ways of acquiring property is common to intellectual creations. But in terms of the law, it is worth noticing that if intellectual creations, authors' rights do not originate in a certain law, them being implicitly assigned to the creation once their paternity established. The law can only recognize and protect them.

Consequently, the authors' rights do not arise due to some human authority; they are natural rights, like the rights to personal liberty, physical integrity, life and like any natural right, as any other intrinsic right that is not based on the process of legislating, they may even come in contradiction with state law. Their belonging to the category of natural rights explains why copyrights are, at least in some of their components, „perpetual".

Thus, authors' rights do not extinguish, they belong to the authors, either dead or alive, even if the term of protection established by law has passed and the creation has fallen into the public domain. In case the author has assigned his rights to the transferee, he is still considered the author of that creation, the transferee being nothing but the holder, not getting the authorship over creation. Moreover, the rights of authors have gained recognition during the Enlightenment, i.e. in the times when natural rights were conceptualized and the foundations for human rights were laid.

In conclusion, we must acknowledge that the Romanian legislator did not qualify authors' rights over their creations as property rights. The complex dual right recognized for authors of new and original creations, as well as the exclusive rights for authors of new and original creations cannot be regarded otherwise than the legislature did.

If we consider „appropriation" as a manifestation of the author's will to act as master of his own creation and if we admit that the rights afforded to authors had all the attributes of property rights, then and only then „appropriation" makes sense; otherwise, it is useless with the intellectual rights.

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RIGHTS CONTENT ON DESIGNS

Ovidia IONESCU[*]

Abstract

Our intellect characterizes us and helps us make a difference in life. Due to our intellect we can understand the world around us, our personality is shaped and developed and, depending on such development, we can learn new things that are beneficial to us both as individuals and the humankind as a whole.

Intellectual property focuses on the intellect and the protection of everything that is a creation, represents an important element of day-to-day life and ensures the adequate progress of things deriving from and related to said aspect.

Authors are the creators of intellectual property, and their creation must be protected. Furthermore, they benefit from a protection system, respectively a protection title, as well as patrimonial and non-patrimonial rights in connection with their achieved creation and in full dependence thereupon.

Keywords: *intellectual property, patrimonial rights, non-patrimonial rights, author, protection title.*

1. Introduction

The field covered by this paper is intellectual property and the themes of the study aim rights content on designs. The importance of the proposed study is to identify the effects of protection and the rights acquired by the authors as a result of mind product protection and the objectives of the paper are to introduce the reader in the intellectual protection area and understand the effects of protection and its importance by showing related structured procedure and a simpler way to understand. I intend to respond to the objectives set by showing main effects of rights on designs and models and their importance, including identification of relevant articles of Law 129/1992 on the protection of designs and models as republished. I would like to show among other aspects presented herein that state of knowledge is high in the matter addressed and the subjects reveal this.

Our intellect characterizes us and helps us make a difference in life. Due to our intellect we can understand the world around us, our personality is shaped and developed and, depending on such development, we can learn new things that are beneficial to us both as individuals and humankind as a whole.

Intellectual property focuses on the intellect and the protection of everything that is a creation, represents an important element of day-to-day life and ensures the adequate progress of things deriving from and related to said aspect.

Authors are the creators of intellectual property, and their creation must be protected. Furthermore, they benefit from a protection system, respectively a protection title, as well as patrimonial and non-patrimonial rights in connection with their achieved creation and in full dependence thereupon.

Law no. 129/1992, as republished, on the protection of designs and models distinguishes between the author of the design or model and the holder of the registration certificate of the design or model.

Thus, Art. 3 of this law states:

"(1) The right to be issued a registration certificate belongs to the author of the design or model or his/her successor in title for designs or models independently created.

(2) If several people independently created a design or model, the right to be issued the registration certificate belongs to the person who filed the first application for registration.

(3) If the design or model was created as a result of contracts with creative purpose or by employees in their work duties, the right belongs to the person who commissioned."[1]

The conclusion that can be drawn from this article is that the right to have a registration certificate issued belongs to the author of the design or model or his/her successor in titles for designs or models independently created or if the model or design has been created as a result of a contract with creative purpose or by employees in their work duties, the right belongs to the person who commissioned it - in the absence of contrary contractual provisions explicitly or implicitly stipulating the creative purpose.

With regard to the above, let us take an example in order to clarify convincingly: a person invents a product and puts it up for sale, it being successful in the outlet market. To be sure that product is to be marketed, will be recognized by the consumer, will have the quality of the initial product and the creator will be acknowledged all the rights of creation, it is necessary that the person who created it is protected in terms of acknowledging that, in terms of product appearance - it belongs to that person, that person has the right to market the product and product quality is

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[1] Law 129/1992 on the protection of designs and models, republication 3 in the Official Gazette no. 242/04.04.2014.

recognized, having thus the right to be paid for the product created.

In doctrine, according to Professor Viorel Ros designs and models "are combinations of lines or colours presenting an original character or shapes in volume which gives the product its own and new features, which distinguish it from other products"[2], and "Products of the spirit must also be protected outside the national borders of their author, when used according to their vocation, in other states"[3], and thus "Productions of the spirit are, of course, the most direct and personal creation, the most legitimate and less likely to be appealed <property>".[4]

Law no. 129/1992 on the protection of designs and models, as republished[5], in art. 2 d), defines design or model as „appearance of a product or a part thereof, rendered in two or three dimensions, resulting from the combination of the main features, particularly lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation".

The protection of the intellectual property also provides economic development, encouraging legality of competition, favouring the creative spirit of the individual and trade of products created both domestically and internationally and it contributes to the development of commercial relations.

The balance between creation and its knowledge at international level (which encompasses marketing) can only be kept by a more complex and complete legal system, better implemented in as many countries as possible. Therefore the international treaties have a very important role, and their implementation at national level, however in a closer implementation.

Creating a design or model also implies the birth of their protection rights and the need of its registration through a legal procedure. Given that in the matter of designs and models there is plurality of protection, the author of a design or model will have rights arising both from his/her capacity as author and rights arising from their registration with the State Office for Inventions and Trademarks (OSIM)[6].

Thus, Art. 5 of Law 129/1992, as republished on the protection of designs and models provides in paragraph 2 that: "**(2)** The protection of registered design or model under this Law shall not exclude or prejudice the protection of copyright thereof."[7]

Therefore, by making a design and model two distinct categories of rights are born, namely: non-patrimonial rights and patrimonial rights. Non-patrimonial rights are perpetual and patrimonial rights are limited in time.

According to art. 5 paragraph 1 of Law no. 129/1992 on the protection of designs and models, as republished, rights on a design or model acquired under this legislation, shall not prejudice the rights on unregistered designs or models[8], trademarks and other distinctive signs, patents and utility models, typefaces and topographies of semiconductor products. Also, the protection of design or model registered under this law, does not exclude or prejudice its protection by copyright.

Non-patrimonial copyrights, known as moral rights of the author are inalienable and imprescriptible rights arising from copyright acknowledged by most legislations of the states[9] and whose content is not expressed in monetary form. Non-patrimonial copyrights is a legal expression of the link between the work and its creator, they precede patrimonial rights, survive them and have permanent influence exerted on them.

Non-patrimonial rights are independent of patrimonial rights, the author of a design or model keeps these rights even after assignment of his/her patrimonial rights[10].

The moral rights are exclusively acknowledged to the author and he/she enjoys in principle the following moral rights:

a. Right of authorship (paternity right);

The right to claim recognition of authorship of a design or model is called in the doctrine "the right to paternity of the work" and is enshrined in art. 3 paragraph 1 of Law no. 129/1992 on the protection of designs, republished, being based on the need to respect the natural link between the author and his/her work. Thus, this right is exclusively recognized to the creator. If the design is a collective achievement, the performers are acknowledged as co-authors[11].

The right to authorship is the most important prerogative which forms the intellectual rights in general and consists in the acknowledgement of rights of true author of a design. This right cannot be the object of a waiver or alienation by acts inter vivos, unlike the right to be issued the registration certificate for the design or model which is transmissible, as shown in the analysis of art. 3 paragraphs 1 of the law.

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[2] Viorel Ros, *Intellectual property law*, Global Lex Publishing House, Bucharest, 2001, p.474.

[3] Viorel Ros, Dragos Bogdan, Octavia Spineanu – Matei, *Copyright and related rights*, All Beck Publishing House, Bucharest, 2005, p.24.

[4] Viorel Ros, Dragos Bogdan, Octavia Spineanu – Matei, *Copyright and related rights*, All Beck Publishing House, Bucharest, 2005, p.7.

[5] Law 129/1992 on the protection of designs and models, republication 3 in the Official Gazette no. 242/04.04.2014.

[6] Gabriel Olteanu, *Intellectual property law*, 2nd Edition, C.H.Beck Publishing House, Bucharest, 2008, p.214.

[7] Law 129/1992 on the protection of designs and models, republication 3 in the Official Gazette no. 242/04.04.2014.

[8] For details on unregistered designs or models, see Ciprian Raul Romitan, *Protection of unregistered Community design*, in "Revista română de dreptul proprietății intelectuale", no.1/2009, pp.182-189.

[9] In the copyright system, moral rights of the author are almost ignored, they are not protected separately. According to art. 4 - 142 of the US Copyright Act, the author has exclusive rights he/she can exercise in contractual conditions such as to guarantee the integrity, but if an author transfers his/her rights without imposing such terms, he/she loses such rights. According to this law, moral rights of the author are a form of property right called right of publicity (e.g., the California Civil Code, Section 3344 regulates the right of publicity).

[10] Ciprian Raul Romitan, *The moral rights of the author*, Universul Juridic Publishing House, Bucharest, 2007, p.48.

[11] Viorel Ros, *works cited*, p.521, Ioan Macovei, *Intellectual property law treaty*, C.H. Beck Publishing House, Bucharest, 2010, pp. 260-261.

In accordance with Art. 50 of the same law indicated above, "unlawful acquirement, in any way, of the authorship of the design constitutes an offense and is punishable with imprisonment from 3 months to 2 years or a fine."

b. Right of disclosure, i.e. the right to decide if, when and how the work will be disclosed to the public;

Art. 30 of Law no. 129/1992 on the protection of designs and models, republished, states that "Throughout the duration of the design registration, the holder has the exclusive right to use and to prevent their use by a third party who has not his/her consent. The holder has the right to prevent third parties from performing, without his/her consent, the following acts: reproduction, manufacture, sale or offering for sale, marketing, importing, exporting or using a product in which the design is incorporated or to which it applies or storing such a product for those purposes."[12]

Thus, the disclosure of the design or model, bringing it to the attention of third parties, time and method for disclosure to the public, belong to the author, but to benefit from protection, he/she must obey and fall into the legal rigors and procedures.

c. Right to decide under what name the work will be disclosed to the public (right to name);

Right to a name is provided in art. 41 par. 1 of the Law no.129/1992 on the protection of designs and models, republished, which states that "The author has the right to have his/her surname, first name and capacity mentioned in the registration certificate, and any documents or publications concerning design or model."[13]

The author has thus the right to have his/her surname, first name and capacity mentioned in the registration certificate issued by the State Office for Inventions and Trademarks - OSIM.[14], and any other documents or publications on design, and these data will be recorded in the employment record of the author.

d. Right to claim the observance of the integrity of the work, known as the right to inviolability of the work,

The same art. 30 of the above mentioned Law regulates this feature of the work.

e. Right to withdraw the work (right of withdrawal).

Art. 36 d) of Law no. 129/1992 on the protection of designs and models, republished, provides that "exclusive exploitation right arising from the registration of design ceases d) by waiver of the holder of the registration certificate", i.e. by withdrawal of work.[15]

The above rights must be recognized to the authors of designs and models on the basis of the principle of unity of art[16] and in the specific protection they are supplemented with the following rights:

a. right to be granted a specific protection title, recognized by art. 3 of the law mentioned;

b. right to transfer the rights upon issuance of the registration certificate, a right provided by art. 30 and art. 34 of the law;

c. exclusive right to exploit the registered design or model, a right provided by art. 30 of the law;

d. right to have full name and authorship mentioned in the registration certificate to be issued by OSIM, and any documents or publications concerning design or model, as stipulated in art. 37 of the Law;

e. priority right of first deposit[17].

Concurrently, art. 41 par. 2 of Law no. 129/1992 on the protection of designs and models, republished, provides that data in the registration certificate for the design or model be recorded in the employment record.

Patrimonial rights are rights acknowledged to the creator of a work, in the case of our analysis, of a design or model which is the economic component of copyright and which can be transferred to another person, for consideration or for free[18].

If the author of the design or model is also the holder of the registration certificate, he/she will be the exclusive holder of the patrimonial rights[19]. In this case, as provided in art. 39 par. 1 of Law no. 129/1992 on the protection of designs and models, republished, which states that "The author, holder of the registration certificate of the design or model, enjoys patrimonial rights established under contract with people who exploit the design or model.", the author-holder of the registration certificate of the design or model enjoys patrimonial rights established under contract with

[12] Law no. 129/1992 on the protection of designs and models, republished,

[13] Law no. 129/1992 on the protection of designs and models, republished,

[14] State Office for Inventions and Trademarks is the specialized body of central government, sole authority in Romania in ensuring the protection of industrial property, in accordance with national legislation and the provisions of international conventions and treaties to which Romania is a party, in accordance with provisions of GD no. 573/1998 on the organization and functioning of OSIM, as amended, art. 68 of Law no. 64/1991 on patents, republished, art. 96 of Law no. 84/1998 on trademarks and geographical indications, republished and art. 48 of Law no. 129/1992 on designs, republished. The organization, functioning and powers of OSIM are provided in GD no. 573/07.09.1998 on the organization and functioning of the State Office for Inventions and Trademarks, as amended by GD no. 1396/2009.

[15] Law no. 129/1992 on the protection of designs and models, republished,

[16] Viorel Ros, *works cited*, p.520.

[17] For details, see Badea Liliana, *Establishment of regular national deposit on industrial designs* (Case Study), paper presented at the Seminar "Industrial property protection in the context of new regulations", Tulcea, August 30 - September 2, 2004.

[18] European Union, *Terminology glossary on intellectual property (industrial property, copyright and related rights)*, a PHARE programme for OSIM and O.R.D.A., 2005, p.52.

[19] Viorel Ros, *works cited*, p.521.

persons who exploit that design or model. In the event of an assignment contract, the author's patrimonial rights are established in the contract, according to art. 39 par. 2 of Law no. 129/1992, republished, which states that, "In case of concluding a contract of assignment, the author's patrimonial rights are established in this contract."

If the author of the design or model is not also the holder of the registration certificate, his/her patrimonial rights are limited. The author has, as mentioned, only those rights based on his/her employment contract or contract of assignment of the patrimonial rights on design or model.

Art. 2 letter c of Law no. 129/1992 on the protection of designs and models, republished, defines "registration certificate" as "title of protection granted by the State Office for Inventions and Trademarks for registered designs."

From the analysis of art. 3 paragraph 1 of the law, according to which the right to have registration certificate issued belongs to the author of design or his/her successor in title for the designs and models independently created, it results that the right to have the registration certificate of a design or model issued, is transferable.

Utilization of a registered design or model may be made personally by the holder of the right, by reproduction, distribution, importation for sale, public exhibition or indirectly, by assigning the right of utilization. According to art. 38 par. 1 2nd sentence of Law no. 129/1992 on the protection of designs and models, republished, rights arising from the registration may be transferred in whole or in part. The transfer may be made by succession, assignment or license.

Transfer by succession of patrimonial rights on designs or models is subject to common law, and in terms of duration and territorial boundaries, the provisions of the special law, i.e. Law no. 129/1992 on the protection of designs and models, republished, shall be taken into account.

The assignment may be total if it relates to all the rights conferred by the registration certificate of the design or model or partial if it relates to only some of the rights conferred by the registration certificate. Partial assignment of rights arising from the registration certificate of a design or model determines a co-ownership regime[20].

The license may be exclusive, in which situation the licensor undertakes not to transfer the rights of exploitation of the design or model to others, or non-exclusive if the licensor retains a right to exploit the design or model and/or may grant the right to exploit the design or model to others also. However, the license may be total if it relates to all the rights conferred by the registration certificate, or partial if it relates to only some of the rights conferred by the registration certificate.

Note that, according to art. 38 par. 3 of Law no. 129/1992 on the protection of designs and models, republished, transfer of rights shall be registered with OSIM in the Register of designs and models and produces effects to third parties only from the date of publication in the Official Bulletin of Industrial Property (BOPI) of OSIM[21] of notice of transfer. The registration of transfer of rights on designs or models in dispute is suspended until the date of the final judgments on rights (par. 4).

Although Law no. 129/1992 on the protection of designs and models, republished, makes no reference on this point, having regard to the provisions of art. 55 of the legislation analysed, according to which, in the case of legal persons, registration certificates of designs and models in force represent intangible assets and may be registered in the property of the holder; transfer of patrimonial rights for these persons can be done by division, merger, liquidation, absorption[22].

In art. 37 special law also provides that holders of registration certificates of designs or models may mention on products the sign D or the letter "D" uppercase, enclosed in a circle, accompanied by the holder's name of by the certificate number.

According to art. 34 par. 10 of Law no.129/1992 on the protection of designs and models, republished, as of date of publication of the application, the natural person or legal entity entitled to have the registration certificate issued, shall temporarily enjoy the same rights conferred on the holder. This provisional protection lasts until the issuance of registration certificate unless the application was rejected or withdrawn[23].

The exclusive right of exploitation arising from the design or model registration provided for in art. 30 of the law referred to above shall cease in the following cases:

a) at the expiry of the validity date (period of validity of a design or model registration certificate is 10 years from the establishment of the regular deposit and can be renewed for 3 successive periods of 5 years);

b) by cancelling the registration certificate. Date of cancellation of registration certificate is the date the court judgment ordering or finding the nullity of the registration certificate, becomes final[24];

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[20] Gheorghe Bucsa, *Protection of designs and models. Case studies and case law,* OSIM Publishing House, Bucharest, 2008, p.54.

[21] It has 12 annual issues and includes applications for registration of designs and models submitted to OSIM, lists of registered certificates, changes in legal status etc.. For details, see Gheorghe Bucsa, Tiberiu Popescu, *works cited,* pp.49-50. For further study, see also Stefan Cocos, *The a, b, c of protection and enhancement of industrial property*, Rosetti Publishing House, Bucharest, 2004, pp.210-212).

[22] Viorel Ros, *works cited,* p.536.

[23] See Ioan Macovei, *works cited,* p.262.

[24] Teodor Bodoaşcă, *Intellectual property law,* C.H. Beck Publishing House, Bucharest, 2006, p.313.

c) by holder's forfeiture of rights for failure to pay fees for maintenance in force of the design or model registration certificate;

d) by waiver of the registration certificate holder[25].

As a conclusion on the above, we can say that the exclusive right of exploitation is temporary (as mentioned above, the validity of a registration certificate is 10 years from the date the regular deposit is established and can be renewed for 3 successive periods of 5 years) and territorial (exclusive exploitation rights is limited to the territory of the state which issued the registration certificate).

According to art. 30 of Law no. 129/1992 on the protection of designs and models, republished, the following deeds constitute infringement of the exclusive right of exploitation of the design or model: reproduction, without right, of the design or model for the manufacture of products with identical appearance, manufacture, offer for sale, sale, import, use or storage of such products for circulation or use, without the consent of the holder of design or model registration certificate, in the period of validity thereof[26]. All disputes arising from the infringement of the exclusive right of exploitation, in accordance with art. 43 of the law fall within the jurisdiction of the courts under common law.

Concurrently, according to art. 52 par. 4 of Law no.129/1992 on the protection of designs and models, republished, for damages caused, the holder is entitled to damages under common law, and may request the competent court to order the seizure or, where appropriate, the destruction of counterfeit goods. This applies to materials and equipment used directly in the crime of counterfeiting.

The infringement proceedings[27] fall also in the jurisdiction of the courts and also action for unfair competition, whose conditions of exercise are regulated by Law no. 11/1991 regarding control of unfair competition[28]. Art. 2 of this legislation defines the unfair deed as any deed or fact contrary to fair practices in industrial or commercial activity. In order that unfair competition action be admitted, it is necessary to fulfil the prerequisite on action in tort[29].

Under art. 53 of Law no. 129/1992 on the protection of designs and models, republished, holder of a registered design or model may request the court: to order precautionary measures when there is a risk of infringement of rights on a registered design or model and if the breach is likely to cause irreparable harm or if there is a risk of destruction of evidence. In taking precautionary measures ordered by the court, establishment by the applicant of a sufficient security to prevent abuse may be requested. For ordering precautionary measures common law provisions[30] are applicable.

In accordance with art. 35 par. 2 of Law no. 129/1992 on the protection of designs and models, republished, throughout the period of validity of the registration certificate the holder has the obligation to pay fees for its maintenance in force. For the payment of fees for certificate maintenance in force, OSIM granted a grace period of 6 months, instead charging increases. Under paragraph 3 of the same article, failure to pay such fees shall cause the forfeiture of rights.

We should mention that the Romanian legislator, as well as legislators in other states of the European Union has not provided the obligation for the certificate holder to exploit registered design or model. Therefore, the inaction of the holder of registration certificate does not attract penalty of forfeiture of rights for non-exploitation[31].

2. Conclusions

The main focus in the present paper was about the content of the rights on designs or models, with the expectation of an optimal impact of these results, in terms of presentation of elements that define the procedure, what needs to be followed and what must be done so as their author benefit from their protection.

A suggestion for future activities would be a comparison of application of design and model protection in different countries, depending on their accession to international conventions, to see the implementation of international conventions at national level and alignment of countries to these so as an uniform national or international protection be implemented.

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[25] According to art. 35 par. 3) of Law no.129/1992 republished, O.S.I.M. grants a grace period of 6 months for the payment of fees for maintenance in force, which are subject to penalties. Failure to pay such fees shall cause the forfeiture of rights (paragraph 4). Under paragraph 5) the forfeiture of rights shall be published in the Official Bulletin of Industrial Property of OSIM.

[26] See Viorel Ros, *works cited*, p.522.

[27] See Ciprian Raul Romitan, *Crime of counterfeiting industrial design or model*. *Need to have an expertise ordered*. *Case Law* in "Revista română de dreptul proprietăţii intelectuale", no. 1/2006, pp. 49-51; Ciprian Raul Romitan, Elena Tanislav, *Counterfeiting industrial models and designs*, in "Revista română de proprietate industrială", no. 2/2003, pp. 68 71; Gheorghe Bucsa, Liliana Badea, *Case studies on attempted counterfeiting of industrial designs and models*, in "Revista română de proprietate industrială", no. 2/2004, pp. 35 37; Mirela Radu, *Counterfeiting industrial property, theoretical aspects*, in "Revista română de proprietate industrială", no. 5-6 / June, 2001, pp. 82-87.

[28] Published in the Official Gazette no. 24 of January 30, 1991 with subsequent amendments and supplements. See Mioara-Ketty Guiu, *Unfair competition offense*, in "Revista de drept penal", no. 3/2003, pp. 43-47; Catalin Paraschiv, *Unfair competition offense*, in "Dreptul" no. 3/1997, pp. 63-65.

[29] Gabriel Olteanu, *works cited*, p. 217.

[30] For further study, see Alina Iuliana Tuca, *The competent court to order measures of preserving evidence, interim and assurance measures in the field of industrial property rights*, in "Revista română de dreptul proprietăţii intelectuale", no. 1/2008, pp. 44-62.

[31] Ioan Macovei, *works cited*, p.264.

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THE THEORY OF ESSENTIAL FACILITIES. THE PRINCIPLE OF ACCESS TO INVENTION IN CASE OF ABUSIVE REFUSAL TO LICENSE

Irina CUCER LISNIC*

Abstract

Essential facilities designate specific inputs which are essential for the production of other downstream goods.

Inputs are situated upstream and so are eligible for intellectual property protection. In order to foster competition in the downstream, holders of these inputs should be forced to give access to potential users, by offering them operating lidcenses. In other words, one must respect the exclusive right of intellectual property holder to freely exploit his invention or must he be sacrificed in favor of downstream competition ?

In the present analysis we intend to analyze some of either controverted or less known judicial aspects related to the theory of essential facilities.

Keywords: *compulsory licenses, essential feature, dominance, abuse, input, effective competition.*

1. Generalities

It has been widely assumed that the compulsory licenses for the intellectual property rights, based on art. 102 of the Treaty establishing the European Union, stand as an example for the cases of essential facilities. According to the logic on which the theory of "essential facilities" is based, the owner of a facility which cannot be reproduced by way of the ordinary process of innovation and investment and in the absence of which the competition on a market is impossible or restricted, must share it with a rival.

Hence, the term essential facility means the entirety of material and non-material installations owned by a dominant and non-reproducible enterprise; as a result the third parties` access to these installations is indispensable for them to carry out their activity on the market, and it concerns the situation when one may obtain a forced access to an intangible asset owned by a dominant enterprise.

The theory has its origin in the American competition case law from the beginning of the last century when a conflict of access to railroad infrastructure had to be resolved[1]. In this case, St. Louis was the only area with railroad infrastructure which granted access to the railroad infrastructure of other areas and the association with *Terminal Railroad Association of St. Louis* owned a fraction of the operation of the railroad in St. Louis, as a result, it actually controlled the entire access to such infrastructure, which caused it to be called to trial in order to be obligated to grant access to other operators in exchange for reasonable and non-discriminatory tariffs. The USA Supreme Court compelled *Terminal Railroad Association of St. Louis* to grant access in exchange for reasonable tariffs on the grounds that the railroad is a public utility and the association *Terminal Railroad Association of St. Louis* acted as a cartel, with the risk of excluding other users of the railroad. At that moment, The Court referred to the competition aspect of the business and did not introduced the term essential facility, it being applied subsequently, the theory assigning it three cumulative conditions in order to be applied: the use thereof is indispensable for an operator which provides a specific service, it is impossible or at least difficult to multiply the infrastructure in this case and, finally, the functional control exercised by way of monopole or a group of associates acting unitary. The subject matter was not fighting the monopoles, but merely the abuse of a dominant position for vertical integration, which imposed the intervention of the competition authorities.

In Europe, the theory of essential facilities was applied for the first time in 1992[2], following a complaint of B&I (an Irish ferry operator), when the Commission established that Sealink (a British ferry operator, which was also the harbour authority in Holyhead, Wales) abused its dominant position when it modified its schedule in such way that this modification affected the loading and un-loading operations of B&I, following the reduction of the available time. In other words, the Commission held that the deed of the owner of an essential facility to use its power on a market in order to consolidate its position on a related market is an abuse according to art. 82 of the EEC Treaty [art. 102 of TEEU]. This happens when such owner grants his competitors access on the related market under conditions that are

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[1] Case *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912);

[2] Case *Be-I Line v. Stena-Sealink*, CJEC, 11 iun. 1992 (IP/92/478).

less advantageous than his own services, without any objective justification. The Commission ruled by way of decision that Sealink to adopt a different schedule or return to the initial one. The Commission assessed that there is a risk of an "irreparable prejudice" to be produced due to increasing the interruptions in the loading and un-loading procedures as well as the effects of such on the services offered.

The term essential facility is not directly connected with the actual completion and efficient competition. The actual competition is defined as the competition exercised on the market, whereas the efficient competition means the best potential competition on the market. It is possible that a non-competition situation, meaning the absence of actual competition, to meet the criteria of an efficient competition. The theory showed[3] that several markets reserve for themselves an efficient competition and the CJEC[4] explicitly says that the purpose of the competition policies is to preserve on the market the possibilities of an efficient or potential competition. This means the possibility of third enterprises to compete with the enterprise in the dominant position, the latter not having the right to compromise the actual competition and thus having particular obligations including to allow the competitors to create an actual competition. This is why one observed that an enterprise in a dominant position might attempt an assault upon the competition even in the absence of an abusive practice considering the obligation pointed above, to ensure an actual competition on the market. In this context, if the enterprise owns an essential facility, it also has the correlative obligation to maintain the market competition.

One observed that such logic resembles the one in the domain of asymmetric regulations, used in case of networks industries[5], where the dominant position of the enterprise is not a consequence of its merits, but one of public power, situation in which, even in the absence of an abuse, such company must license third parties.

The background of the theory of essential facilities is the notion of abuse and monopole. If we were to refer it by comparison to the property law in the Civil Code, transposing this definition to the intellectual property law, we might say that the intellectual property is a material good that belongs to a person and the competition law is an easement of such good. The owner of the good may use it in an absolute manner but the limits of exercising the ownership right have been introduced under art. 556.

The theory of the abuse is comparable to the abuse of dominant position.

The essential facilities assign the specific inputs, indispensable to producing other downstream goods. The inputs are thus situated upstream and may benefit from the protection of the intellectual property, and in order to favour the downstream competition, the owners of such inputs should be compelled to allow the access of the potential users, by way of offering them operating licenses.

In other words, must one respect the exclusive right of the owner of the intellectual property to exploit freely its invention or should one sacrifice it in favour of the downstream competition?

This problem occurred in numerous contemporary businesses regarding the competition law and there have been considerable discussions on this topic. In order to address the question, we remind that a patent gives the owner an exclusive right to prevent the use by third parties, more specifically to produce or to sell without the owner`s authorisation during the legal protection period of 20 years as of constituting the regulated deposit.

The European competition law acknowledges the intellectual property, but if such concerns an input which is indispensable to the downstream production, a license refuse in this sense is deemed as abusive behaviour, considering the dominant position on this market. Such classification of an abuse based on art. 102 of the TEEU lead to the theory of the so-called essential facilities.

In a dynamic vision, the innovative enterprise owns an essential facility generated by an invention and finds itself in a forceful position for its direct competitors and enterprises situated downstream which need access to such essential resource. The problem is extremely delicate and it is up to the competition authorities to analyse the enterprise`s action which owns the facility whether it is guilty of abuse of dominant position meaning if an increase of the prices requested by such suppresses the technological competition and thus the efficiency.

The use of essential facilities theory in European case law accredited the thesis of the expropriation of the owner of intellectual property rights in the superior interest of the competition, but the articulation between the two domains is much more complex.

In USA, where the intellectual property law is deemed intangible under the competition requirements, the problem was brought into question in the 70s in the famous case *FTC v. Xerox*, when FTC[6] imputed to the photocopy machines manufacturer that it created a portfolio of thousands of patents, which increased on annual basis, that lead to a sort of monopole over the photocopy machines markets, thus blocking the entry of other competitors on this market. *Xerox* was accused of restrictive and market monopole practices[7] and FTC`s objective was to allow competition. By way of decision ruled on February 17,

[3] Marie – Anne Frison Roche, *Régulation versus concurrence, in Au-delà des codes*, Dalloz, Paris, 2011, p. 171-185.
[4] CJEC 21 feb. 1973, case *Euroemballage-Continental Can c/Comision Europenne*, no. 6/72.
[5] Marie – Anne Frison Roche, *op. cit*, Dalloz, Paris, 2011, p. 171-185.
[6] Federal Trade Commission of USA.
[7] Antitrust Litigation, 203 F. 3d 1322.

2003[8] the American justice condemned *Rank Xerox* forcing it to ensure access to competitors to the parts and computer programs thus to form an efficient market competition.

The guidelines of JD[9] and FTC in this domain are based on three principles:

– the intellectual property is treated in the antitrust domain as any other form of property;

– there is no assumption that an intellectual property right automatically creates a market power;

– protection by license of an intellectual property right is *a priori* pro-competition but there is no obligation for the owner of the intellectual property right to license third parties in order to ensure competition on the same market.

The Supreme Court mentioned in the case of *Verizon Communications v. Law Offices of Curtis V. Trinko* that the enterprise has no obligation to license competitors save for particular situations, when its refusal may have anti-competition consequences.

In European case law, as of the case of *Volvo*[10], but even more significant the case of *Magill*[11], the principle of access to work subject to an abusive refusal of license grounded by the theory of essential infrastructure has been materialised.

This principle works for the particular situation of an enterprise in a dominant position owning a material or non-material infrastructure, non-reproducible and to which the access of competitors is indispensable for carrying out their activity.

The fundamental feature of an "essential facility" case is that once the abuse was identified, there is an obligation to offer access to the facility.

In general, it is pro-competition to allow the companies to keep for their exclusive personal use the goods they acquired or built, and to expect from the other companies to acquire and to build their own products corresponding to their use, in case they need such goods to be competitive. The possibility to be compelled to share a facility, whose cost is substantial, must always have a certain effect of discouragement of the investments. Nevertheless, in case there is an abuse of exclusion according to art. 102, paragraph b of TEEU, more specifically if a dominant company owns or controls the access to something that is essential to allow its competitors to compete, it may be pro-competition for the company to be compelled to allow access to a competitor, (only) in case its refusal to proceed so has serious enough effects on the actual or potential competition. This obligation occurs, even when the refusal is proven, only when the competitor cannot obtain the products or the services from another source and it cannot build or invent by itself, and only in case the owner has no legitimate justification for the refusal. In other words, the exception applies only when the "dominant" competition is possible, and when such is possible, only in case it allows access to this facility. Anyway, these conditions are necessary, but not enough, for a duty to contract.

We mention that based on art. 102 paragraph b of TEEU, there is an obligation to allow the first license in non-discriminatory terms under the aforementioned requirements. It is not an abuse to deny the access solely because the claimant would be in a better position, should it allow access to it, or because another competitor might occur. The refusal to distribute a facility, irrespective of it importance, is not normally an abuse, which we shall explain when we address the "additional abusive behaviour".

We remind that the enterprise is dominant on the market by supplying a product or a service that is essential to the competitors which operate on a secondary (marginal) market and there is no real or possible source for such product or service, or if there is no satisfactory substitute for such, and the competitors could not produce it by themselves. Objectively, the competitors cannot offer their services on the secondary market without access to that product or service. If they can offer their services, even if with serious disadvantage, the advantageous facility cannot be elementary.

The refusal to supply the product of the service would cause damage to the consumers (this requirement is expressly provided by art. 102, paragraph b, which is, at least usually, and probably, always, the relevant provision in art. 102).

The damage caused to the consumers may occur because the refusal creates, confirms or strengthens the dominant position of the company on the secondary market (as seller on that market, and not only because of its control over an essential factor of production). This usually represents the "limitation" or reduction of the existing competition in a way it would not have been thus restricted. Nevertheless, if the competition on the main market has already been restricted by the intellectual property rights of the dominant company, isn`t there an abuse from the company to exercise such? The prejudice caused to the consumers can be also produced by preventing the apparition of a new type of product or service that offers clear advantages for the consumers, which would compete with the product of the dominant company.

However, there is no objective justification for the refusal to contract.

There are no set criteria to determine the appropriate price in case of obligatory forced access to the elementary facility by compulsory license.

The phrase "essential facility" does not create another different type of breach of the right or the legal norm. In addition, it does not create an abuse where, otherwise there would not be an abuse. A dominant company is never obligated to compensate its

[8] Case *Verizon Co. v. Law Office of Curtis V. Trinko*, US Supreme Court, LLP 358, US 905.
[9] Department of Justice of USA.
[10] CJEC, 5 October 1988, *AB Volvo c/ Erik Veng (UK) Ltd*., Nr. 238/87, *Rec.* p. 6211.
[11] CJEC, 6 April 1995, *RTE etITP Ltd c. Commission*, 241 et 242/91, Rec., p.743.

competitors for the disadvantages they have (of course, save for those the company itself created).

If there is an obligation to allow access, then there is also an obligation to allow access in on-discriminatory terms, and these terms may correspond to the terms imposed by the dominant company for its operations (because terms less favourable would cause a certain degree of blocking, against the provisions under art. 102, letter b). If this kind of operations does not exist, but art. 102 letter c applies, it suffices that these terms to meet the requirements under art. 102 letter c.

In case *Oscar Bronner*[12] one argued that it is necessary to demonstrate that the owner of the intellectual property rights prevents the apparition of a new product for which there is a potential demand, situation in which the theory of essential facilities is applied.

We remind that in the case of *Magill*[13] the Court of Justice deemed as abusive the refusal expressed by the Irish television channels to broadcast the programs grill of *Magill* in view of it editing a weekly guide to regroup the TV programs of six national channels. The denial to make available to *Magill* the TV programs was deemed discriminatory and not allowing a license to reproduce was deemed as not reasonable, which constitutes itself an abuse of dominant position of the Irish television channels on upstream market and obstructing the apparition of a new offer for the one which is not a direct competitor in a downstream market.

Also, in the case of *IMS*[14] the Court found that this enterprise comprised a data base regarding the sales in German pharmacies under the form of a 1860 modules structure and a derived 2847 modules structure, which became a standard due to its practical aspect based on the German postal codes and the free distribution thereof to pharmacists; in the same time NDC decided to opt for the use of this structure but IMS refused to sell its data base and the Court applied the theory of essential facilities deeming that the owner of the infrastructure must ensure the access to competitors in order to make the competition possible.

The difference between this and the previous case, in grounding the defence, is that the essential facility was granted to a company that operated on the same market, and not as in the previous decisions, on a downstream market.

In cases of *Microsoft*, the courts have changed the grounds for the sentencing thereof, insisting on the idea of the prejudice caused to the consumers by affecting the technical progress.

If, in the case of *Volvo*, the actual behaviours which can be deemed abusive are indicated (the arbitrary refusal to deliver spare parts to the independent repairers, fixing the prices of the spare parts at a inequitable level, the decision of not producing spare parts for a certain model, although many cars of the same model were in circulation), in the case of *Magill* there is a general rule connected to the exceptional circumstances which can be qualified as abuse of dominant position generated by a refusal of license of intellectual property rights.

Thus, the Court showed that there is no real or potential substitute to the weekly television guides which Magill wants to publish and that the television channels were the only brute source of information regarding the programs, as raw material indispensable to make a weekly television guide, and the refusal to license constitutes an obstruction to the apparition of a new product (...)"for which there is a potential demand from the consumers[15]" and finally, that "this refusal was unjustified". By "raw material" it was considered the information owned by the television channels as a simple raw material, regardless of its nature and without out any interest in the intellectual property rights.

There are thus three conditions to classify a refusal to license as abusive:

– an obstruction to the apparition of a new product for which there is a potential demand from the consumers, which means the indispensable character of the product protected by intellectual property rights;

– the absence of an objective justification of the refusal to license to be examined whether it is objective and proportional, always grounded on "exterior factors of the dominant enterprise[16]";

– the total exclusion of the competition on the derived market, more specifically, following the refusal to license by the owner of the intellectual property right, it reserves for itself a monopole on a derived market, except for the market of the product covered by the intellectual property right. This way, it is forbidden to extend a monopole to a derived market, such being deemed as abusive.

The appreciation of the connection between the main market and the derived market assumes a sufficient connection that is appreciated on a practical basis so that the responsibility of the owner of the dominant position on the main market to be disjointed towards the adjacent one; in this sense, the dimension of the derived market is of significant importance.

In case of *Tiercé Ladbroke*[17], TPI CE stated that "the refusal to license cannot be revealed as a breach of art. 86 of the EEC Treaty [art. 102 of the TEEU]

[12] CJEC, November 26, 1998, case *Bronner c. Media Print* C7/97.

[13] CJEC, April 6, 1995, case *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*, **C**-241/91 P şi C-242/91 P.

[14] CJEC, case 418/01 IMS *Health GmbH & Co. c. NDC Health GmbH & Co. KG* (2004) ECR I-5039.

[15] CJEC, April 6, 995, *RTE et ITP c/ Commission*, cited case.

[16] JOCE, Nr.C 45 of February 24, 2009, p. 7, point 28.

[17] TPI, June 12, 1997, *Tiercé Ladbroke s.a. c/ Commission*, 504/93, p. 923.

unless it concerns a product or a service which is either essential for exercising the activity in question, in the sense that there is no real or potential substitute, either it is a new product whose apparition is obstructed and which has a potential and constant demand from the consumers".

According to above, it appears that a judicial obligatory license mechanism was instituted at European level, the Commission deeming that it has the right to set forth the conditions of license and to impose thereof, which under the aspect of contractual freedom is a measure which must be appreciated as exceptional, accepted as a necessity in regulating the markets[18].

This aspect was theoretically analysed[19], having been deemed that such an intervention to create obligatory licence without legal support cannot be but exceptional, interpreted *strict sensu* and should be expressly provided in the legal norms.

However, this matter is not easy to accomplish because the intellectual property is subjected to norms at national level, thus the mechanism on non-voluntary license should be provided by the national legal texts, which may lead to legislative fragmentation and different interpretation, but more specifically it is contrary to the competition law norms which are of European essence, including the praetorian way in which the European judge acts, who took the liberty to interfere in the existence and exercise notions of the intellectual property rights.

In our opinion, we deem that we are in the presence of a rule of competence and based on grounds, in order to achieve a unique internal market and the observance of the competition principle, the competence falls under the Commission and the CJEU regarding the exercising of the intellectual property rights. The refusal to license must be deemed as a reference to exercising the intellectual property rights, and not the existing thereof.

In this context, we ask ourselves whether the system of obligatory license, which is not grounded on a text of law, can fall discretionary in the hands of the European authorities, in the absence of *non*-subjective principles to guide their means of action?

The question remains opened and obviously pertains by the competition and promotion policies of the technical progress.

We join the theoretically opinion which states the absence of an indispensable precision to remove the arbitrary aspect in the aforementioned assessment.

2. The conditions of the essential facilities theory

In order to accede to a principle of access to the infrastructure protected by intellectual property rights, save for Magill case, in which we find it in an incipient form, clarifications have been subsequently brought in a continuous evolution of the case law.

Thus, the conditions which must be observed in order to apply this principle have been delimitated, in the case of IMS the conditions of application from the case-law regarding the abusive refusal to licence as well as in the case of *Oscar Bronner*[20] are indicated, although it does not concerns intellectual property rights. In the case of *IMS*[21] it was mentioned that the conditions must be met cumulatively, more specifically: the existence of an obstruction to the apparition of a new product for which there is a potential demand from the consumers, the exclusion of the competition on the derived market and the absence of an objective justifications to deny the license. Without direct indication, there is also a forth condition, more specifically the one regarding the indispensable feature of the product or service for which the access is requested, but such is self-understood from the previous three conditions.

We shall further examine these conditions:

a. The indispensable feature of the product or service

This must be deemed as a prior condition, in the absence thereof the enunciated principle cannot be applied to an actual situation. In the case of *Oscar Bronner*, CJEC stated that "in order to invoke the case of Magill in sense of the existence of an abuse according art. 86 of the EEC Treaty [art. 102 of the TEEU], not only the refusal of the service must be in such way that it removes any competition whatsoever on the market from the service petitioner, but it must also not be objectively justified, unless, but in equal measure, the service itself is indispensable for carrying out its activity, in the sense that there is no real or potential substitute to this service." One finds that by the way of stating the grounds, the theory of essential infrastructure in the intellectual property law was complied with. One must also note that in the case of *Oscar Bronner* the court used the phrase of absence of a real or potential substitute with reference to a service indispensable for carrying out an activity, by referring to a service or a product constituting the upstream market owned by an enterprise in a dominant position following the monopole conferred by an intellectual property right. Regarding the assessment of the indispensable feature, one must understand it depending on the proven facts, depending on the inexistence of an alternative solution to that service or

[18] M. A. Frison Roche, *Contrat, concurrence, régulation*, RTD civ. 2004, p. 451.

[19] P.Y. Gautier, *Le cédant malgré lui" : étude du contrat forcé dans les propriétés intellectuelles*, D.Aff., 1995, p. 123.

[20] Cases *Oscar Bronner GmbH & Co. KG contre Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG et Mediaprint Anzeigengesellschaft mbH & Co. KG., Nr.* C-7/97, Rec. p. I-7791, point 41.

[21] CE, July 3, 2001, No. 2002/165/CE, No. COMP D3/38.044, *NDC Health c/ IMS HEALTH*, JOCE Nr. L 59 du February 28, 2002 p. 18, point 45 si 56.

product. The alternative solutions, regarding the case law, must concern a "real or potential" substitute, which makes the term substitute to be very broad so that the products and the services can be even less advantageous.

The absence of alternative solutions does not suffice in order to establish the indispensable feature of the product or the service, it is necessary to ascertain "the existence of regulatory or economical technical obstructions which would make impossible or at least very difficult for an enterprise to try to operate on the said alternative products or services market, to cooperate, in the end, with other operators[22]. Depending on these, one may establish whether the obstruction is nullifying for the derived market in the development of a new alternate product or service.

We deem that an enterprise is in absolute impossibility in case of economical non-viability of development of an substitute for the product bearing intellectual property rights in order to have access on the derived market. We deem that the term regulatory obstruction has a legal source, i.e. legislative, by which the enterprises receive a monopole in carrying out their economical activities, such as: power grids, methane gas, railroads and others. Besides these legislative sources there may exist regulatory ones, norms or certificates particular to the activity or product in the respective case.

As regards the intellectual property, the source is legislative by way of allowing the owner of the intellectual property rights by the lawmaker a monopole of exclusive exploitation of its creation. The term technical obstruction is more complicated because it refers to a third party`s impossibility to enter on a derived market, in other words, to accede to technical means to allow it to create and develop an infrastructure which challenges the one from which it requests access. This wide meaning competes with the regulatory obstruction in case there are technical norms for a product, regarding putting in on the market, with certain particular characteristics.

We reiterate that in the case of *Microsoft*[23], it had a dominant position on the operating systems market and denied the supply of operative data Sun Microsystems which would allow it to operate on the derived market of server operating systems. Actually, the data concerned "the protocol specifications of server to server communications". The Court defined the inoperability as "the capacity for two computer programs to change information and to mutually use this information so that each computer program to be allowed under the means provided". These data were extremely specialized and hermetic, thus Sun Microsystems, in order to activate in a viable manner on the server operation market, had to come up with operation systems capable to communicate with the Windows operating systems found in every informatics environment, considering the extremely powerful position Microsoft had in this domain, which determined the Commission to deem these data as "extraordinary characteristics"[24], protected by the intellectual property, and Microsoft owned more than 90% of the market and *Windows* is the "fact norm" for these operation systems, thus any competitor cannot trade in a viable manner its products if it is unable to achieve a high degree of operability with such. This means there is no other way but to know what Windows created, whereas its information is irreplaceable. As regards the term economical obstructions, this means that creating an alternate product or service is not economically profitable when comparing it to the economic efficiency of the original product or service.

Thus, the European Commission sentenced Microsoft on March 24, 2004 for abuse of dominant position following the limitations of the inoperability regarding the operation systems for servers and sales connected to *Media Player*. From this case, it appears that voluntary limitation of inoperability was the result of a strategy for committing an abuse of dominant position targeting the transmission by way of crossbar effect of the market power in the domain of operation systems for PC to operation systems for servers. The Commission retained that it had a dominant position following the entry barriers set up by own networks in the domain and the enterprise`s practices which indicate the said strategy. The Commission deemed that the interface protocols are necessary for the viability of every alternate offer to the extend *Windows* was not yet the market standard but was becoming cvasi-inexorable and that meant that although the Microsoft strategy did not have as immediate effect the elimination of competition, this still induced a significant risk in this sense. This is why the Commission deemed that such practices obstruct the innovation and are in the detriment of the competitors, which are to pay extremely high prices, and in the same time lead to decreasing the consumers` freedom of choice. Microsoft`s refusal to allow licenses to the competitors meant that those competitors are prevented from developing advanced versions of their products. The penalty consisted of a 500,000 EUR fine together with the obligation to supply to the competitors information regarding the interoperability in order to transmit information protocols of client to server and server to server communication and to authorize the use thereof for the development and distribution of competitive products on the operation systems market[25]. In motivating the decision, the court showed that a dominant operator has specific obligations in preserving a structure of the actual competition, *a fortiori* which means the European

[22] CJEC, April 29, 2004, *IMS Health*, caz precitat.
[23] Case *Sun Microsystems, Inc. v. Microsoft Corporation, U.S. District Court, Northern District of California, San Jose*, nr. 97-CV-20884.
[24] European Commission, March 24, 2004, Nr. COMP/C-3/37.792, *Microsoft*, point 429.
[25] TPICE, Decision of September 17, 2007 in the case of *Microsoft Corporation c. Commission* (case T-2001/04).

vision in applying the theory of essential facilities and granting obligatory licenses: "although the enterprises are mainly free to choose their commercial partners, a dominant enterprise`s refusal to deliver may, in certain circumstances, act as an abuse of dominant position."

In the case of *Oscar Bronner*, the Court stated that the economic obstruction cannot be deduced from the fact that reproducing the infrastructure was not profitable and consequently, the economical activity of the license petitioner must be reported in quantitative terms to the one of the infrastructure owners.

Following the analyze of the aforementioned cases it appears that an abuse of dominant position by not allowing a license to competitors may exist only if the existence of the competitive enterprises is compromised and it limits the technical development on the consumers` detriment in a direct and/or indirect manner thus by affecting the actual competition`s structure. At the same time, one must notice that the enterprise in the dominant position cannot use any price to allow the third parties access to the essential facility found on its property, because it would commit another abuse of dominant position. But this price aspect is hard to quantify and regulate by the competition authorities, because there are no criteria regarding the amount of the technological advance comprised in the essential facility, which creates a legal uncertainty[26] with effects on the innovation determination on behalf of the essential facilities owners, these not being certain that they can benefit from the innovation effort.

Thus, to invest in an alternative product or service that is not profitable may be considered an economical obstruction, if the profitability is appreciated in the conditions thereof. In this sense, one may proceed arithmetically by establishing the development and functioning costs of an alternative product or service by an enterprise which cannot obtain profit from its economical activity. However, the problem of the economical obstruction is more subtle, because the economical obstruction makes that any investment in an alternative product or service to be an economical nonsense.

We deem that the difference depending on the nature of the obstructions must not be made absolute in the performed analysis, which is how the judges have proceeded in the aforementioned cases, where they gathered information and finally ruled only upon the economical obstruction, the other two not being defined. At the same time, we notice that the obstruction in the creation of an alternate product or service actually means barriers in entering on a market limited by the product or service protected by the intellectual property, owned by the enterprise in the monopole position. OCDE performed a synthesis on this problem[27] which defined the term of entry barrier pointing out that "the important thing in the actual cases is not to know whether an obstruction responds to the definition of the entry barrier like in other case, but to question oneself with regards to a pragmatic manner over the possibility, opportunity and measure in which an entry can intervene taking into account the actual situation of every business".

b. The risk of excluding the competition on the derived market

The main problem consists of distinctly identifying the two markets, the main one and the derived one, which, in the case of *IMS Health*[28], the court stated that "it is determinative to be able to identify two stages of different production, connected by the fact that the upstream product is an indispensable element for providing the downstream product", in other terms, one may identify an upstream input market. Such market can be but potential, "in the sense that the enterprise in the monopole position which operates in this market to not trade in an autonomous manner the inputs in this case, but to exploit them in an exclusive manner on a derived market, restraining or completely removing the competition on this secondary market".

Following these arguments, it appears that the enterprise in the dominant position operates on the main market, but not on the derived market. What happens when it operates on the derived market as well? Does the principle of essential infrastructure still apply?

In our opinion, the condition of the distinct markets is no longer complied with and thus, the principle cannot be invoked. Under this aspect, we deem the European case law confusing in the case of IMS where the supply is made on the same market of the product, but it is used as argument the obstruction of the new product protected by intellectual property rights.

c. The condition of the existence of the obstructions at the apparition of a new product

The condition was mentioned in the case of IMS, according to which "the enterprise requesting a license must not limit oneself to reproduce products or services which are already offered on the derived market by the owner of the intellectual property rights, but to intend to offer new products or services which the owner cannot offer and for which there a potential demand from the consumers". According to the formulation, the condition of the new product sets a double protection: of the interests of the owner of the intellectual property rights and of the interests of the consumers.

The novelty, by reference to the product already offered by the owner, implies the delimitation of the

[26] The legal uncertainty is a general principle of the European law established by the CJEC in the case of SNUFAP v. The High Authority CECA on March 22, 1961 and implies the expectancy of the rule and its stability. In this case, the uncertainty concerns the expectancy of the resources flow resulting from innovation.

[27] OCDE, The competition and the entry barriers, Synthesis, February 2007, available on http://www.oecd.org/.

[28] CJCE, April 29, 2004, C – 418/01.

notion. We deem that it means the existence of certain sufficient elements of particularity of the product already offered by the owner on the derived market. To impose the novelty seems to be a condition much too severe for the petitioner by reference to the novelty of the product covered by the intellectual property law. In reality, we deem that there is novelty when a consumer can find differences between this product and other competitors` products; to this it must also be added the potential character of the consumers` request which at the moment of requesting the access to the essential facility, they are not satisfied with the equivalent products already existing on the market.

The condition of the new product allows the attenuation of the problem of the particular merit acknowledged to the owner of the intellectual property rights to deny the access of third parties which only aim at proposing a product already offered by the owner. In case law and doctrine, the condition of the new product was deemed to materialize the idea of the competition on merits.

In the communication of the Commission regarding the application of art. 102 of TEEU[29] it has been set forth that: "according to the caselaw it is not illegal for an enterprise to occupy a dominant position and this enterprise may participate at the competition game through its merits". This is why it looks unjust that the creation effort supplied by an enterprise to obtain a place on the derived market to be reduced up to zero by obligations set in order to cede a license over its right, whereas the third party did not place any effort to obtain a place on the derived market. This is also the subject matter of art. 102 of TEEU which does not protect the less successful enterprises than the dominant enterprise.

As regards the novelty by reference to the consumer`s request, we deem that it has been pursued that this condition to remedy the appreciation difficulties regarding the novelty criterion, in the sense of appealing to a less subjective criterion and not connected to the owner and the competitors on the derived market, but which would allow the consumers to distinguish between the offered products and the ones already existing and to request them which leads to amelioration of the allocation of the possible resources.

The novelty criterion in the analysed context is different from the novelty which characterises the patented inventions, having distinctiveness in the competition law. Because the abusive refusal to license can only be applied in the derived products of the essential infrastructure, in this sense, in the case of IMS, it was estimated that "the refusal to license cannot be deemed abusive save for the case the enterprise which requested the license does not expect to limit only to substantially reproducing the goods and the services which are already offered on the derived market by the owner of the intellectual property rights, but also has the intention to produce goods or services with different characteristics which may compete with the goods or the services of the owner of the intellectual property rights and thus, to meet the specific needs of the consumers which are not satisfied with the existing goods and services". Therefore, the novelty cannot be assimilated to the absence of the ability to be replaceable in the sense of the competition law. If the new product cannot non-replaceable to the already offered product, there is no risk of competition between the rightful owner and the license petitioner. In the case of *Microsoft*[30], the Court insisted on the fact that the damage brought to the consumers is primary in order to characterise the obstruction of the apparition of a new product and consequently, it deemed the novelty condition needs to be appreciated, according to art. 82 paragraph 2, letter b of the EEU Treaty, according to which the practices consisting in the limitation of the markets production or the technical development causing damage to the consumers are abusive.

In other words, the condition of the new product is nothing but an element amongst all the others which should be viewed per ensemble.

3. The additional abusive behaviour as a condition of the remedy principle by compulsory licenses

According to the case law, the refusal to license is illegal only to the extent that is has an "additional abusive behaviour". In addition, the Court retained that allowing the compulsory license assumes in all cases the existence of *exceptional circumstances*.

The additional condition is justified because, on one hand, the dominant position is never illegal. Thus, even if the dominant position is based on intellectual property rights, the competition law cannot end this position by way of allowing compulsory licenses. On the other hand, a dominant enterprise`s denial to license an intellectual property right could not normally be an abuse because it would mean that the dominant enterprises be actually prevented from acquiring and exercising the intellectual property rights for their own use. However, it cannot be deemed as illegal the deed of a dominant enterprise that uses the owned intellectual property rights according to the purpose for which such were conceived.

Thus, a compulsory license can be requested only in certain circumstances, and a simple refusal to allow a license over an intellectual property right is not illegal based on art. 102. To support the contrary, it means to consolidate a rule which would contradict the concept of intellectual property, as well as the principle provided under art. 102 which states in all cases the existence of an abuse.

[29] JOCE No. C 45 du February 24, 2009, p. 7, point 1.
[30] TPICE, September 17, 2007, case *Microsoft Corp. c/ Commission*, Nr. T-201/04, *Rec.* p. II-3601, point 332.

Obtaining and exercising the intellectual property rights are deemed as pro-competition, even when the owners are dominant enterprises, because they will not be encouraged to obtain new patents, unless they are free to exercise the rights they own.

However, the case law does not explain "additional abusive" as well as the way it is accompanied by the refusal to contract. Save for the fact that a refusal to license cannot be itself an abuse, the case law does not offer a clear approach for any future cases. The Court simply resumes at offering a few examples of situations whose subject matter is "additional abusive behaviour". There are the typical situations of essential facilities found on two markets in which the dominant enterprise monopoles a clearly identifiable main market. There is also the example which was presented in the case of Magill, regarding the granting of television licenses, where the refusal to license prevents the consumers from a new type of product, which was not produced by the dominant company and for which there is a clear unsatisfied demand. In the decision in the case of *Microsoft*, the Court ruled that there might be a compulsory license in case the refusal would limit the technical development of the competitors, thus causing damages to the consumers. As a result of a lack of adequate explanations, it was deemed necessary to conceive an enumeration of all the circumstances which in courts` view have set exceptional circumstances. It appears that there is no clear rule.

It is obvious that the refusal to allow a license can be deemed illegal only to the extent that it is directly connected by an "additional abusive behaviour". An abuse that lacks any connection would affect the legality of the refusal to license. Based on art. 102 letter b, the additional abusive behaviour must imply a serious damage caused to the consumers and can also manifest outside the market to which the intellectual property right refers to.

As already explained, the characteristic of the essential facility is that when an abuse is identified, the remedy implies not only the cease of the abuse but also the compulsory access to that license. Therefore, automatically it must be a relation between the abuse and the compulsory access.

The relation between the refusal to license and the additional abusive behaviour, which makes the refusal to license illegal, must argue why a compulsory license is an adequate remedy for the additional behaviour.

Therefore, the connection is explained by the fact that the refusal makes the other behaviour possible, strengthens or aggravates its anti-competition and exploitation effects. Probably the connection is the fact that to simply end the other abuse does not suffice and would not be an efficient remedy. The compulsory license must be the adequate remedy for the additional abuse.

So, we are in the presence of an "additional abusive behaviour" if the dominant enterprise would refuse to license in other way than in anti-competition conditions (for example, save for the condition that the owner of the license not to challenge its intellectual property rights) or in exploitation conditions (for example, in case it would insist on royalty payment of the license owner`s rights or on excessive prices) or in the case it would refuse to license for an intellectual property right even if it would have committed to allow the license in view of a standard to which it agreed. A remedy at the market level by allowing a compulsory license seems more efficient and less bureaucratic than continuing the surveillance by a competition authority in order to ensure that the initial abuse would not repeat itself. Continuing the surveillance may though be necessary in cases of setting excessive and discriminating prices.

The behaviour or the additional element must be a behaviour forbidden by art. 102 of TEEU. Practically, the dominant enterprise must commit deeds or cause effects among the ones punishable by art. 102. Otherwise it would be in the presence of a normal result of the exercise of the intellectual property right on the market. The additional element cannot simply be an economical monopole, because such is, at least temporary, many times, the result of the application of an intellectual property right. The behaviour must bring an anti-competition effect which would cause damages to the consumers.

All the elements that prove the simple dominant position cannot constitute the condition of "additional abusive behaviour". However, the behaviour, and not the market situation, constitutes an abuse. The characteristics of the market determined by the legal monopole conferred by the intellectual property right, may lead, temporary or permanently, to an economical monopole, may explain the dominant position, but they cannot constitute an abuse. Thus, the fact that simple intellectual property right represents an unique source difficult to duplicate or "reinvent", very valuable, does not equivalates to an "abusive behaviour", characteristics which generate a considerable competition advantage.

The case of Bronner is an important case for the "essential facilities", especially due to the general attorney`s opinion, although the intellectual property is not the subject matter. A newspaper editor who had the only home delivery service in Austria refused to offer home delivery services of a competitor newspaper. The Court said that the refusal would be illegal only if it would eliminate the entire competition by the petitioner, without objective justification, and if the service would be indispensable because there would not be a real or potential replacement. But there were alternatives to home delivery and it was possible to develop a competitor system of home delivery. There was no prove that it would be non-economical for the competitors, acting together if it would be necessary, to create the second home delivery system with a coverage similar to the existing one.

For example, in the case of *Volvo vs. Veng* and *CfCRA vs. Renault* the Court stated that the freedom of an intellectual property right to refuse to license is the core of its right and that the refusal to license cannot be contrary to art. 102. The Court retained that "one must note the fact that exercising an exclusive right by the owner of a registered draw or a model as regards the car body board can be forbidden by art. 82 [art. 102 of TEEU] if such implies, from a dominant position enterprise, certain abusive behaviours, such as the abusive refusal to supply with spare parts to the independent repairers, establishing inequitable prices for the spare parts or the decision to cease the production of spare parts for a certain model, even if many cars of such model are still in circulation, provided that such behaviour would affect the trade changes between the member states".

In this case, the general attorney argued that the refusal to license might be illegal should the excessive prices be combined, which is contrary to art. 102 paragraph a of TEEU. In the conventional theory regarding the compulsory granting of licenses, as an aspect of the right to essential facilities, this commentary would be hard to digest, because the excessive prices have nothing to do with the essential facilities. Also, the excessive prices for the products intended for the dominant market would constitute an abuse for the same market for which the compulsory license was granted. It had always retained that in the cases of essential facilities there must always be two markets. If there would not be two markets, the dominant company would be compelled to share the competitive advantage with a direct competitor.

Thus, the case *Volvo vs. Veng* suggest a principle that applies to the exploitation abuses, more specifically if an identifiable abuse was committed, the compulsory access by way of license would be an efficient and adequate remedy.

In the case of Microsoft, the Court retained that the additional abuse must not necessarily prevent the development of a new product for which there is a clear and unsatisfied demand. The abuse might "limit the technical development" of a competitor according to art. 102 paragraph b of TEEU, if the damage caused to the consumers is obvious enough. This finding is important because it complements one of the omissions of the conventional law over the "additional abusive behaviour". This consolidates the theory pursuant to which the additional abusive behaviour can be any kind of abuse forbidden by art. 102 of TEEU. In addition, it becomes clear that at. 102, paragraph b of the TEEU offers a comprising and clear definition of the exclusion abuse, which is necessary for the judicial security.

In the case of *IGR Stereo Television*[31], IGR, a group owned by all German manufacturers of television equipments, was also the owner of certain patents for stereo receivers necessary to equipping the German televisions with stereo reception systems. They unified their patents for a stereo television system and the German authorities approved their system. IGR licensed only its own members, establishing that licensing other traders would occur subsequently and only in limited quantities. The patent was used to stop the distribution by Salora, a Finnish company of stereo television in Germany. The Commission appreciated that the intellectual property right does not justify the refusal to license. The case is not well known, but it is important because it shows that in case of agreements to share technologies, each party can have a legal obligation to grant licenses to third parties.

FGR Stereo v. Salora is, consequently, an important precedent in cases in which companies agreed to set a standard, based on the fact that the licenses for certain patents can be essential to allow the use of the standards as well as in cases of patents clusters and participative associations.

Thus, the condition of the existence of the "additional abusive behaviour" must refer to an abuse according to the provisions of art.102 of TEEU instead of the simple exercise of the intellectual property rights, even if there are prejudices caused to consumers, makes a clear interpretation.

If there would be a duty to contract, even if there were no abuses committed, simply to create a bigger competition, this would represent a regulation rule, which does not comply with the principles of the competition law. All cases of essential facilities implied identifiable abuses. In case the abuse is discriminatory, the obligation to contract in non-discriminatory conditions is clearly the adequate remedy. In case there is a refusal to contract for the first time, the abuse must consolidate the dominant position or to disadvantage the competitors in a new way. In these situations, a prejudice caused to the consumers would result from the refusal to contract, and the refusal would limit the production, commercialization or technical development of the competitor or the newcomers. In each of these cases, the obligation to contract may clearly be the adequate remedy.

In conclusion, the principle of essential facility is in fact a remedy principle. We have not identified clues out of which to result that the case-law of the Union`s courts suggests that the Union`s law would impose, in accordance to art. 102 of TEEU, an obligation to allow access to a facility, simply because it is essential. This fact is contrary to the principles according to which a dominant position is not illegal and that it will not apply a remedy if an abuse was not committed.

[31] The Commission, Report XI on the Competition Policy, 1982, p. 63.

4. Arguments pro and con to the theory of essential facilities

The demarcation line between the inherent and extrinsic limits of protection, between keeping the functionality of the industrial property system and the salvation of the free competition, between the protected technology and the replacement technology becomes more fine because it is the intellectual property right itself which provides rules by opening the protection system through exclusive rights to a real competition between the dependent complementary technologies towards the intra-technological competition. Such device of inherent limits favouring the intra-technological competition should be efficient if the exclusive right does not degenerate in a very broad monopole right in order to be individually exploited by a single enterprise.

Normally it is about saving the possibility of the development of secondary markets, the diversification of protected products based on products that are dependent partially, technically and economically on the firsts. In the end, the problem that the law seeks a solution to is similar to the one subsidiary to the rules defining the patented invention in front of the exclusion of very wide real knowledge in order to be *internalized* in an useful way through an exclusive right granted to a single owner such as findings, scientific theories or mathematics methods, etc. The provisions of art. 52 para. 2 letter a and c of the CBE does not aim only to maintain the public domain of knowledge but also to avoid the appropriation of knowledge whose application is very wide and unpredictable to be usefully entrusted to an individual and exclusive exploitation. The theory emphasized the very broad blocking effect that a patent produces on discoveries, scientific theories, mathematical methods or plans and principles of intellectual activities and on the other hand the transaction costs required for operating a very wide exclusivity.

The case law in the matter of competition law sentences an enterprise which owns an exclusive right and dominates a market to license the third parties who want to create new products, dependent on a protected product on a derived market where the dominant enterprise has no firm objectives but where there is a certain or probable demand[32]. These solutions are much commentated and do not need further explanations[33].

One recalls that competition law cannot intervene if its particular application criteria are met, namely the existence of a dominant position in the market and the fact of abuse characterized by the use of an invention for which there is an actual or real potential demand on a neighboring market and the dominant enterprise refrains itself to satisfy without valid justification. The crucial problem of this case-law is not that it does not allow third parties to penetrate the exclusive right by a license application which the owner will not refuse without abuse. Consequently these licenses will not allow them to make direct intra-technological competition to the dominant enterprise, but only to serve or develop secondary markets for complementary or substitution derivatives thus to enter into a barriers and technological diversification competition.

Often the problem is better to grasp and define the nature and importance of the knowledge to which access must be granted in order to maintain effective competition through merit, in every market. Consequently, the only fact, although the owner of the information did not disclose it, concerning its person, its enterprise and its business has by definition a factual or legal monopole on such information without this meaning that there is a dominant position on the market information. Such an approach would deny *a priori* any possibility of competition for obtaining the concerned information. Therefore, the information must have particular qualities and in any case we must preserve the assimilation in Magill case law to an essential facilities theory. The dangers related to the investments uncertainty or sub-remunerations, innovative inputs also reduce the risks of innovation require an approach and focuses on specific restrictions on competition rather than a statutory approach as found in the essential facilities theory.

In the field of intellectual property, the theory of essential facilities should be used with reluctance, as did the US competition authorities, considering that as a brake on development.

However, a compulsory license is not in complete contradiction with the intellectual property protection because it also causes an innovation effort to overcome competitors amid the dissemination of knowledge in the technical field.

Therefore, a policy of compulsory license is a compromise between the interests of innovators and society as a whole.

Such compulsory licensing implied the issue of the prevalence of competition law on intellectual property law, with major consequence of legal uncertainty given the unfounded access requests of the opportunistic enterprises and damage innovation. More surprising is that such a theory was taken over in European law after the American Supreme Court has abandoned it.

According to the American case law[34], the concept of essential facility designates an indispensable resource owned by an innovating

[32] CJEC of October 5, 1988, Case no. 238/87, *Volvo/Veng*, Rec. 1988, 6211, p. 9; *idem* October 5, 1988, Case no 53/87, *CICRA/Renault*, Rec. 1988, 6039, p. 16; CJEC of April 6 1995, Case no C-241/91 P si C-242/91 P, RTE and ITV *Publications/Commission*, Rec. 1995 I 743, p. 48 and the subs.; TPI of September 17, 2007, Case no. T-201/04, *Microsoft/Commission*, Rec. 2007 II p. 621

[33] Microsoft Decision: abuse of dominant position, refusal to license TPI of September 17, 2007, Case no. T-201/04, *Microsoft/Commission*, Rec. 2007 II, p. 621, 637.

[34] Case *United States v. Terminal Railroad Assn. of St. Louis*, 224 U.S. 383.

company that would allow competitors to carry out their activity on the relevant market, but it is impossible to be acquired by reasonable means (financial, technical and temporal). If the court reaches such a conclusion, it can force the holder of the facility to open their access under reasonable conditions, so to ensure the competition.

In Europe, the competition policies applied the theory of essential facility to the intellectual property rights in a much broader way, on the idea that the inventor has a competitive advantage vis-a-vis the subsequent enterprises, requiring arbitration. Yet, a compulsory license in profit competitors may compromise innovation.

The European case law has applied the theory of essential facilities by dragging from physical infrastructure to intangible assets, when the US Supreme Court reiterated its rejection of the theory. The two opposing views exist because there are different views on competition, as one gives importance to the market structure or the analysis of innovation concerns. The European vision admitted the obtaining of a forced access to an intangible asset, owned by a dominant enterprise in the form of compulsory licenses, which caused the competition law to prevail on intellectual property rights. It was considered that [35] the application of the theory of essential facility to intangible assets creates a climate of legal uncertainty regarding the possibility of opportunistic enterprises to have unfounded access to such structures which affects the companies` innovation concerns.

The theory of essential facilities, by its logic, is not irreconcilable with the essence of intellectual property, since it aims to impose mandatory sharing and forced contract, while the main objectives of intellectual property rights aim to provide exclusivity to its owner. The theory of essential facility, allowing limitation up to suppression of the intellectual property right owner to prohibit the exploitation of its right by third parties, allows this way for the idea that the refusal itself to license constitutes an abuse of a dominant position to be validated. Moreover, the exclusive right of exploitation is reduced to a mere right to be paid.

Another negative effect of the application of the theory of essential facilities to intellectual property rights is represented by the diminishing of the concerns to create, to innovate. To this it is added the uncertainty of the conditions for the application of essential theories for a very wide interpretation made by the European Commission and Court of First Instance of the European Union, as was done in the Microsoft case where the CFI considered that the risk is simple enough to be considered competition is exclusive. Finally, this theory has as negative effect the practical difficulties of setting the price of access to resource.

This theory comes to accentuate the current phenomenon of regulation of the intellectual property law by competition law, which has not happened in the past, with the consequence of increased legal uncertainty for the creator, creation of killer patent portfolios, scientific incompetence of competition authorities, etc.

Opposite to the analyzed case-law trends, we notice that the intellectual property and the competition are not absolutely incompatible as long as the intellectual property does not degenerate into abuse or abusive monopole.

We consider that both the legislator as well as the courts must turn their attention to the notions of *abuse* and *unfair monopole* and ensure regulations or interpretations that are consistent with the theory of abuse of rights, but also excluding the possibility that the enterprises less inventive to call upon vexatious measures.

All that implies a right implies the possibility of misuse and the abuse must be excluded in order to allow the coexistence of rights.

We believe that intellectual property is a two-edged weapon: it stimulates the innovation by protecting a monopole, but also blocks access to goods under monopole, goods which may be necessary to produce other goods needed in the market.

In other words, the monopole may have the effect of preventing third parties to innovate. It is a movement that creates a vicious cycle which imposes a regulation of intellectual property in a new way to overcome these drawbacks.

This way we wish to say that it would wrongly blame the competition law which sought a solution to prevent abuse of rights in case of monopole caused by intellectual property and which is only a palliative in waiting for a regulation of the intellectual property law and that's why competition law intervention should be limited to exceptional circumstances.

We believe that competition law is best to a quality innovation stimulation that will positively be passed on to the consumer.

The technical compulsory license can bring a balance within the intellectual property law by reference to competition law, although it constitutes a limitation of the intellectual property law, the introduction of compulsory license has the effect of producing an incentive to innovation that would allow innovators to remunerate their investments and ultimately, to encourage the dissemination of knowledge within the company. The legal license is considered as having a high degree of difficulty in terms of setting the tariff access to essential facility. Therefore, a rigorous theoretical framework in which the legal uncertainty generated by limiting intellectual property rights to be reviewed is necessary for an optimum dosage of legal and judicial measures.

[35] Frédéric Marty, Julien Pillot, *Politiques de concurrence et droits de propriété intellectuelle: La théorie des facilités essentielles en débat, disponibil pe : http://www.gredeg.cnrs.fr/working-papers/WP-anciens/Old/Intangibles_facilites_essentielles_contentieux_concurrenti els.pdf*

In conclusion, three fundamental principles must prevail in the case of essential facilities theory[36]:

– the obligation of the owners of an essential resource to share its use with third parties should only be exceptional especially when the monopole comes as an innovation effort of its owner;

– the irresistible need of third parties to use that resource and the fact that they do not seek merely to share the monopole rent to be proved;

– the refusal to license a third party shall not itself be deemed illegal and should not be condemned save for proving the abuse of dominant position of the monopole holder to remove the competitors from the market.

5. Granting licenses in other cases of abuse

The principle of remedy is not limited to any particular type of abuse. Apart from cases of suppression of a new and desirable type of product, a compulsory license could be an adequate remedy for establishing excessive prices, contrary to art. 102 lit. a, as suggested by the Court, and of course in cases of discrimination. As already mentioned, compulsory licenses would be appropriate where the company has committed itself to grant licenses to a standard. Where a dominant enterprise makes two products that must work together, it may be required to be licensed all intellectual property rights involved in the interface that make them work together, so as to allow competitors to make each product compatible with the other (but not to copy any of the products). This would be a natural part of a judicial remedy in a case of "binding", under art. 102 lit. d or in a case of "grouping". In a case of fraud or "patent thicket" (the deliberate multiplication of questionable patents in order to obstruct competitors), a compulsory licensing for all patents may be the only effective remedy. Where a dominant enterprise acquires unduly intellectual property rights, it may be requested to license third parties. In addition, if an intellectual property right has been used to complement or enhance an exclusionary abuse committed in another way, the right cannot be used to obtain unlawful indirect result.

It is well established in European competition law that a behavior which in isolation could be legal, it can be illegal if combined with illegal behavior in one strategy of exclusion. However, in cases where the abuse is the monopolization of a second market, the essence of the abuse is blocking the current competition and where there is competition to be blocked, there is normally no abuse. Intellectual property rights provide even to a dominant enterprise the right to refuse to open a market for its competitors.

The theory of remedy also clarifies in a useful way, the issue of imposing compulsory license indecisions on interim measures. In accordance with the established practices, the provisional measures should be taken to maintain or restore a situation as it was before the alleged abuse to occur. According to the theory of remedy, the abuse should not be a refusal to grant licenses, but another type of behavior. The provisional measures, if they were justified, would be necessary to restore the situation as it was before starting that other behavior. If no license was given or promised, then no license should be decided by way of interim measures. This means that interim measures should not be imposed in cases where abuse prevents the development of a new type of product for which there is a clear and unsatisfied demand because, by definition, a license in this case would change the previous situation. But provisional measures would constitute as appropriate action if a dominant company would obstruct or reduce existing competition, where the other conditions for interim measures were complied with. Therefore, the theory of remedy explains and confirms the view of the President of the Court of First Instance, that 'the Commission would not normally have to decide to grant a compulsory license in an interim measures decision. However, if it would be appropriate that by interim measures to end obstruction or handicap competition created by the alleged abuse, the fact that they could be removed only if permitted licensing of intellectual property rights, it should be allowed this to make the provisional measures ineffective.

It should be recognized that it would be difficult to use a compulsory license as a remedy in cases of excessive pricing under art. 102 lit. a. The essential difficulty is to establish appropriate royalty rate. It must be small enough to allow licensees to sell the product or service at a lower price than the dominant enterprise, and not just to be on the "price umbrella" safe of the dominant company in order to share his excessive prices.

Art. 40 para. 1 of the TRIPS Agreement recognizes that the practice or concession conditions in licensing of intellectual property law that restricts competition may have adverse effects on trade and hinder the transfer and dissemination of technology can be regarded as illegal. The agreement recognizes the compulsory licensing scheme granted by public authorities concerning a patent in exchange of an adequate remuneration of internal law and provides a procedure preceding the grant of a compulsory license agreements, measures which aim to prevent such licenses relating to the hindered competition.

[36] Areeda Ph. (1988), *Essential facilities: an epithet in need of limiting principles, Antitrust Law Eview*, vol. 58.

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THE NOTORIOUS, REPUTED AND FAMOUS TRADEMARKS

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Abstract

The owner of a trademark that has a reputation in Romania or in the European Union may request to court to forbid the infringer from using, without its consent, a sign identical or similar to its trademark, but for products or services different from those which are sold or provided under said trademark. According to Law no. 84/1998, the notorious (well-known) trademark is the trademark which does not necessarily have to be registered under the Trademark law protection. The Romanian doctrine sustains that famous trademarks do exist.

In this paper, we shall attempt to find (if it really does exist) the difference between notorious (well-known), reputed and famous trademarks, the criteria by means of which these trademarks shall be distinguished and the evidence by means of which the notoriety, reputation or fame of a trademark may be argued. We shall also present the legal regime and our analysis will be based on the Trademark law, doctrine and case-law studies.

Keywords: *notorious (well-known) trademarks, reputed trademarks, famous trademarks, likelihood of confusion, likelihood of association.*

1. Introduction

The Romanian literature speaks of notorious trademarks, reputed trademarks, famous trademarks[1] (or of the highest repute[2]), as categories of distinctive signs of commerce benefiting from different legal regimes. Different and somehow preferential, given the fact that, in order to benefit from legal protection, distinctive trademarks must usually be recorded, and thus must pass through the OSIM (*State Office for Inventions and Trademarks*) filter.

But do these types of trademarks really exist or are they just a creation of doctrine? How could they be defined and what differentiates them? What is the legal status they enjoy and what are their means of protection?

Hugo Boss, Versace, Kalvin Klein, Knorr, Lavazza are unregistered trademarks in Romania, which the Romanian law protects. Are they notorious trademarks, reputed trademarks or famous trademarks? What is their legal regime and how can they be protected against usurpers?

These are the questions we aim to answer further below.

2. Are there really famous and reputed trademarks?

According to Law no. 84/1998 (hereinafter referred to as the Trademark Law), the **notorious trademark** is the *widely known trademark in Romania, by the audience segment targeted by the products or services to which it applies, without the need for the trademark registration or use in Romania in order to be opposed* (art. 3 letter d)). The law also reminds the notorious trademarks when listing and defining *the previous trademarks* as the *trademarks that, at the date of filling the application for registration or, where appropriate, at the date of the claimed priority, are notorious in Romania in the meaning of art. 6bis of the Paris Convention for the Protection of Industrial Property* (art.6, para. (2) letter f), and also when listing the criteria according to which the notoriety of a trademark is examined (art.24 para. (1)).

The Regulation for implementing the Trademark Law provides rules for determining and proving the notoriety in art. 19, these being the sole provisions from this legal act that address the notorious trademarks.

However, the Paris Convention admits the existence and the need to provide protection for notorious trademarks, under art. 6bis which provides that the *EU countries undertake, either ex officio if their legislation allows it or at the request of the interested party, to refuse or cancel the registration and to forbid the use of a manufacturer trademark or a commercial trademark that constitutes a reproduction, imitation or translation, capable of creating confusion, **of a trademark that the competent authority, from the country of registration or use, will rule that said trademark is notoriously known as the trademark of a person entitled to benefit from this Convention and as being used for identical or similar products**. The same procedure shall be followed when the essential part of the trademark constitutes a reproduction of any such notorious trademark or when an imitation may be confused with it*.

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[1] Viorel Roş, Octavia Spineanu-Matei, *Dragoş Bogdan, Dreptul proprietăţii intelectuale. Dreptul proprietăţii industriale. Mărcile şi indicaţiile geografice* (Bucharest: All Beck, 2003), 100-112.

[2] Yolanda Eminescu, *Regimul juridic al mărcilor* (Bucharest: Lumina Lex, 1996), 83-85.

Concerning the **reputed trademark**, the Trademark Law neither defines it nor mentions it in any way, but it does speak of the registered trademarks reputation, namely of trademarks which "have a reputation", of "the Community trademark reputation" and the "previous trademark reputation" (art. 6 para. (3) and (4) letter a), art. 36 para. (2) letter c), art. 90 para. (2) letter c)). The published literature[3], however, defined reputed trademark as being the "*trademark known by a significant part of the audience targeted by the products and services for which the trademark is registered*", according to the same authors "a significant part of the audience targeted", meaning something more than insignificant, but less than a "widely known trademark", such as the notorious trademark.

Not only is **the famous trademark** not defined, but it is not even mentioned in any way by either the Law or the Paris Convention. It is, however, accepted by the doctrine, according to the French model, as the trademark "*known by most of the general public, not only in France, but abroad as well and which acquired autonomous value, independent of the product or service which it usually designates"*[4].

It was also said that the famous trademark (or of the highest repute) would be the one that gained world fame and this feature would justify the need to be protected, including when an identical or similar sign would be registered for different products or services.[5]

In our opinion, neither the reputed trademark nor the famous trademark have any independent existence; therefore we cannot classify the trademarks (depending on the degree of distinctiveness) in notorious, reputed and famous trademarks.

We shall present below the arguments regarding the inexistence of the reputed trademark as a stand-alone trademark.

Rigorously analysing the provisions of art. 6 para. (3) and (4) and art. 36 para. (2) letter c), we shall notice that **the Romanian Trademark Law neither establishes, nor protects the "reputed trademark", but establishes and protects the *reputation* of the registered trademark, whether it is notorious or not,** as an attribute, a quality, a feature gained through usage and recognition by the audience targeted by the products and services the trademark designates and which distinguishes it from other trademarks.

The law claims that a trademark is refused upon registration or, if registered, is liable to be cancelled if it is identical or similar to *a previous Community trademark* (art. 6 para. (3)) or to *a previous trademark registered in Romania* (art. 6 para. (4)) and if it is intended for products or services which are not similar to those for which the previous mark was registered, when the previous Community trademark/previous trademark registered in Romania enjoys a reputation in the European Union/in Romania and if:

- in the case of the previous Community trademark, **an unfair advantage were obtained from the *distinctive character* or *the reputation* of the Community trademark**, from the subsequent trademark use.

- in the case of the previous trademark registered in Romania, **an unfair advantage were obtained from the *distinctive character* or *the reputation* of the previous trademark** or **if the use were *detrimental for the distinctive character* or *for the reputation of the previous trademark***, from the subsequent trademark use.

In relation to the provisions mentioned above, it should be taken into consideration that, according to art. 6 para. (2) letter f), earlier trademarks are trademarks that, on the date of submitting the application for registration or, where appropriate, on the date of the claimed priority, are notorious in Romania, in the meaning of art. 6bis of the Paris Convention.

Also, art. 36 of the Trademark Law, governing the counterfeiting action, entitles the trademark owner to ask the competent court to prohibit third parties from using, in their commercial activities, without its consent, a sign that is identical or similar to the trademark, for products or services different from those for which the trademark is registered, when the latter **has acquired *a reputation* in Romania and if the unlawful usage of the sign were detrimental to the distinctive character of the trademark or *detrimental to its reputation*** (para. (2) letter c)).

In conjunction with the legal texts mentioned, we may conclude that the Trademark Law provides protection for the reputation of a trademark, whether it is a notorious trademark in Romania, a Community trademark, a registered trademark in Romania or a different previous trademark, among those provided for by art. 6 para. (2) of the Law.

The Law does not protect the "reputed trademark" as a trademark different from the notorious trademark, but recognizes and protects the reputation of the trademarks, when appropriate, including **the reputation of notorious trademarks**! (and this fact results from art. 6 para. (4) letter a), in relation to art. 6 para. (2) letter f)).

Regarding famous trademarks, this cannot exist as a trademark different from the reputed trademark, as it is not legally regulated under national or conventional law (namely by the Paris Convention for the protection of industrial property and by the TRIPS Agreement).

Secondly, from a semantic point of view, there is no difference between famous and notorious; on the contrary, the two adjectives are synonyms: according

[3] Viorel Roş, Octavia Spineanu-Matei, Dragoş Bogdan, *op. cit.*, 112.

[4] A. Bertrand, *La propriété intellectuelle. Livre II. Marques et brevets. Dessins et modèles*, (Paris: Delmas, 1995) apud. Viorel Roş, Octavia Spineanu-Matei, Dragoş Bogdan, *op. cit.*, 107.

[5] Yolanda Eminescu, *op. cit.*, 84.

to the Explanatory Dictionary of the Romanian Language, "**famous**" means *renowned, famed, illustrious*, while "**reputed**" ("of repute") means *famous, famed, renowned, glorious, illustrious*.

Thirdly, but perhaps the most important part, since the jurisprudence did not feel the need to recognize a third category of trademarks, alongside the notorious trademark and the reputed trademark, we may admit that only a false need may boost the recognition and protection of the famous trademarks *per se*.

In conclusion, for the reasons set out above, the famous trademark is a doctrinal creation[6], whose existence, if accepted, would be ineffective because such a category of trademarks would not find applicability in practice.

Therefore, our opinion remain that there are no notorious, reputed or famous trademarks as trademarks with a different legal regime; however, notorious trademarks exist, as they are recognized by national and conventional law. There are no reputed trademarks, but the "of repute" concept does exist and the Romanian Law makes available, to the trademarks owners, means of protection for these trademarks. There are no stand-alone famous trademarks; the concept of "famous trademark", should we admit its existence, it is at most a synonym for the notorious trademark.

3. The legal regime of the notorious trademark.

In essence, the notorious trademark is a trademark with a distinctive power, superior to other registered or unregistered trademarks. This is due to the fact that the notorious trademark is the trademark widely known, in Romania, by the audience targeted by the products and/or services to which it is applied/ which it designates.

For that matter, the published literature admits that the notoriety is a way of acquiring the exclusive right of a trademark, in relation with the fact that "the notoriety of the sign chosen as a trademark has the same effects as its registration: the trademark owner is protected in terms of the use and registration of said sign by other parties"[7].

Concerning its provisions, the Law grants unlimited protection to the notorious trademark, as **even a holder of an unused trademark on the Romanian territory** may subject to national courts an action for annulment or an infringement action against the person who takes over its trademark or may oppose the registration of such trademark to the State Office of Inventions and Trademarks. However, notoriety must be proved according to the criteria and methods set out by the Trademark Law and its Implementing Regulation, namely: the notorious trademark degree of distinctiveness (initial or acquired) in Romania; the notorious trademark duration and extent of use in Romania in relation to the products and services for which a trademark is sought to be registered (if the notorious trademark is used in Romania); the notorious trademark duration and extent of advertising in Romania: the notorious trademark geographical area of use in Romania (only if the trademark is used in our country); the degree of knowledge of the notorious trademark on the Romanian market, of the targeted audience segment; existence of identical or similar trademarks for similar or identical products or services, belonging to someone other than the person who pretends that its trademark is notorious (art. 24 para. (1) from the Law).

The trademark notoriety must be proved by its owner, by any evidence, as "acts" may be presented (art. 19 para. (6) of the Trademark Law Implementing Regulation) such as those concerning the marketing/sale of products or services under the known notorious trademark, the import or export of the products on which the notorious trademark is applied, the advertising of products and services under notorious trademark known in Romania.

However, in order to establish that a trademark is notorious, it should be well-known, on Romanian territory, by the Romanian audience segment towards targeted by the products and services for which the trademark is used (art. 19 para. (1) of the Trademark Law Implementing Regulation). The quoted legal text provides for two *sine qua non* conditions ruling the trademark notoriety, conditions that have as reference elements the Romanian territory and the Romanian audience segment targeted by products or services. According to the law, the good or less good knowledge of the trademark is examined in relation to these elements.

The notorious trademarks are recognized by both the Paris Convention (as revised in Hague in 1925) and the TRIPS Agreement. The Paris Convention enforces the Paris Union members (among which Romania as well) to refuse, ex officio or upon request, the registration or to prohibition on using a trademark which constitutes a reproduction, imitation or translation of a trademark which *"the competent authority of the country of registration or use shall consider to be notoriously known as already being the trademark of a person entitled to benefit from this Convention and as being used for identical or similar products"*, the same being true where the essential part of a trademark constitutes "a reproduction of a notoriously known trademark or an imitation that may be confused with it" – art. 6bis.

Given the context, it should be noted that the Romanian translation of the Paris Convention (under Decree no. 1177/1968) is slightly unfortunate and likely to lead to "confusions", given that the terms "well-known" and "noitoirement connues" from

[6] Andre Bertrand, G.H. Bodenhausen and Yves Saint-Gal are among foreign authors that admit the existence of the famous trademark.
[7] Viorel Roș, Octavia Spineanu-Matei, Dragoș Bogdan, *op. cit.*, 103.

English and French were translated into Romanian as "notoriously known", although the correct translation would have been "notorious".

According to art. 16 item 3 of the TRIPS Agreement, with respect to art. 6bis of the Paris Convention, the notorious trademark shall also be protected against identical or similar signs which will be registered for products or services different from those designated by the "**registered trademark**". The published literature granted, to the quoted text, an interpretation according to which the protection imposed on notorious trademarks by means of art. 6bis of the Paris Convention is also extended to the products or services that are different from those sold under the notorious trademark, conditional on the **prejudice of the trademark owner interests**, as well as the **registration of the notorious trademark**: "*TRIPS expands the protection area for the notorious trademark, including products and services that are not identical or similar (...); however, the protection shall be extended only for registered notorious trademarks, and not for unregistered notorious trademarks as well. However, TRIPS does not intend to amend the Paris Convention and dispose of the registration of notorious trademarks in all cases"*[8].

4. Civil law means for protecting the notorious trademark

As with other trademarks, notorious trademarks may be protected by owners either under the administrative proceeding, by introducing opposition proceedings (under art. 19 in conjunction with art. 6 and with reference to art. 24 of the Law), or during legal proceedings, the notorious trademark right owner having available, where appropriate, the action of infringement, annulment or unfair competition (as regulated in art. 36 of the Law).

If the action of annulment seeks the annulment of a registered trademark which conflicts with the notorious trademark, the action of infringement tends to force the usurpers to stop using signs meant to cause damage to the notorious trademark right owner and to pay compensation for damages caused.

The action of infringement may also be used by the notorious trademark right owner for defending the reputation of its trademark.

According to art. 36 para. (2) letter c), when a sign identical or similar to a trademark is used for products or services different from those for which the notorious trademark is registered, its owner may bring an action of infringement, if the unlawful use of the sign is meant to cause damage to the trademark reputation. The action is also brought against a notorious trademark owner, under the condition that said trademark had been registered.

The published literature states that the extension of trademark protection (notorious or not) on products and services different from those for which the trademark was registered constitutes an attenuation of (and not a derogation from) the effects of the trademark specialty rule. [9]

By comparison to the provisions of the Trademark Law analysed above and in relation to the fact that both a registered trademark and a notorious trademark (registered or not) may gain a reputation, we believe that the owner of a trademark with a reputation may bring, if necessary, an action for the acknowledgement of the trademark reputation.

At the same time, we believe that the existence or inexistence of the trademark reputation shall be proved within the action for the reputation acknowledgment, taking into account the criteria for examining the notoriety, as defined and provided for in art. 24 para. (1) of the Law and art. 19 of the Regulation.

3. Conclusions

Neither the provisions of Law no. 84/1998 on trademarks and geographical indications, nor the Paris Convention, nor the TRIPS Agreement do not allow us to classify the trademarks based on their degree of distinctiveness, in notorious trademarks, famous trademarks and reputed trademarks. As stated from the interpretation of the legal provisions, if the recognition and existence of the notorious trademark is certain, the other two categories do not exist.

In reality, the Law, by recognizing the reputation of a trademark, does not protect the concept of "reputed trademark", but the trademark reputation itself, reputation that may coexist with a notorious trademark, registered or unregistered, and also with a registered trademark, according to common-law. However, what must be remembered is the fact that, in order to have its reputation protected, the notorious trademark must be registered.

However, an interesting problem is the fact that any person that registers a trademark wishes for the sign thus registered to gain reputation among the audience segment targeted by the products or services it designates.

However, if it does not gain reputation, does the trademark still perform its function of differentiating the products and services and of indicating their origin? May we claim, concerning such a trademark, that it lacks distinctiveness? In essence, could a trademark without reputation be cancelled? What is the boundary between the reputation and distinctiveness required both at the time of submitting the application for the registration and for its survival in the commerce? The answers to these questions,

[8] Viorel Roș, Octavia Spineanu Matei, Dragoș Bogdan, *op. cit.*, 103.

[9] Jérôme Passa, *Droit de la propriété industrielle* (Paris: L.G.D.J, 2009), 175. The rule „attenuation" takes place only for the trademark reputation protection.

which are interesting, exciting and with practical applicability, shall represent the subject of future endeavours.

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PUBLIC DOMAIN PROTECTION. USES AND REUSES OF PUBLIC DOMAIN WORKS

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Abstract

This study tries to highlight the necessity of an awareness of the right of access to the public domain, particularly using the example of works whose protection period has expired, as well as the ones which the law considers to be excluded from protection. Such works are used not only by large libraries from around the world, but also by rights holders, via different means of use, including incorporations into original works or adaptations. However, the reuse that follows these uses often only remains at the level of concept, as the notion of the public's right of access to public domain works is not substantiated, nor is the notion of the correct or legal use of such works.

Keywords: *copyright, public domain, exceptions and limitations, innovation, right of access, technological means of protection, TPM, protection system, access to culture, copy control mechanism, Circumvention of TPMs.*

1. Public domain protection?

I mentioned a so-called "protection" of the public domain and it might seem inappropriate that I talk about the protection of a sector that includes works that are meant to be used freely, meaning unprotectable, whose main characteristic is that they can be used in any way without the consent of the author/proprietor, and without payment of any fee.

But the free use must not be confused with the right of ownership. Large defined the public domain as being "a place of sanctuary for individual creative expression, a sanctuary conferring affirmative protection against forces of private appropriation that threatened such expression."[1]

Public domain works can be used in any way, it's true, can suffer any form of transformation, adaptation, remixing, incorporations of any kind, but none of these forms should lead to a way of appropriation of the public domain work, damaging other users or in the detriment of other types of uses. It's true that a new work is created, with patrimonial and moral rights that are distinct from the ones held by the original work. But all of these new rights can be exercised only as far as the new contribution is concerned, this original component being different from the one which belongs to public domain.

Because there won't always be a clear demarcation between the two types of works, or rather between the public domain work and the added value of the new contribution, there are cases in which the proprietors of the new work have tried to exercise their exclusive exploitation rights over the work as a whole, including over the public domain component, forbidding any form of usage. These uses are completely inappropriate and disadvantageous for society, because it can be deprived of exercising the right of access to the public domain work.

Mostly, everything starts from a misperception of what a "public domain work" means. The majority of people thinks that it's an abandoned material, when, in fact, it's a material that belongs to everyone, meaning a material upon which we all have rights and the protection that is mentioned in the title refers exactly to this aspect, namely the protection of the rights that every person holds over public domain materials, rights that need to be protected in the same way that regular works are protected by copyright.

The most discussed case of private appropriation is that of Disney Enterprises, Inc., a producer who, following the exhaustion of the exploitation rights in its 1938's adaptation, started a series of trademark registrations of several character names such as "Snow White" who, before belonging to its film adaptation, belonged to a story that was part of the public domain ("Snow White" - as part of the Brothers Grimm anthology). Actually, the replacement of a determined and limited in time form of protection is being attempted, with an infinite one (through mark renewals) and maybe the perseverance of defending intellectual property rights as efficiently as possible would be admirable, if this form of protection wouldn't cover elements that belong to public domain and that should remain in this sphere of free use.

Another example is that of the works management done by libraries and museums. There is now a fairly high frequency of efforts to digitize works owned by museums and public libraries. Although works that these institutions present to the public digitally belong to the public domain (most works' protection periods have expired), the access to these is marked by copyright references that belong to said libraries and museums. Since the work in question is not protected by copyright, the only right that could be claimed is over photographic reproduction. But photographic reproductions of public domain materials cannot be protected, as they lack the main

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[1] David Lange, Reimagining the Public Domain, *66 Law and Contemporary Problems*, Winter 2003, p. 463-484.

quality – originality. This was argued in a case discussed before U.S. courts, but could easily be argued before any other court (including the European ones), because a digital copy is just a form of reproduction; if the original belongs to the public domain the copy has to belong to it as well. These things seem clear and simple, but the copyright references of libraries and museums are mentioned to the damage of the public, which perceives the access to these works as being restricted.[2]

Libraries and museums have gone from copyright references to publicly communicate the works by submitting to open licenses, such as creative commons, but isn't the access to this licensing system allowed solely to authors/owners? It's the case of the National Library of Spain, which uses open licensing (licensing systems that should not be confused with copyright), in order to communicate works that belong to the public domain. It's what can be called an attempt to limit the use of works that should be available to anyone.

2. What is public domain and what is the importance of the right of access?

The report issued by WIPO in 2010 on the protection of traditional knowledge and traditional cultural expressions of folklore[3] has held that the public domain "consists of intangible materials that are not subject to exclusive IP rights and which are, therefore, freely available to be used or exploited by any person."

The definition does not transpose a normative text; the sphere of what public domain involves being rather inferred/understood in relation to what a work that benefit or could benefit from copyright protection means. Perceived more as a symbol of non-property (the opposite of property), the public domain seems to contradict protection itself, although there are plenty of opinions who argue that, on the contrary, innovation, in its essence, depends on the existence of a rich/vast public domain.

We support this opinion, adding that the position according to which the act of creation itself is the result, not only of the individual effort, but of the multitude of resources made available throughout the years, needs to be affirmed. Among these, a substantial part is represented by the public domain materials, a range of works whose protection rights have expired, for example, or which do not fulfill the conditions to be protected by copyright, any one of them being available to be taken and used for the development of future works. One could say that the creative act itself can be dependent on the existence of a public domain that the author can access and that should contain a wide enough variety of quality works.

The aforementioned WIPO report clarifies the types of works that can belong to the public domain; this nuancing is important because each type comes with specific abusive forms of use or with specific limitation forms of subsequent access.

WIPO identifies three categories in the sphere of public domain: (i) works whose protection term has expired, (ii) works that do not meet the legal conditions to be protected by copyright and (iii) invalidated materials (if we consider the US legislation from before 1978, for example, these would be works that have not been registered or those that, after their registration, have never been renewed).

Freedom of use, the first of the characteristics that are presented as a common denominator of all the aforementioned categories, actually represents an effect of the lack of any intellectual property rights. The work, although it can belong to a certain author, will be available for use, in principle, without restrictions, without the need of any payments or requesting said author's permission. A second common characteristic of all the works belonging to the public domain is accessibility, a characteristic that, moreover, emphasizes the freedom of use because a free work that cannot be accessed, is in fact a work that carries restrictions, one being unable to refer to these as public domain works.

Concretely, freedom of use and accessibility are not just features derived from the definition of public domain, since they mark the existence of certain rights that automatically arise in each person's patrimony. Accessibility is only one aspect of the right of access, while the characteristic of being free cannot be accepted in the lack of a right of usage without restrictions, all of these generating, independently, as well as corroborated, the need for symmetric exploitation.

This is the context in which we can talk in detail about the existence of a right of access that can be exercised by any person, regarding any public domain work and without which the public domain itself is under the risk of remaining at the level of concept, with repercussions on innovation itself.

I think of the right of access to public domain as being one of the cultural rights, considered a natural component of human rights, without which the human personality cannot assert itself in its entirety.

Edmond Kaiser maintained, in his study "Terre des Hommes" ("Lands of People") that cultural rights are "acknowledged as one of the most important conquests of the human spirit," the states' obligation being that of "insuring the access to training, education, participation in the cultural life, in order to guarantee the normal development of the individual, in a world that is increasingly more complex and demanding."

Is the existence of this right of access to public domain works certain? And what value does this right

[2] Ignasi Labastida i Juan, The Digital Closing Of The Public Domain, http://blogs.cccb.org/lab/en/article_el-tancament-digital-del-domini-public/ - Long live the public domain.

[3] World Intellectual Property Organization Draft report of Sixteen Session, 2008.

have in relation to copyright? In order to answer these questions, some aspects correlated with the very functions of copyright need to be mentioned.

The copyright limitations, for example, have been discussed and sustained from the very first forms of copyright regulation, and they are especially correlated with its social function.

The social function of copyright imposes a double limitation – in its duration – and in exercising certain prerogatives. In order to explain the limitation in exercising copyright, Adoph Diez talks about a tension relation between copyright and modern society's need for information. From this perspective, we could, in reality, consider that, in addition to the categories indicated by the abovementioned WIPO report, one can also talk about a free use category resulted from copyright limitations and exceptions.

What justified the existence of these limitations? Was the protection system always thought out to be limited, or is it in its nature that rights not be exclusive or that this exclusivity manifest itself within certain limits? There are interpretations that explain the existence of these limitations as a regulation of exception, conceived to lead the work to its destiny of being devoured by the consumer and to finally become a part of the cultural heritage, which needs to be continuously enriched. The limitative nature of copyright is explained, as well as the purpose of the regulation derived from the copyright's social function, which is that of also satisfying the public's need of information/knowledge. This perspective is not at all wrong, but without a detailed explanation of what a regulation is in the field of copyright, the majority will perceive the existence of limitations as being similar to a series of legislative favors awarded by authors and owners to society in general. Whereas in reality, copyright limitations and exceptions "translate" into fact real rights of access to protectable works or to works in general (if we take into account the works from the public domain).

Anyway, to not recognize the rights of the public (with the right of access in a leading role) in this field is equivalent to deny the process preceding any regulation and the fact that any provision, regardless of the domain, has as main purpose social order, which is made by attempting to create an equilibrium between holders of various conflicting interests. In the field of copyright, the norm is the expression of an attempt to maintain the interests of authors/copyright holders in order, on one hand, with the interests of the general public, of access to culture, on the other hand.

The above mentioned tension relation represent, in fact, the legal relationship regulated by the norm, the subjects remaining the same, regardless of whether or not they are expressly highlighted. There is, without a doubt, a relation between owners and the object of the protection, namely protectable or protected works, but the copyright regulation itself is the prioritized expression of the relation between authors and the rest of the people, categorized as being the general public, society in general, if you will, whose interest is of access to information/culture is contrary (somewhat and to a certain level) with the interest of the author to protect that work and narrow/limit the access to the work without its consent.

Guaranteeing certain rights to a category of subjects, for example to owners, will always correspond with the existence of certain obligations assigned to the other category of subjects, the obligation to not reproduce a protected work without the owner/author's permission, for example, actually being the expression of the owner's rights to authorize or forbid the reproduction of said work. It is what the doctrine considers to be an indissoluble connection between the subjects of judicial relation, manifested throughout the ongoing judicial relationship.

In general, the norm goes into effect according to certain situations, mostly determined, or at least relatively determined. Outside of those situations, the norm does not have effect, respectively, the obligation cannot be imposed, which leads to the birth of the corresponding right – which can at least be accepted as a right to non-conform to the norm.

It is easier to highlight these aspects in the context of the limitations accepted by the current legislation, and, if you take into account the characteristics of the public domain and the fact that its existence is manifested just as any limitation of exercise the exclusive rights, the same explanations can also be used as regards to the right of access to public domain works. The rule of symmetry mentioned above is also applied to the public domain. If you consider, for example, the works that became part of the public domain as a result of the expiration of the protection period, we would be dealing with a norm that indicates a protection up to a certain date, after which the norm would cease to function in the sense of the existence of certain rights over the works. The inexistence of the patrimonial rights actually represent the owners/author' corresponding obligation to abstain from exercising them, thus being confirmed the correlative existence of the right of access to these works.

But what is the right of access in the context of a confusing regulation, which does not emphasize it clearly? And what value does this right have in the lack of obligations of correct use of public domain works?

The correct use is actually a legal use, in the context of guaranteeing right of access. With exact reference to another type of work in the public domain, different from the ones whose protection period has expired, Yolanda Eminescu noted, in 1987, regarding folklore materials, that these should be used correctly and exactly. It was mentioned the necessity of limiting the usage, as well as the necessity to "ban the deformation of folkloric works to preserve, unaltered, this important legal indissoluble fund of cultural identity of a people."

It's most certainly the specific nature of folkloric works that entails particular discussions, but the

common denominator between any type of works in the public domain sphere, is the fact that the inexistence of rules of exercising the right of access implicitly leads towards abusive forms of use that restrain future uses, ultimately altering the public domain fund.

3. The right of access and the technological means of protection as an abusive form of exercising the owners' rights

In order to prevent and limit any actions on protected works, to the benefit of the rights holder, the possibility of using "efficient technology" has been created, meaning technologies that "allow control by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism."

The definition of technological measures of protection has been integrated at European legislation through the Information Society Directive[4]:

"(...)"Technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective."

This type of technology meets the efficiency conditions required by the European norm only in the case in which the control is as efficient as to ensure the achievement of the goal of protection, namely the prevention and ban of some unauthorized acts by the author/holder. Basically, the possibility not only of a copy control is created, but more importantly, a control of access is created, equivalent with the possibility to exercise the rights granted to holders, exclusively, unlimitedly.

This type of technology allows, at any point, abuses by the rightholders, to the disadvantage of the users/public, with serious repercussions over the availability that has to define public domain works, in order to allow access to culture, to information, ultimately stagnating development, progress.

Point 4 of the same Article 6 from the Directive, presents itself as an 'attempt' to balance interests by so-called provisions meant to protect the beneficiaries of the copyright exceptions provided by the same directive, however, without any of these provisions being more than a simple recommendation, if we consider the fact that neither one of these provisions is supported by methods of sanction of the non-conforming holder.[5]

"*Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.*

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions."

Therefore, although there are clear provisions[6] that regulate the cases of violation of the technical protection methods and there are obligations addressed to efficiently protect these instruments of control ("legal protection of anti-circumvention measures"), there is no obligations assigned to Member States in order to guarantee the right of access for the beneficiaries of the copyright exceptions, nor are there any sanctions provided for the abusive use of technical measures. And this is largely because of the fact that the interests of the two parties are not considered as needing equal protection, an aspect that is also nuanced by the preamble of the Directive, "(39) Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention."

The aspects above mentioned exclusively nuance the situations of copyright exceptions and especially of certain exceptions, through precise identification, one also being able to mention that the application through analogy for other types of exceptions, which are not

[4] Art. 6, point 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonization of certain aspects of copyright and related rights in the information society.

[5] References to Articles 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, correspond to the following exceptions: private reproductions, specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, ephemeral reproductions that are transitional, for the benefit of people with a disability, for the sole purpose of illustration for teaching or scientific research.

[6] Art.6 pt.1, of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, "Member States shall provide adequate legal protection against the circumvention of any effective technological measures".

specified in the European text, could not be accepted. For these reasons, it cannot be assumed that the text would apply to other types of free uses that, even without being identified as exceptions, have the same effects, and we are particularly referring to the examples of public domain work usage. Particularly, we're talking about what is actually called "retelling a story" from public domain, or about the situations in which certain public domain works or fragments of them, are taken over and integrated into original works, or about the case of adapting works from the public domain. Each of these is an example of situation in which the public has the right of access to the public domain work, as it does not carry exclusive rights and because the access to it should be free, therefore unrestricted. But this right of access is only theoretical, since we cannot talk of its actual exercising in the context of the existence of technical protection measures, to which the Member States have obliged themselves to a legal and unconditioned protection.

The situation deserves to be summed up – the protection of technological measures needs to be legal and the measures need to be efficient, including through the sanction of any form of violation/circumvention of TPM, whereas, as far as the general public is concerned, Member States are obliged to only take "appropriate measures" and that only to some of the forms of free use, which do not include, as I mentioned, the use of public domain works, but only those forms of use corresponding to the exceptions noted in Article 6.

Legalizing TPM indisputably led to the impossibility of enforcing the provisions relating to copyright exceptions and limitations, as prof. Lawrence Lessig, correctly, classified it as a transposition of "copyright abuse", indeed referring exclusively to fair-use. His assessment was supported by the reality of many processes initiated by owners, also being just as pertinent referring to the well-known warning that marks the beginning of any DVD or VHS recording, through which the reproduction of any part of said recording, without permission from the producer, is strictly forbidden. This example represents a blatant denial of the fair-use doctrine, of what is represented by the copyright exceptions and limitations, implicitly of the notion of private copy, of user and consumer rights, of the possible public domain components, and of society in general.

The American correspondent of the aforementioned European Directive is the Millennium Copyright Act, at least as far as the technological protection means are concerned, and the means of sanction any forms of circumvention.

"Section 1201(a)(1) of the Copyright Act prohibits the act of "circumvent[ing] a technological measure that effectively controls access to a work," including, for example, by-passing password protection or encryption intended to restrict access to paying customers. Section 1201(a)(2) prohibits the manufacture or sale of "any technology, product, service, device, component, or part thereof' primarily designed for the purpose of circumventing access controls on copyrighted works. Additionally, § 1202(b) prohibits the manufacture or sale of products, devices or services primarily designed to circumvent "a technological measure that effectively protects a right of a copyright owner"-for example, a technological measure intended to prevent reproduction of a copyrighted work. The authors of Fair's Fair[7] said, "the ban against circumvention devices can prevent many users from making a fair use of protected works. The problem illustrates a more general threat. A legal prohibition against circumventing the protective measures adopted by copyright owners leaves those owners with virtually absolute control over the terms of use."

There are currently DVDs or e-books sold with restricted access, although many of them contain collections or public domain works, such as stories whose protection period has expired, or legends belonging to traditional knowledge or folklore[8].

Inevitably, the issue of the existence or not of a right of access is, most of the time, unresolved in these situations because reference may be made to the multitude of **other** free resources, available as alternatives, and which allow, to the same extent, the user's access to public domain works, such as the versions available in public libraries. But the issue of the right of access should not be studied from the perspective of other alternative resources that are available. Encrypting an e-book will represent in any case an abusive form of use of the public domain works it contains and this is because, by applying technological protection methods, the nature of these free materials change, through their restriction.

In all these cases, we obviously also need to consider the interest of the owner who uses those technological protection methods. Even if, most times, these collections do not represent aspects of originality and the only valuable component resides in its public domain material, it needs to be accepted that there are also situations in which the owner's interest especially require protection, the most obvious cases being those of adaptations, of the type of retelling, as well as of the public domain works' integration as part of original works. Each of these shows, without a doubt, particularities but the most important aspect, and the most common, of these examples is the fact that the right of access needs to be guaranteed and, if the solutions to protect both interests are not impossible to find, even in the event in which there is not a clear

[7] Robert C. Denicola, Fair's Fair - An Argument for Mandatory Disclosure, University of Nebraska, 2004.
[8] http://www.elefant.ro/ebooks/fictiune/literatura-romana/literatura-romana-clasica/legende-populare-romanesti-167551.html. http://www.polirom.ro/catalog/ebook/povestile-fratilor-grimm-2572/redirect.html.

divide between the public domain material and the original work[9].

Coming back on European ground, we have to admit that, despite the provisions mentioned, the recent jurisprudence has nuanced interpretations of Directive 2001/29/EC that are closer to what it could be called an equilibrium of interests. The year 2014 meant quite a lot if we consider the decision taken in January 2014 by the European Court of Justice, which decided that circumventing a protection system may be lawful[10], from which we hold:

1 "'Technological measures' within the meaning of Article 6 may include measures incorporated not only in protected works themselves but also in devices designed to allow access to those works;

2 When determining whether measures of that kind qualify for protection pursuant to Article 6 where they have the effect of preventing or restricting not only acts which require the rightholder's authorisation pursuant to that directive but also acts which do not require such authorisation, a national court must verify whether the application of the measures complies with the principle of proportionality and, in particular, must consider whether, in the current state of technology, the former effect could be achieved without producing the latter effect or while producing it to a lesser extent."

It's interesting to study the problem of protecting technologies created not only to prevent copying, but to restrict interoperability as well, being a way to emphasize the fact that technologies applied by owners are not protected unconditionally, but only if they conform with the definitions provided by law[11]. A correct interpretation leads to the conclusion that, beyond the limitations expressly provided by the law, one cannot talk about a correct/legal use, the protection, as a final effect, being unobtainable. If the technological protection measures have the effect of restriction of those acts that are not subject to holder authorization (by effect of the law), these TPM are obviously examples of abusive TPM, whose violation can be considered legal.

Indeed, CJEU ruled that the manufacturer of the console is protected against that circumvention only in the case where the protection measures seek to prevent illegal use of videogames, thus being understood that legal protection cannot be ensured to other forms of restriction.

Legal protection cannot be granted to restrictions aiming at the public domain component, as these type of measures also have the purpose of forbidding/limiting some forms of use that do not need the permission of the authors/owners.

4. Other dangers: Information society and the impact on the public domain sphere.

The public domain is diverse in its content, works whose protection period has expired being only one of the categories that belong to this sphere. Another category is that of materials that, in accordance with the internal or international legislation, cannot be protected by copyright[12].

These types of materials are, most of the times, located outside of copyright protection, as effect, for example, of provisions that establish the exemption from protection of ideas, mathematical concepts and formulas, theories, procedures and methods of function. Mathematical formulas, concepts and functioning methods, are, in accordance with the legislation corresponding to copyright, types of materials that are included in the public domain sphere, naturally, from their very development.

But as diverse as the sphere of public domain is, it is just as fluctuant, certain legislative changes or court decision leading to a narrowing of the public domain sphere, by considering some material/information, which are by nature excluded from protection, as being protectable, such as functioning methods, or simple data.

I'm referring to the case of Oracle v. Google[13], the most recent decision regarding them stating that "the APIs are protected by copyright, both in regards to their source code, as well as the structure, sequence and organization of the Java library (API packages)."

Taking into account their component[14], and the purpose for which these APIs were used in programming, objectively established as being – the

[9] GPL licenses for open-source software have the particularity of maintaining the source code available for any other subsequent use. Similarly, the rightholders that take over, in any way, public domain materials, should be obliged to allow the access of public to that material, in a format free of any other intervention, in order to ensure the access is unrestricted.

[10] Advocate General Eleanor Sharpston, Opinions in Case C-355/12 Nintendo v PC Box, September 2013 http://curia.europa.eu/juris/document/document.jsf?docid=141822&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=1931439 http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=1&part=1&mode=req&docid=141822&occ=first&dir=&cid=1931439.

[11] Article 6 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society – "Technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder.

[12] This paper exclusively takes into account the public domain related to copyright, but, evidently, any work or material that does not carry exclusive rights and that can be freely used, regardless of their rights, trade secrets, patents, etc., falls in the sphere of what the public domain is.

[13] U.S. appeals court decided Oracle could copyright parts of the Java programming language, which Google used to design its Android smartphone operating system - see the full text of the decision: https://www.eff.org/files/2014/11/10/oracle_v_google_13-1021.opinion.5-7-2014.1.pdf.

[14] All SSO details/components – structure, sequence and organization – lack protection, as they **represent** functioning methods.

insurance of interoperability, it goes without saying that this decision has the potential to significantly affect the public domain sphere, by considering these materials/information (if we can call them that) as being protectable by copyright.

This decision would affect everything open-source stands for, and innovation in general, the EFF[15] mentioning that the freedom to reimplement and extend existing APIs represents the key to progress both in the development of hardware products, as well as software. With a higher emphasis on the need for software compatibility, the following explanations are offered: "When programmers can freely reimplement or reverse engineer an API without the need to negotiate a costly license or risk a lawsuit, they can create compatible software that the interface's original creator might never have envisioned or had the resources to create. Moreover, compatible APIs enable people to switch platforms and services freely, and to find software that meets their needs regardless of what browser or operating system they use."

Pamela Samuelson recently said[16], referring directly to the dispute between Google and Oracle:

" (...) a computer program designed to be compatible with another program must conform precisely to the API of the first program which establishes rules about how other programs must send and receive information so that the two programs can work together to execute specific tasks".

"(...) once that the API exists, it becomes a constraint on the design of follow-on programs developed to interoperate with it."

The digital era is supposed to be favorable to the spread of information and innovation in general, but also bears, as we've seen, multiple threats to the public domain.

5. Conclusions

An excessive control of copyright actually means a denial of the citizens' right of access to the public domain, a denial of the importance of public domain in general and a denial of the special role the public domain has in innovation.

The context of the existence of technological protection methods and of some confusing regulations of what a legal use of the public domain means, has lead to numerous actions, such as the Communia Association, which issued, in 2014, a set of recommendations, from which we can mention the ones with implications involving the public domain[17].

"Pt.6 Any false or misleading attempt to misappropriate Public Domain material must be declared unlawful. False or misleading attempts to claim exclusivity over Public Domain material must be sanctioned.In order to preserve the integrity of the Public Domain and protect users of Public Domain material from inaccurate and deceitful representations, any false or misleading attempts to claim exclusivity over Public Domain material must be declared unlawful. There must be a system of legal recourse that allows members of the public to get sanctions imposed on anyone attempting to misappropriate Public Domain works.

Pt. 7 The Public Domain needs to be protected from the adverse effects of Technical Protection Measures. Circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works. The deployment of TPMs to hinder or impede privileged uses of a protected work or access to public domain material must be sanctioned. Technical Protection Measures such as Digital Rights Management systems can have adverse effects on the Public Domain. Access restrictions imposed on works can remain in effect even after a work has passed into the public domain and over time Protections Measures can become orphaned making access to protected works impossible. Most current TPM 'solutions' do not take into account user rights created by Exceptions and Limitations thereby limiting their effectiveness and undermining the inherent checks and balances of the copyright system. Given the above, circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works."

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EU DIRECTIVES IN THE FIELD OF COPYRIGHT AND RELATED RIGHTS

Ana-Maria MARINESCU[*]

Abstract

The aim of this article is to underline the evolution and the importance of the European Directives in the field of copyright and related rights, their contribution to the development of the law and the national implementation, namely their transposition into Romanian Law no. 8/1996 on copyright and related rights. For this purpose, the article will analyze the historical evolution of the European Directives in the field of copyright and related rights and their most important dispositions. Given the wide range of subject matter with which it is concerned, the European Directives in the field of copyright and related rights address to enforcement, protection of databases, protection of computer programs, resale right, satellite and cable, term of protection, rental and lending rights, copyright and related rights in the information society, orphan works and management of copyright and related rights. Taking into account the wild range of subjects that European Directives in the field of copyright and related rights address, it is important to observe the permanent interest of the European legislator on the harmonization of the law on copyright and related rights. In this way, the result was the adoption of 7 directives in a 10-year interval between 1991 and 2001, and of 4 directives, including the one for the modification of the Directive on the term of protection, also in a 10-year interval between 2004 and 2014. Despite the extensive process of harmonization, copyright law in the Member States of the European Union is still largely linked to geographical boundaries of sovereign states.

Keywords: *directive, copyright and related rights, enforcement, protection of databases, protection of computer programs, resale right, satellite and cable, term of protection, rental and lending rights, copyright and related rights in the information society, orphan works, management of copyright and related rights, evolution, harmonization, national implementation.*

1. Introduction

At the present 11 Directives in the field of copyright and related rights are in place in the European Union[1]:

a). Council Directive 91/250/CEE from the 14th of May 1991 on legal protection of computer programs, published in the Official Journal of European Communities no. L 122 from the 17th of Mai 1991, replaced by the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, published in the Official Journal of the European Union no. L 111/16 from the 5 of May 2009;

b). Council Directive 92/100/CEE from the 19th of November 1992 on the rental and lending right and other rights related to copyright in the field of the intellectual property, published in the Official Journal of EC no. L 346 from the 24th of November 1992;

c). Council Directive 93/83/CEE from the 27th of September 1993 on the harmonization of certain provisions regarding copyright and neighboring rights applicable to the broadcasting of programs via satellite and cable retransmission, published in the Official Journal of EC no. L 248 from the 6th of October 1993;

d). Council Directive 93/98/CEE from the 29th of October 1993 on the harmonization of the duration for the protection of copyright and certain neighboring rights, published in the Official Journal of EC no. L 290 from the 24th of November 1993;

e). European Parliament Directive and that of the Council 96/9/CE from the 11th of March 1996 on the legal protection of databases, published in the Official Journal of European Communities no. L 077 from the 27th of March 1996;

f). European Parliament Directive and that of the Council 2001/29/CE from the 22nd of May 2001 on the harmonization of certain issues of copyright and neighboring rights in the information society, published in the Official Journal of European Communities no. L 006 from the 10th of January 2002;

g). European Parliament Directive and that of the Council 2001/84/CE from the 27th of September 2001 on resale right for the benefit of the author of original works of art, published in the Official Journal of European Communities no. L 272 from the 13th of October 2001;

h). European Parliament Directive and that of the Council 2004/48/CE from the 29th of April 2004 on insuring the observance of intellectual property rights, published in the Official Journal of European Communities no. L 157 from the 30th of April 2004;

i). Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain

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[1] Ciprian-Raul Romițan, Paul-George Buta, *Drept român și comunitar al proprietății intelectuale: Dreptul de autor și drepturile conexe* (București: Ed. ASDPI, 2006), 141-318.

http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm.

http://www.orda.ro/default.aspx?pagina=212

related rights, published in the Official Journal of the European Union no. L 372/12 from 27 December 2006, amended by the Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, published in the Official Journal of the European Union no. L 265/1 from 11 October 2011;

j). Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, published in the Official Journal of the European Union no. L 299/5 from 27 October 2012;

k). Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, published in the Official Journal of the European Union no. L 84/72 from 20 March 2014.

Having in mind the wide range of subjects concerning copyright and related rights described by the Directives, it is important to analyze their historical evolution, their main dispositions, the level of harmonization and their national implementation into the Law no. 8/1996 on copyright and related rights[2].

The research of the EU Directives in the field of copyright and related it is an important part of the general research on copyright and related rights, being a part of the legislation structure in the field, together with the international framework.

The international vocation[3] of copyright and related rights is underline by international conventions and treaties like: Berne Convention for the Protection of Literary and Artistic Works (1886), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), WIPO[4] Performances and Phonograms Treaty (1996), WIPO Copyright Treaty (1996), and Trade Related Aspects on Intellectual Property Rights (TRIPS - 1994). All above mentioned international conventions and treaties are adopted and transposed into our national legislation.

Copyright and related rights has to be protected also outside the national frontiers, on the territory of other states[5], and, of course, has to be protected on a harmonize level inside the European Union. The instrument chosen by the European legislator in order to fulfill this aim is the directive, defined as binding the Member State only for the result, leaving the Member States the competence to choose the forms and the ways for fulfilling the objective[6]. As it was underlined in the doctrine[7], this is the main difference between directive and regulations. The regulations are compulsory, having as the law a general influence, unlike the directive which binds only as regards the result.

The Romanian literature in the field, limits to presents the European Directives in the field[8], as a collection of laws, or tackles in a comprehensive manner to some subjects of the Directives[9].

2. Content

As I mentioned before, at the present 11 Directives in the field of copyright and related rights are in place in the European Union.

The first Directive, on computer programs, was adopted in 1991. The **Directive on the legal protection of computer programs (91/250/EEC)** was a real European "first" for copyright law, the first copyright measure to be adopted. The objective of the Directive was to harmonize Member States' legislation regarding the protection of computer programs in order to create a legal environment which will afford a degree of security against unauthorized reproduction of such programs[10]. In the sense of the Directive, the object of protection is the 'computer programs`, which shall include their preparatory design material[11]. So, the protection in accordance with this Directive shall apply to the expression in any form of a computer program, with the exception of ideas and principles which underlie any element of a computer program, including those which underlie its interfaces that are not protected by copyright[12]. The only criteria that will be applied to determine the eligibility for protection of a computer program is if it is original in the sense that it is the author's own intellectual creation[13].

Another important disposition of the Directive regards the authorship of the computer programs created by an employee in the execution of his duties or following the instructions given by his employer. In

[2] Published in the Official Journal of Romania no. 60 from 26 March 1996, subsequently amended and completed by Law no. 285/2004 on the modification and completion of Law no. 8/1996 (published in the Official Journal of Romania no. 587/30.06.2004), GEO no. 123/2005 on the modification and completion of Law no. 8/1996 (published in the Official Journal of Romania no. 843/19.09.2005) and Law no. 329/2006 (published in the Official Journal of Romania no. 657/31.07.2006).

[3] Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, (București: All Beck, 2005), 24.

[4] World Intellectual Property Organization.

[5] *Idem*.

[6] Ion P. Filipescu, Augustin Fuerea, *Drept instituțional comunitar european*, ediția a V-a (București: Actami, 2000), 38.

[7] *Idem*.

[8] Romițan, Buta, *Drept roman și comunitar al proprietății intelectuale,* 141-318.

[9] Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 419, 423-429, 448-452, 490-492.
Ciprian Raul Romițan, Mariana Liliana Savu, *Drepturile artiștilor interpreți sau executanți*, (București: Universul Juridic, 2008), 47-50.

[10] http://ec.europa.eu/internal_market/copyright/prot-comp-progs/index_en.htm

[11] Art. 1 (1).

[12] Art. 1 (2).

[13] Art. 1 (3).

this case, the employer exclusively shall be entitled to exercise all the economic rights in the program so created, unless otherwise is provided by contract[14].

Directive 91/250/EEC has been repealed and replaced by Directive 2009/24/EC and has been transposed totally into the Romanian legislation.

The second Directive adopted in the field of copyright and related rights was the **Rental Right Directive** in 1992 which harmonized the rights of commercial rental and lending. In this case, the most important fact of the Directive is that harmonizes certain related rights of fixation, reproduction, broadcasting and communication to the public and distribution at levels in excess of the minimum norms of the Rome Convention[15]. The related rights beneficiaries are the performers, phonogram producers, film producers and broadcasters.

Directive 92/100/EEC has been repealed and replaced by Directive 2006/115/EC and had been transposed into Romanian Law no. 8/1996 on copyright and related rights.

In 1993, two more Directives were adopted.

The **Satellite and Cable Directive** was described in the special literature as a direct response to the deployment of new technologies of transmission of broadcast programs, by satellite and cable that greatly facilitated the broadcasting of television programs across national borders[16], envisioned in this way the establishment of an internal market for broadcasting services.

Also, one of the most important characteristics of the Directive is that introduce a scheme of mandatory collective rights management with regard to acts of satellite and broadcasting. In this way, according to article 9 (1) of the Directive *"Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society"*. Thereupon, *"Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter"*[17].

Law no. 8/1996 on copyright and related rights transposes the above mentioned dispositions of the Directive[18] , cable retransmission right being a case of compulsory collective management[19] together with the private copy remuneration[20].

In 1993, also the **Term Directive** was adopted, which harmonized the term of protection of copyright and related rights of 70 years *post mortem auctoris*, and set the duration of related rights at 50 years.

The Directive has been repealed and replaced by Directive 2006/116/EC on the term of protection of copyright and certain related rights. According to article 1 of this Directive *"The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention[21] shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public"* and according to article 3 the duration of related rights is:

"(1) The rights of performers shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

(2) The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

(3) The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term 'film' shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

(4) The rights of broadcasting organisations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite."

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[14] Art. 2 (3).
[15] Estelle Derclaye, *Research Handbook on the Future of EU Copyright* (UK: Edward Elgar, 2009), 15.
[16] *Idem.*
[17] Art. 9 (2).
[18] Art. 121.
[19] Art.123^1 (1) g).
[20] Art.123^1 (1) a).
[21] Art. 2 Protected Works: 1. "Literary and artistic works"; 2. Possible requirement of fixation; 3. Derivative works; 4. Official texts; 5. Collections; 6. Obligation to protect; beneficiaries of protection; 7. Works of applied art and industrial designs; 8. News.

Three years later, in 1996, the **Database Directive** was adopted. The Directive created a new exclusive *"sui generis"* right for database producers, valid for 15 years, to protect their investment of time, money and effort, irrespective of whether the database is in itself innovative ("non-original" databases). The Directive harmonized also copyright law applicable to the structure and arrangement of the contents of databases ("original" databases). The Directive's provisions apply to both analogue and digital databases[22].

As it was mentioned in the doctrine[23], Law no. 8/1996 on copyright and related rights regulates the databases as object of copyright as derivate works, but transposing the Database Directive, envisages a *sui-generis* right of the makers of databases, and not a right for copyright. Therefore, the Law talks about the makers of databases and not of creators/authors[24]. However, this *sui-generis* right on databases is not excluding the possibility of protection of the databases or their content through copyright and other rights (art. 122^4). This is reason why the databases are still enumerated by the Law no. 8/1996 as object of protection as derivate works.

In the light of the *sui-generis* right, the maker of a database has the exclusive economic right to authorize and prohibit the extraction[25] and/or re-utilization of the entire or of a substantial part of the database, evaluated qualitatively or quantitatively[26].

In 2001, was adopted the **Directive of copyright and related rights in the informational society**. The final text is a result of over three years of thorough discussion and an example of co-decision making where the European Parliament, the Council and the Commission have all had a decisive input[27].

As it was mentioned in the press release of the Directive[28], its aim was to stimulate creativity and innovation by ensuring that all material protected by copyright including books, films, music are adequately protected by copyright. It provides a secure environment for cross-border trade in copyright protected goods and services, and will facilitate the development of electronic commerce in the field of new and multimedia products and services (both on-line and off-line via e.g. CDs).

The Directive harmonizes the rights of reproduction, distribution, communication to the public, the legal protection of anti-copying devices and rights management systems. Particular novel features of the Directive include a mandatory exception for technical copies on the net for network operators in certain circumstances, an exhaustive, optional list of exceptions to copyright which includes private copying, the introduction of the concept of fair compensation for rightholders and finally a mechanism to secure the benefit for users for certain exceptions where anti-copying devices are in place.

Adoption and implementation of the Directive enabled the Community and its Member states to ratify the 1996 WIPO Treaties - the so-called Internet Treaties[29].

Implementing this Directive, Law no. 8/1996 on copyright and related rights regulates in Chapter VI, articles 33-38, the Limitations on the Exercise of Copyright. These limits are strictly provided by the law, they cannot be extended by analogy[30], as in case of the exceptions on copyright and related rights.

Also, the limits and the exceptions has to be enclosed to the so-called 3 steps test[31]: that such uses conform to proper practice, are not at variance with the normal exploitation of the work and are not prejudicial to the author or to the owners of the exploitation rights[32].

Analyzing the legal norms, the doctrine[33] underlined the following categories of limitations for public use:

1. The reproduction with the scope of quotations (art. 33 (1) b)-d);

2. The reproduction of visual works placed in public places (art. 33 (1) f);

3. Information on actuality problems;

4. temporary acts of reproduction that are transient or incidental forming an integral and essential part of a technical process and the sole purpose of which is to enable transfer, in a network between third parties, by an intermediary or the lawful use of another protected object and that should have no separate economic value on their own, are excepted from the reproduction right[34];

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[22] http://ec.europa.eu/internal_market/copyright/prot-databases/index_en.htm

[23] Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 180.

[24] Art. 122^1-122^4.

[25] Art. 122^2 (2) a): extraction shall mean the permanent or temporary transfer of all or a substantial part, evaluated qualitatively or quantitatively, of the contents of a database to another medium by any means or in any form.

[26] Art. 122^2 (2) b): re-utilization shall mean any form of making available to the public all or a substantial part of the contents of a quantitative or qualitative apprised database by the distribution of copies, by renting, or other forms, including by making available to the public of the contents of the database so that anyone may access it in a place and time individually chosen by them. The first sale, on domestic market, of a copy of a database by the rightholder of sui generis right or with his consent shall exhaust the right to control resale of that copy.

[27] http://ec.europa.eu/internal_market/copyright/copyright-infso/index_en.htm

[28] http://europa.eu/rapid/press-release_IP-01-528_en.htm?locale=en

[29] WIPO Performances and Phonograms Treaty and WIPO Copyright Treaty.

[30] Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 302.

A. Lucas, *Droit d'auteur et numérique*, (Paris : Litec, 1998), 170-172.

[31] Art. 9 (2) Berne Convention and art. 5 parag. 5 Directive of copyright and related rights in the informational society.

[32] *See for more details on the conditions of the 3 steps test* Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 304-305.

[33] Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 311-322.

[34] Art. 33 (3).

5. The alteration of a work shall be permissible without the author's consent and without payment of remuneration in the following cases[35]:

(a) If the alteration is made privately and is neither intended for nor made available to the public;

(b) If the result of the alteration is a parody or caricature, provided that the said result does not cause confusion with the original work and the author thereof;

(c) If the alteration is made necessary by the purpose of the use permitted by the author;

(d) If the alteration is a short review of the works by didactic purpose, mentioning the author.

6. For the purpose of testing the operation of their products at the time of manufacture or sale, trading companies engaged in the production or sale of sound or audiovisual recordings, equipment for the reproduction or communication to the public thereof and also equipment for receiving radio and television broadcasts may reproduce and present extracts from works, provided that such acts are performed only to the extent required for testing[36].

One of the most important limit regulated by the Directive and the one that had been controversial at the level of the Member States till recently is the private copy.

Article 34 (1) Law 8/1996 on copyright and related rights define the private copy: the reproduction of a work, without the author's consent for personal use or for use by a normal family circle, provided that the work has already been disclosed to the public, while the reproduction does not contravene to the normal use of the work or prejudice the author or the owner of the utilization rights.

In order to compensate the prejudice broth to the copyright and related rights holders, the Romanian legislator established a levy system for the private copy remuneration[37]: For the media on which sound or audio-visual recordings can be made or on which reproductions of the works graphically expressed can be made, as well as for apparatus dedicated for copying, in the situation provided for in paragraph (1), a compensatory remuneration established by negotiation, according to the provisions of this law, shall be paid.

The private copy exception doesn't apply to computer programs[38], for which is permitted only a copy for archive or safety, in the manner in which this is necessary for using the computer program[39].

On the one hand, the Directive generated a series of documents and consultations very important in the information society economy, like:

1. The Green Paper on copyright in the knowledge economy (16.07.2008)[40]. With this Green Paper, the Commission plans to have a structured debate on the long-term future of copyright policy in the knowledge intensive areas. In particular, the Green Paper is an attempt to structure the copyright debate as it relates to scientific publishing, the digital preservation of Europe's cultural heritage, orphan works, consumer access to protected works and the special needs for the disabled to participate in the information society. The Green Paper points to future challenges in the fields of scientific and scholarly publishing, search engines and special derogations for libraries, researchers and disabled people. The Green paper focuses not only on the dissemination of knowledge for research, science and education but also on the current legal framework in the area of copyright and the possibilities it can currently offer to a variety of users (social institutions, museums, search engines, disabled people, teaching establishments).

2. The public consultation on "Content Online" (October 2009) with the need to create a genuine Single Market for creative content on the internet, focused on three area of actions:

- Make sure creativity is rewarded so that creators, rightholders, and Europe's cultural diversity can thrive in the digital world;
- Give consumers' clearly-priced, legal means of accessing a wide range of content through digital networks anywhere, anytime;
- Promote a level playing field for new business models and innovative solutions for the distribution of creative content across the EU.

In the press released of the public consultations[41], is noted that in Europe, the cultural and creative sector (which comprises published content such as books, newspapers and magazines, musical works and sound recordings, films, video on demand and video games) generates a turnover of more than € 650 billion annually and contributes to 2.6% of the EU's GDP, employing more than 3% of the EU work force. European policymakers therefore have the responsibility to protect copyright, especially in an evolving economic and technological environment.

As part of the ongoing discussions on the priorities for a European Digital Agenda, and adding to similar debates currently taking place at national level, the Commission now wishes to focus the debate on practical solutions for encouraging new business models, promoting industry initiatives and innovative solutions, as well as on the possible need to harmonize, update or review the applicable rulebook of the EU's single market.

3. Communication on Copyright in the Knowledge Economy (19.10.2009) aiming to tackle

[35] Art. 35.
[36] Art. 37 (1).
[37] Art. 34 (2).
[38] Art. 81.
[39] Art. 77.
[40] http://europa.eu/rapid/press-release_IP-08 1156_en.htm?locale=fr
[41] *Idem.*

the important cultural and legal challenges of mass-scale digitisation and dissemination of books, in particular of European library collections.

On the other hand, the private copy system and levies was one of the most controversial subject in the field of copyright and related rights. A mediation process took place at the level of EU in the period 02.04.2012-31.01.2013, date when the mediator António Vitorino presented its recommendations[42].

The core elements of the recommendations refer to:

- The private copy remunerations between Member States have to be collected at the level of the State were the final consumer reside (this principle results from the European Court of Justice case C-462/09 - Stichtung de Thuiskopie vs. Opus Supplies Deutschland GmbH)[43].
- The general possibility to establish remunerations for devices and equipment depends on the place where de product is capable to make copies, this is way the scope is that the product to be remunerated only one time in the European Union.
- Non-application of private copying levies to professional users.
- Shift the liability to pay levies from the manufacturer's or importer's level to the retailer's level while at the same time simplifying the levy tariff system;
- Oblige manufacturers and importers to inform collecting societies about their transactions concerning goods subject to a levy.
- Place more emphasis on operator levies compared to hardware-based levies in the field of reprography.
- The levies should be visible for the final consumer.
- Ensure more coherence with regard to the process of setting levies by defining 'harm' uniformly as the value consumers attach to additional copies in question (lost profit).
- Ensure more coherence with regard to the process of setting levies by providing a procedural framework that would reduce complexity, guarantee objectiveness and ensure the observance of strict time-limits, for example:
- In the case of a new product being introduced on the market, the decision as to the applicability of levies should be taken within 1 month following its introduction. The provisional level of tariffs applicable should be determined not later than within 3 months following its introduction.
- The ultimate level of the applicable levy should, to the extent possible, not be superior to the one imposed temporarily. If nevertheless this were the case, the resulting difference should be payable gradually and could be split into several instalments.
- The final tariff applicable to a given product should be agreed or set within 6 months period from its introduction on the market.

In the view of the Recommendations and in light of the Directive of copyright and related rights in the informational society, it is necessary that the Romanian legislation to be harmonized at this level, by amending and completing the dispositions of Law no. 8/1996 regarding the private copy system.

In 2001, after barely surviving its perilous journey between the Commission, the European Parliament and the Council (and back again), the **Resale Right Directive** was finally adopted[44].

The resale right – as an inalienable right, which cannot be waived, even in advance - was provided, for the benefit of the author of an original work of art, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author[45]. The right shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art[46].

The European Court of Justice Decision in the case C-518/08 (VEGAP vs. ADAGP) stated that art. 6 (1) Resale Right Directive[47] must be interpreted in the sense that is not opposing to a national disposition which reserve the benefit of the resale right only to the legal inheritors of the author, excluding the testamentary legatees[48].

For stating this Decision, the Court took into account on the one hand, the fact that the Directive is intended to assure a certain level of remuneration of authors and this purpose is not compromised by the devolution of the resale right to some legal subjects by excluding others after the death of the artist. On the other hand, although the EU legislator had in mind that legatees to benefit of the resale right after the death of the author, didn't considered that is advisable to interfere in the field of the inheritance national laws, leaving to each state the competence to define the categories of legatees. Results that in the light of the Directive the Member States have the liberty to establish

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[42] Ana-Maria Marinescu, "Analiza Recomandărilor lui Antonio Vitorino rezultate din medierea privind copia privată şi remuneraţiile în reprografie", *Revista Română de Dreptul Proprietăţii Intelectuale* nr. 3 (2013): 46-49.

[43] *See for details on the case* Ana-Maria Marinescu,"Gestiunea colectivă a dreptului de autor şi a drepturilor conexe. Jurisprudenţă română şi europeană în domeniu", *Revista Română de Dreptul Proprietăţii Intelectuale* nr. 4 (2014): 107-110.

[44] Derclaye, *Research Handbook on the Future of EU Copyright*, 16.

[45] Art. 1 (1).

[46] Art. 1 (2).

[47] Article 6 Persons entitled to receive royalties

1. The royalty provided for under Article 1 shall be payable to the author of the work and, subject to Article 8(2), after his death to those entitled under him/her.

2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.

[48] Marinescu,"Gestiunea colectivă a dreptului de autor şi a drepturilor conexe. Jurisprudenţă română şi europeană în domeniu": 126-128.

the categories of persons which can benefit of the resale right after the death of author.

According to article 21 of Law no. 8/1996, as stated also in the doctrine[49], the resale right applies only to an original work of graphic or plastic art or of a photographic work. Also, as stated in the doctrine[50], having in mind the frugifer nature of the resale right, it least all the life of the author and is the subject of being inherited for 70 years after the death of author, according to article 25 of Law no. 8/1996[51].

The **Directive on the enforcement of intellectual property rights** such as copyright and related rights, trademarks, designs or patents was adopted in April 2004.

The Directive requires all Member States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy and so creates a level playing field for right holders in the EU. It means that all Member States will have a similar set of measures, procedures and remedies available for rightholders to defend their intellectual property rights (be they copyright or related rights, trademarks, patents, designs, etc.) if they are infringed. The similar set of measures refers to: measures for preserving evidence[52], right of information[53], provisional and precautionary measures[54], corrective measures[55], injunctions[56], alternative measures[57], damages[58], legal costs[59] and publication of judicial decisions[60].

Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights extended the term of protection for performers and sound recordings to 70 years. In this way the Directive narrows the gap between the copyright term of protection for authors (currently life plus 70 years after the authors' death) and the term of protection for performers (currently 50 years after the performance). Consequential the performers will receive remunerations over a longer period of time.

The Directive also strengthens the position of performers with a number of accompanying measures[61]:

- A 20% fund for session musicians, paid by the record companies. This remuneration ensures that performers who are forced to sell their rights against a one-off flat fee obtain additional payments during the extended term. The fund would apply to all recordings which benefit from the term extension.

- A 'use it or lose it' clause, which means the record company will have to cede control over its copyright to performers if it does not market the sound recording containing the performance. If a record company does not market a recording despite the performers' request, the performers will get their rights back and can market the recording themselves.

- A 'clean slate' provision, which means that producers are not entitled to make any deductions from the contractual royalties due to featured performers during the extended term.

According to art. 2 of the Directive Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 November 2013.

In Romania, the Directive was transposed through Law no. 53/2015 for the modification and completion of Law no. 8/1996. The Law no. 53/2015 was adopted after the term prescribed for the implementation of the Directive, Romania being for a short time in the pre-infrigment procedure.

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works sets out common rules on the digitisation and online display of so-called orphan works. Orphan works are works like books, newspaper and magazine articles and films that are still protected by copyright but whose authors or other rightholders are not known or cannot be located or contacted to obtain copyright permissions[62]. Orphan works are part of the collections held by European libraries that might remain untouched without common rules to make their digitisation and online display legally possible.

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[49] Roş, Bogdan, Spineanu-Matei, *Dreptul de autor şi drepturile conexe - Tratat*, 284.

[50] Roş, Bogdan, Spineanu-Matei, *Dreptul de autor şi drepturile conexe - Tratat*, 285-286.

[51] Art. 25.—(1) The economic rights provided for in Articles 13 and 21 shall last for the author's lifetime, and after his death shall be transferred by inheritance, according to civil legislation, for a period of 70 years, regardless of the date on which the work was legally disclosed to the public. If there are no heirs, the exercise of these rights shall devolve upon the collective administration organization mandated by the author during his lifetime or, failing a mandate, to the collective administration organization with the largest membership in the area of creation concerned.

(2) The person who, after the copyright protection has expired, legally discloses for the first time a previously unpublished work to the public shall enjoy protection equivalent to that of the author's economic rights. The duration of the protection of those rights shall be 25 years, starting at the time of the first legal disclosure to the public.

[52] Art. 7.

[53] Art. 8.

[54] Art. 9.

[55] Art. 10.

[56] Art. 11.

[57] Art. 12.

[58] Art. 13.

[59] Art. 14.

[60] Art. 15.

[61] http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm

[62] Art. 2.

For the purposes of establishing whether a work or phonogram is an orphan work, the libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations shall ensure that a diligent search[63] is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question. The diligent search shall be carried out prior to the use of the work or phonogram.

The Directive establish also the mutual recognition of orphan work status[64], in this way a work or phonogram which is considered an orphan work in a Member State shall be considered an orphan work in all Member States. By consequence, Member States shall ensure that a rightholder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned[65].

The permitted uses of orphan works are set out in article 6 of the Directive, for this Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations are permitted to use orphan works contained in their collections in the following ways:

(a) by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;

(b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration the libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations shall use an orphan work only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 29 October 2014. By present, in Romania the collective management organisations submitted to the Romanian Copyright Office (ORDA) proposals for transposing the Directive, but the Directive wasn't implemented yet.

The last of the Directives adopted by the European Union is the **Directive on collective management of copyright and related rights**.

Chronologically the predecessors of the Directive were the Recommendation 2005/737/EC regarding the trans-border management of copyright and related rights for the on-line music services, adopted by the European Commission at 18.10.2005, the public hearings on governance of collective management in the European Union (Brussels, 23.04.2010) and the proposal of the Directive (11.07.2012)[66].

The Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online uses aims at ensuring that rights holders have a say in the management of their rights and envisages a better functioning of the collective management organizations in the EU. The Commission will work closely with the Member States in order to achieve a correct transposition of the provisions of the Directive into national law by the transposition date of 10 April 2016. *De lege ferenda*, the transposition of the Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online uses into Romanian Law on copyright and related rights requires a minimum set of provisions taking into consideration the fact that Romania implemented already the principles of the Recommendation 2005/737/EC[67].

The main dispositions of the Directive refer to:

- Definitions[68] – more than 14 definitions are set by the Directive, some of them can be implemented also into the Law no. 8/1996, for example the definition of user;
- General principles[69] like the fact that collective management organizations act in the best interests of the rightholders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights.
- Membership rules of collective management organisations[70] including the electronic ways to communicate with the members;
- Rights of rightholders who are not members of the

[63] Art. 3.
[64] Art. 4.
[65] Art. 5.
[66] Ana-Maria Marinescu, Gheorghe Romiţan, Alina Havza, "Analiza Propunerii de Directivă privind gestiunea colectivă", *Revista Română de Dreptul Proprietăţii Intelectuale* nr. 3 (2012): 238.
[67] Ana-Maria Marinescu, "Analiza Directivei 2014/26/UE a Parlamentului European şi a Consiliului privind gestiunea colectivă a drepturilor de autor şi a drepturilor conexe", *Revista Română de Dreptul Proprietăţii Intelectuale* nr. 3 (2014): 112-121.
[68] Art. 3.
[69] Art. 4.
[70] Art. 6.

collective management organisation[71], which in my opinion had to be set down also in the Statue of the collective management organisations;

− General assembly of members of the collective management organisation[72], including the possibility of the members to vote through a representative or for voting by electronically means;

− Supervisory function[73] which, in my opinion, is not set very clearly, because interfere with the functions of the Censors Commission establish by the Romanian laws. If this function will be done by external auditors, it will be very expensive for some of the collective management organisations in Romania;

− Collection and use of rights revenue[74], deductions[75] and distribution of amounts due to rightholders[76]. In my opinion, the weak spot of the Directive is the distribution of amounts due to rightholders. The provisions regarding this point of the Directive were better set in the proposal of the Directive than the Directive itself.

− Management of rights on behalf of other collective management organisations[77];

− Relations with users: Licensing[78] and Users' obligations[79];

− Transparency and reporting divided in 5 parts[80]:

a) Information provided to rightholders on the management of their rights;

b) Information provided to other collective management organisations on the management of rights under representation agreements;

c) Information provided to rightholders, other collective management organisations and users on request;

d) Disclosure of information to the public;

e) Annual transparency report.

Most of the transparency measures mentioned before are already set down in Law no. 8/1996[81] and in some cases, for example the annual transparency report, it is provided by the Law no. 8/1996 in the form of the annual report. So, in my opinion, the transposition of these provisions have to very well compared in order not to excessive load the obligations of the collective management organisations.

- Enforcement measures divided in 3 parts:

a) Complaints procedures[82] set by the collective management organisations for dealing with complaints, particularly in relation to authorisation to manage rights and termination or withdrawal of rights, membership terms, and the collection of amounts due to rightholders, deductions and distributions.

b) Alternative dispute resolution procedures[83] between collective management organisations, members of collective management organisations, rightholders or users regarding the provisions of national law. In my opinion, this disposition address to a very wide range of subjects, and *de lege ferenda* could be implemented only as regards, on the one hand, collective management organisations and, on the other hand, collective management organisations and users.

c) Dispute resolution[84].

In the present, in Romania, we are in the stage of the First Compliance Table. For this, the collective management organisations communicated to the Romanian Copyright Office their proposals of implementing the Directive.

3. Conclusions

The European Directives adopted till 2004 refer to a wide range of subjects according to the needs of economic and technical evolution of the society. In my opinion, the most ambitious of them is the Directive of copyright and related rights in the informational society. Also, as I mentioned previously, it was the Directive that generate most of the controversial.

After 2004, we can observe a period extremely relaxed for the European Union for adopting new Directives, therefor were adopted only Directives that repealed and replaced older Directives.

After 2011, we can observe a new wave of EU Directives one more important than the other, culminating with the adoption of the Directive on the collective management of copyright and related rights, which in my opinion is the first supra-national act on the management of copyright and related rights, because till it adaptation some of the Directives were referring to the collective management of rights[85].

The new generation of Directives (term of protection, orphan works and collective management), demonstrate again the interest of EU on finding legal solutions to problems that we can find in practice, but also a way to preserve a field that is bringing so much money to the EU and international economy. If we think that the phonograms of Beatles or Elvis were

[71] Art. 7.
[72] Art. 8.
[73] Art. 10.
[74] Art. 11.
[75] Art. 12.
[76] Art. 13.
[77] Art. 14-15.
[78] Art. 16.
[79] Art. 17.
[80] Art. 18-22.
[81] Art. 134^1 – 135.
[82] Art. 33.
[83] Art. 34.
[84] Art. 35.
[85] Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 490-492.

approaching the term of 50 years of protection, we will understood we it was a need to extended the term of protection for performers and sound recordings to 70 years. If we think that UE are functioning more than 250 collective management societies, that are managing annually revenues for more than 6 milliards EURO, and the remunerations resulted from music using represent approximately 80% from the revenues collected by the collective management societies[86], we will understood we it was a need to adopt a Directive on collective management of copyright and related rights.

Analyzing the Directive on collective management of copyright and related rights, I can affirm that its impact on the collective management activity for sure cannot be measured now: maybe it will ultra-regulate the activity of the collective management societies, or maybe it will modernize the Law no. 8/1996 on copyright and related rights which is already exceeded by the practical situations. It will take years to quantify the impact of the Directive, at least as regards its benefits, but is sure that the way in which the collective management activity is done is not neutral[87] for the EU and that the role of the collective management is growing in the universe of the digital era[88].

In Romania the level of harmonization is pretty high, except the fact that the Directive on orphan works wasn't implemented till now and it will be implemented after the term prescribed for transposition. If the Directive on the term of protection and the Directive on the orphan works, were transposed in the national legislation after the term stipulated in the Directives, hopefully this will not happen and the scenario will not repeat in the case of the Directive on the collective management of rights. For this, of course, there is a need also for some political will.

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[86] Marinescu, Romițan, Havza, "Analiza Propunerii de Directivă privind gestiunea colectivă", 238.
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PROTECTION OF INVENTIONS IN THE PHARMACEUTICAL SECTOR THROUGH SUPPLEMENTARY PROTECTION CERTIFICATE

Viorel ROŞ*

Abstract

The topic of health is nowadays, more than ever in the history of mankind, one that enjoys an entirely special attention. It concerns, albeit at a different level, the sick and the healthy, doctors and patients, the young and the elderly, women and men. It concerns governments and individuals, medicine and herbal medicine researchers, and beneficiaries of the research activity.

The paper below is aimed to present special issues regarding the patent for medicinal products and authorisation of placement on the European market of medicinal products.

Keywords: *health, medicinal products, research activities, supplementary protection certificate, costs, temporary monopoly, territorial monopoly, authorisation procedure.*

1. Health care policies worldwide and health care institutions in the EU

Health is a component of the standard of living that also comprises the health care, enshrined as a universal human right under art. 25 of the Universal Declaration of Human Rights[1], and in harmony with that the **World Health Organization** has stipulated in its **Constitution** that its objective is the attainment by all peoples of the highest possible level of health.

The "**Alma-Ata Declaration**" adopted in 1978 formulated the organization's disease fighting strategy. The "**Ottawa Charter**" of 1986 formulated the organization's concept on health and maintaining it through the disease fighting strategy. The organization is responsible for managing certain health risks on a worldwide basis, establishing the health research agenda, offers technical assistance to the Member States, monitors and assesses the people's health, and approaches the most complex population health challenges.

Lately, some of the WHO's actions in the health care domain have been controversial, the organization having even been accused of bioterrorism in the form of the support given to certain manufacturers of vaccines that are actually biological weapons, and of affiliation to international corporate crime syndicates. These accusations must be regarded with reservation, however they cast doubt on the overall activity of this organization and on the efficiency of its actions.

The topic of health, defined by the World Health Organization as a „***state of complete physical, mental and social well-being and not merely the absence of disease or infirmity***", or as a state that „***should ensure a physical and mental state allowing a person to become productive and useful to society***", is nowadays, more than ever in the history of mankind, one that enjoys an entirely special attention. It concerns, albeit at a different level, the sick and the healthy, doctors and patients, the young and the elderly, women and men. It concerns governments and individuals, medicine and herbal medicine researchers, and beneficiaries of the research activity.

The international cooperation in the health domain takes most complex forms. Over the past years, a special attention has been paid to the cooperation and promotion of new medical technologies and new (original, innovating, or generic) efficient medicines to be made available to the population, including the poor countries' people for whom the access to generic medicines (much cheaper than the innovator ones) is essential. In 2001, the "**Declaration on intellectual property and public health**" was adopted at the Conference in Doha, which offers an answer to the concerns expressed by the developing countries about the need for a more facile and less burdensome access to a range of essential medicines designed to fight major epidemics, at the same time offering the necessary assurances to the manufacturers of pharmaceutical products on the observance of the intellectual property rights, with a view to encouraging the furthering and development of the research activities.

The European Union has also implemented concrete actions in the public health domain, the health care concerns targeting not only the diagnosis and treatment, but also prevention. The basic principle of the health care policies of the European Union has become, „**health in all policies**", and the Lisbon Treaty has emphasized the importance of the health policy, stipulating that, „*a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities*". In its turn, the Charter of Fundamental Rights of the European Union proclaims, under art. 35 (Health care),

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[1] Adopted at 10 December 1948 by the Resolution no. 217A, in the third session of the UN General Assembly.

that „*Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national law and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities*".

From the historical viewpoint, the Community health care policy originates from the health and safety provisions, developed pursuant to the free circulation of the persons and goods within the internal market, which has made possible the coordination of the health care activities and actions. The consumption and dependence on drugs, the expansion of serious diseases like cancer, the new diseases like AIDS, the crisis caused by the bovine spongiform encephalopathy (BSE), all these represent major health issues, which in conjunction with the ever freer circulation of the patients and medical personnel within the EU have secured the public health an even more important role on the EU's agenda. Amid the crisis caused by ESB, the Directorate General or Health and Consumers of the Commission (DG-SANCO) has assumed the coordination of all the health related domains, including the medicines, albeit the main responsibility for the protection of health, and in particular of the health systems, further lies with the Member States. The strengthening of the specialized agencies like the **European Medicine Agency** (EMA) and the establishment of the **European Centre for Disease Prevention and Control (ECDC)** evidence the increased commitment of the EU to the health policy.

The European health policy is aimed at:

(i) Offering all the Union citizens access to high quality health care;

(ii) Preventing diseases;

(iii) Fostering a healthier life style, and

(iv) Protecting citizens from health threats like pandemics.

And in order to ensure **the efficiency of its actions, the European Union has created its own instruments of action, both at regulatory and institutional levels**.

Thus, with reference to medicines, the **legislative process**, which started in 1965, **aimed at securing high standards in the pharmaceutical research and industry, harmonizing the national procedure for the grant of licenses for medicinal products, and implementing regulations on publicity, labelling and distribution**. Recent evolutions include the „***pharmaceutical package***", approved by the European Parliament (EP) in early 2011.

The community research programmes regarding the health care and public health date back to 1978, and refer not only to the main diseases, but also to aspects such as health issues influenced by age, environment and lifestyle, irradiation risks and human genome analysis. As regards the mutual assistance, the Member States have agreed to mutually assist one another in case of disasters and very serious diseases. Many such issues have come into the public eye over the past two decades, for example the bovine spongiform encephalopathy (BSE), swine flu, and more recently the H1N1 flue.

Recently (2012-2013), the European Parliament has defined its position also as regards the enactment of the legislation on the cross border health services, and the **revision of the legal framework concerning the medical devices and advanced therapies**. The European Parliament has consistently promoted and promotes coherent public health policies, also through: **notices, studies, debates, written declarations and reports**, on its own initiative, regarding multifarious aspects such as, *inter alia*: EU health care strategy; radiations; protection of patients under medical treatment or in under diagnosis process; health information and statistics; respect for life and caring for patients in terminal stages; European charter for children in hospital; health determinant factors; biotechnology research, including the transplants of cells, tissues and organs, and surrogate mothers; rare diseases; safety and self-sufficiency in supplying blood for transfusions and other medical purposes; cancer; hormones and endocrine disruptors; electromagnetic fields; drugs and their impact on health; smoking; breast cancer and in particular women's health; ionizing radiations; European health card comprising essential medical data readable by any doctor; nutrition and diets and their impact on health; ESB and its consequences, food safety and health risks; e-health and telemedicine; resistance to antibiotics; biotechnology and its medical implications; medical devices; cross border health services; Alzheimer disease and other dementia diseases; alternative medicine and herbal medicines; capacity of response to the H1N1 pandemic flue; and the advanced therapies. The (EU) Regulation no. 282/2014 of the European Parliament and of the Council of 11 March 2014 on the establishment of a third Programme for the Union's action in the field of health (2014-2020) continues the previous programme. The Regulation is the result of the successful negotiations carried out in the final phases of its preparation between the Commission, Parliament and Council with regard to three main aspects: budget allocation, modes of adoption the annual work programmes, and co-financing of the joint actions designated to create incentives for improving the participation of the less prosperous Member States.

As regards the **institutional framework** required for the attainment of the health care health programmes and policies, the following have been established in the European Union:

(i) Consumers, Health and Food Executive Agency,

(ii) European Foundation for the Improvement of Living and Working Conditions,

(iii) **European Medicines Agency MA),**

(iv) European Centre for Diseases Prevention and Control,

(v) European Agency for Safety and Health at Work, and

(vi) European Food Safety Authority.

From the viewpoint of the topic discussed hereunder, particularly important are the regulations that **have instituted the supplementary protection certificate for medicinal products** and **supplementary protection certificate for plant protection products**, and the institution with special competences in the field of medicinal products, being the **European Medicines Agency (EMA).**

2. Special issues regarding the patent for medicinal products and authorisation of placement on the market of medicinal products.

The connection between the people's health and the research and development activity is so close that we do not exaggerate in the least when stating that without the new medicinal products created pursuant to the research and development activities in the health domain the humankind health would be in great jeopardy. That is why it is natural the concern for this field at global, regional and national level. And the shift to the personalized medicine or precision medicine, recently announced as a political project in the US, will make the research more intense but also more costly, since this medicine will have to treat individually, with adequate medication for each patient. The personalized medicine also entails a surge in the number of medicinal products in the near future, but also the manufacture of smaller quantities thereof, therefore their prices will be increasingly higher, as the manufacturers can only eliminate the risk of not covering their investments by increasing prices.

Without examining the causes of this phenomenon, we can however say that there is an increased need for new medicinal products, that there is a permanent need in this domain of innovation, new medicines and higher efficiency, and that their manufacture and placement on the market **is conditional not only on the issue of patents**, but also on the **authorisation of their placement on the market, procedure that actually shortens the actual lifetime of a patent**.

However, certain medicinal products exist on the market that are no longer protected by a particular protection title, and these are, and have to be, bioequivalent to the original medicinal products.

The medicinal products protected by patent are also known as „***original***", „***organic***" or „***innovator***" medicinal products. These are manufactured, as a rule, by large pharmaceutical companies, which in order to achieve these products spend for research and development, and thereafter for preclinical and clinical trials, huge amounts, and even higher amounts for marketing and promotion activities. For example, if in the 70s of the last century the average price of an innovator medicine was 138 million dollars, and in the 80s was 231 million dollars, in 2007 the average cost reached 897 million dollars, and nowadays is over 1.38 billion dollars. As regards the term of achievement of a new medicine, this is 15 years on the average. In Europe, a new medicine is obtained from 5,000 through 10,000 synthesized molecules.

The high costs of achieving original active substances, researching, developing, launching in the market and maintaining these products, and the need to ensure the recovery of the investments and the manufacturers' profit also justify the concern for extending the duration of the monopoly conferred by the patent through various methods.

Pursuant to the expiry of the practical life span of the patents for inventions, which is shorter than the life span of the patent due to the lengthy procedures of authorisation of the placement on the market of the patented medicinal product, these companies lose the monopoly of exclusive manufacture rights, which allows the placement on the market of medicinal products not protected by patent, called generic medicines, whose prices is much lower.

This class of medicinal products, called **"generic"**, is actually represented by medicines equivalent to the original product, having the same quantity and quality composition of active substances and the same pharmaceutical form, the bioequivalence with the original medicinal product being proven under prior appropriate studies. The various salts, esters, ethers, isomers, mixtures of isomers or derivatives of the active substance are deemed the same as the active substance, inasmuch as they do not vary significantly as regards the safety and/or efficiency characteristics. The various pharmaceutical forms of oral administration with immediate effect are deemed as one and the same pharmaceutical form.

The generic medicine is subject to the same rules regarding the manufacture and pharmacovigilance, and has to present the same quality, efficiency and safety characteristics. The sale price thereof is, however, different from that of the original medicines, being 20% through 90% smaller than that of the original medicines, since their manufacturers do not have to recover the investments in their achievement. Due to their quality and price, generic medicines are very attractive, their low prices allowing the access to these of sick people with no income or low income, therefore they balance the health budgets of the poor economies and contribute to an increased standard of living of the consumers, stimulating the further innovation. Meanwhile, the therapeutic efficiency of these medicinal products lowers or even vanishes for reasons related to the adaptation and/or modification of the pathogenic agents of diseases, therefore without the research and development activity in the pharmaceutical industry the risks are huge. However, the research and development activity of the manufacturers of generic medicinal products is limited, their profit being generated by the fast placement on the market, and without the costs entailed by the research and development.

In other words, the original medicinal products are expensive because they entail costly research activities, and the expenses have to be recovered, while the generic medicinal products, which are much cheaper, can only be manufactured after the expiry of the term of protection of the intellectual property rights over the original medicinal products and at the expense of those. However, generic medicinal products cannot be manufactured if original medicinal products are not manufactured upstream. This does not mean that generic medicinal products are only manufactured based on original medicines.

3. Medicine patenting, actual lifetime of the medicinal product patent and consequences of its short lifetime

The protection through patent of medicinal products is recent. In France, it was only through a decree of 30 May 1960 that the solution of the French lawmaker of 1844 was invalidated, and the patenting of medicines was admitted, a "special patent for medicine" being crated. The rationale of exclusion stems from the interpretation given to the condition of industrial applicability, and the fact that medicinal products can be found in nature, and these are actually discoveries, the case of penicillin being maybe the best example. Nowadays, however, in truth, pharmacy is considered an industry, and medicines, manufactured.

What is a medicinal product? In a simple definition, the medicinal product is a substance used to prevent, cure, alleviate or treat disease or, in a wider definition, a medication is a substance or a composition which contains curative or preventive properties with regard to humans or animal illnesses for the purpose of medical diagnostic or to restore, to correct or to modify organic functions. According to another definition, a medicine is a preparation used to prevent, diagnose, treat a disease, trauma, or to restore, correct or modify organic functions.

Art. 1 (a) of the Regulation no. 469/2009 defines the medicinal product as "*any* ***substance or combination of substances*** *presented for treating or preventing disease in human beings or animals and* ***any substance or combination of substances which may be administered to human beings or animals with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in humans or in animals***".

Generally, medicines are classified into indispensable, secondary or adjuvant, comfort and placebo type. The general basic law of the medicinal product, which does not take exception, is that medication acts on the functions of the body, modifying them in a positive (stimulatory) or negative (inhibitory) way.

Medicinal products have been prepared for a long time solely based on plants (e.g., alkaloids like digitalin or morphine), animals (e.g., vaccines) or minerals (e.g., aluminium). Nowadays, medicines are manufactured by the pharmaceutical industry, which offers a higher accuracy and safety of use. In parallel, the pharmacy proposes more and more synthetic products, which copy more or less truthfully natural substances, or are entirely original.

A medicinal product contains one or more active ingredients. Generally, the essential active ingredient gives its name to the medicinal product. Each essential active ingredient is identified in three different ways from the scientific, legal or commercial viewpoint. The scientific denomination is the exact chemical name of the active ingredient. It is typically less used due to its complexity. The international common denomination (DCI) corresponds to the generic name of the active ingredient in medicine. The commercial name is given by the pharmaceutical laboratories, which create new medicines by modifying the molecular structures of the original substances to increase their therapeutic efficiency and reduce secondary effects. One and the same active ingredient may be marketed as medicinal product by two different laboratories, two commercial names may correspond to the same substance, possibly with different presentations and/or doses.

In this domain, patents may also refer to a product or a procedure. No patents are granted for treatment methods, however the products, substances, compositions used in treatments are not excluded from patenting.

Generally, the **medicinal product has an active substance, a molecule** and **other parts that make the active substance therapeutically usable**, conferring the pharmaceutical form of the medicine, the types of claims encountered in practice in respect of innovator and patentable medicinal products being as follows:

- Product claim, where the claimed substance is new and the result of an inventive activity. The protection granted by the product invention covers all the types of manufacture and use of the substance, even those not related to the pharmaceutical domain;
- Claim to scope as the „first medical indication", where the claimed substance is technically known but the invention reveals for the first time a medical use thereof;
- Claim to scope as „a second or other medical indication", possible where the substance is also known as medicinal product but the invention consists in a new use in the medical field, in which case in order to be patentable it should also not be obvious;
- Claim to use for „a second or other medical indication", possible where the use of a substance already known as medicinal product is new and inventive for the treatment of another affection;
- Claim to a medicinal product preparation process, where the process in itself is new and includes an inventive activity, and not the substance.

Significant for the examined topic are the first four types of claim, which put up for discussion the active ingredient or combination of active ingredients, the only ones susceptible to supplementary protection.

At the same time, the Regulation provides for in art. 1 (c) that the basic patent (which must exist for a supplementary protection certificate to be granted) may also protect „***a process to obtain a product or an application of a product, and which is designated by its holder for the purpose of the procedure for grant of a certificate***".

Similarly to any other domain, the product newly obtained through a creative activity and susceptible of industrial application is protected by patent, the **pharmaceutical product** designated for marketing being difficult, impossible even, to protect by secrecy, the modern techniques allowing the reproduction without much difficulty of the medicinal products.

The patent is that protection title conferring its holder a **temporary and territorial monopoly**[2]: of **exclusive exploitation**, being to manufacture and market the product and prohibit third parties from performing any act of use without his consent on the **territory** in which the protection title is effective, over the period of validity of the patent.

As regards the **term of the exclusive monopoly conferred by the patent**, this is twenty years from the regular filing date (art. 33 of the Romanian patent law, which is consistent with the regulations of other law systems, the community law and the international conventions).

The exploitation monopoly is territorially limited, in principle, since the patent is effective where the law is effective, the protection outside the borders being able to the obtained either based on a patent requested in the country where the applicant has an interest, or through a patent obtained in accordance with the Washington Treaty of 1970 (PCT), or through an European patent.

Mention should be made that the Community law also limits the **effects of the territoriality** of the national patents in the EU. The Treaty on the Functioning of the European Union enshrines the principle of free circulation of goods, which contradicts the territorial nature of the monopoly related to the national patent. In order to eliminate the contradiction between the two legal orders, the Community case law referring to the analysis of art. 30 of the TFEU has evidenced a specific object of the patent right, and a principle of the right exhaustion Community-wide, thus restricting the exercise of right in the name of the free circulation, but preserving the existence thereof. The specific object of the right conferred by the patent, that the Treaty does not want to affect, is to ensure its holder, in order to compensate the creative effort of the inventor, the exclusive right to use the invention for the purposes of manufacturing and putting into circulation for the first time the industrial products, either directly or through the grant of licenses, and the right to challenge any counterfeiting, infringements of his right. However, once a product covered by patent is put into circulation for the first time in an European Union country, with the holder's consent, the latter can no longer oppose to the product circulation in other Member States by calling forth parallel patent rights (valid in those countries).

Another exception from the exploitation monopoly is, with reference to medicinal products, the so-called **Bolar provision**[3], an exception meant to favour the placement on the market of generic medicinal products immediately after the expiry of the protection conferred by patent and supplementary certificate of the original medicinal product. In accordance with this provision of exception, the **manufacturers of generic medicinal products may commence the preparations for the authorisation of the placement on the market of a generic medicinal product prior to the expiry of the period of protection of the original product, and file the authorisation documentation so that the generic medicinal product can be placed on the market immediately after the original product is no longer protected by patent and supplementary protection certificate**.

Obtaining a patent for a medicinal product is possible solely provided that the **claimed active substance benefits from novelty**, in other words the substance is not known either in the medicine or other domain, therefore is different from the known substances due to its technical characteristics, such as a new formulation, dosage or synergistic combination. The new medicinal product will be patented provided that it also meets the other two conditions imposed by the law, being: the inventive activity (the patent should be granted for ingenious achievements involving an intellectual effort that has to be rewarded) and industrial applicability (that includes besides uses the redundancy of achievement of the medicinal product).

The placement on the market of innovator medicinal products, protected by patent, is however also conditional upon **obtaining the marketing authorisation for medicinal products**, which requires studies, tests, verifications and authorisation formalities, the procedure taking a long time (up to 12 -15 years), which makes the actual lifetime of a medicinal product patent much shorter.

This means that the term of protection of the new achievement through patent is not equal to the actual lifetime of the patent, the latter one being significantly shorter in the case of the medicinal products. However, this short actual lifetime makes the activity of research and development, and of achievement of new innovator medicine unattractive, since the relevant investments cannot be recovered in such a short time. The solution to this problem is to extend the term of

[2] The territorial limitation of the right of exclusive exploitation is, in the EU, contrary to the principle of free circulation of goods (commodities).

[3] The name comes from the case Roche Products vs. Bolar Pharmaceutical examined by the US Federal Tribunal in 1984 regarding the manufacture of generic medicinal products, Bolar being the manufacturer thereof.

protection through the supplementary protection certificate.

However, mention should be made of, and is essential to emphasize, the **absolute independence of the patent from the marketing authorisation for medicinal products**. This means that where any medicinal product may be marketed solely provided that it has been authorized for placement on the market, the medicinal product does not necessarily has to be patented. For example, generic medicinal products are not covered by patent, however in order to be patented their prior authorisation is compulsory. And where there is an existing patent for a medicinal product but subsequently such patent is cancelled or revoked, the marketing authorisation does not have to be withdrawn, the same as the withdrawal of the marketing authorisation will not affect the validity of the medicinal product subject to the withdrawn authorisation.

4. Medicinal product marketing authorisation

The patent for a **new medicinal product** is a protection title for the **patented medicinal product**, and confers its holder an exclusive exploitation right over twenty years from the regular filing date. In order for the medicinal product to be placed in the market, the Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (which has replaced the Directive 65/65/EEC) has instituted the **obligation to obtain an authorisation prior to marketing** in all the Member States of the European Union. With reference to medicinal products for veterinary use, the code was adopted by the Directive 2001/82.

The procedure is lengthy both for the applicant (holder of the patent) and in terms of the formalities to be performed by the latter and of those in charge of the authorities issuing the authorisation. It is a procedure whereby and in the course of which the national authority or, as the case may be, the European one verifies, in order to approve the placement on the market of a medicinal product, its safety, efficiency and quality. The studies indicate that this procedure involves filling out about 1,850,000 pages of over 4,000 files measuring 230 meters in height and 500 kilometres in length, and lasting sometimes up to 12 - 15 years.

The medicinal product marketing authorisation can be obtained on the basis of a centralized procedure, in respect of the whole territory of the European Union, by the European Medicines Agency (EMA), or of a domestic procedure, by the National Agency for Medicines and Medical Devices. The similar body in the US is the US Food and Drug Administration (FDA).

5. Domestic authorisation procedure

In our law, the marketing authorisation for (original or generic) medicinal products is regulated by the Law no. 95/2006 on the health reform, updated in 2013, which transposes the Directive 2001/83/EC, Chapter 3 (Marketing authorisation), Section I (Marketing authorisation for medicinal products). No medicinal product may be placed on the market in Romania without a marketing authorisation (MA) issued by the National Agency for Medicines and Medical Devices, in accordance with the provisions of this law, or an authorisation issued according to the centralized procedure.

Medicinal products that have to be authorized by the European Medicines Agency under the centralized procedure are excluded from the grant of this marketing authorisation. The issued authorisations may enjoy mutual recognition in other Member States of the European Union. As of 1 January 1998, the mutual recognition procedure is compulsory in respect of the medicinal products that are to be marketed in another Member State than the one where the medicinal product has been first authorized. The procedure of mutual recognition of the marketing authorisation has been introduced by the Council Directive 93/39/EEC, in accordance with the provisions of Directives 65/65/EEC and 73/319/EEC.

6. Centralized procedure of marketing authorisation for medicinal products in the EU

The creation of a single market for medicinal products as well has been a concern of the Communities ever since the establishment thereof[4]. In order to attain the relevant objectives, the centralized procedure of marketing authorisation for medicinal products has been instituted, and the body(ies) in charge of the verification of the conditions established by the Community rules, and of the grant of the authorisation has(ve) been nominated, being the European Commission, the technical procedures being carried out through the European Medicines Agency (EMA) based in London.

The procedure of centralized authorisation of marketing for new medicinal products is currently regulated by the Regulation (EC) no. 726/2004 of the European Parliament and of the Council of Europe 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency. EMA

[4] Directive 65/65/EEC was the first Community legal enactment concerning the pharmaceutical products. This regulated the regime of the marketing authorizations for medicinal products and data exclusivity. Other legal enactments regulated the pharmacovigilance – Council Directive 75/319, labeling and packaging of medicinal products - Directive 92/27/EEC, while the Council Regulation 1768/1992 created the supplementary protection certificate for medicinal products.

verifies and monitors the safety, efficiency and quality characteristics of the medicinal products for both human and veterinary use.

As regards its scope of application, the Regulation no. 726/2004 provides for that no medicinal product appearing in the annex thereto may be placed on the market within the Community without a prior authorisation granted by the Commission, which acts in this regard and performs its verification duties through the European Medicines Agency (EMA).

In order to obtain an authorisation, the applicant has to make available to EMA comprehensive data pertaining to the characteristics, safety and efficiency of the medicinal product, in accordance with art. 8.3 of the Directive 2001/83/EC of the European Parliament and of the Council, amended by the Directive 2002/82/EC of 27 January 2003.

EMA has established **two Scientific Committees** (for medicinal products of human use and for medicinal products of veterinary use) and one **(Scientific) Paediatric Committee**, responsible for preparing the notices regarding the medicinal products falling within their ambit of competence, the notices of these committees underlying the authorisation to be issued by the European Commission.

The committees have to present their notices within 210 days from receiving the relevant request, and for these purposes may perform tests on the medicinal product, raw materials or intermediary products, or may perform inspections at the medicinal product manufacturing plant. Each authorisation proposal has to be taken into consideration by the Committee on the basis of the **scientific criteria** regarding the quality, safety and efficacy of the respective medicine. These three criteria allow the assessment of the risk-benefit ratio in respect of any medicinal product. The Committee first verifies the compliance with the conditions of issue of a marketing authorisation. If the authorisation conditions are deemed not complied with, the applicant will be informed thereof, and may submit to EMA within fifteen days a notice re-examination application.

On the basis of the (positive) notice of the EMA Committee, the European Commission prepares a draft decision regarding the application for medicinal product authorisation. The final decision is made pursuant to a procedure of consultation of the EU Member States. If the draft decision of the European Commission is not consistent with the EMA notice, the Commission will attach to its draft decision an annex explaining the reasons of the divergent opinion, which will be submitted to the Member States and the applicant.

The marketing authorisation will be **rejected** if the:

- Applicant has not properly and sufficiently demonstrated the quality, safety and efficacy of the medicinal product;
- Information is inaccurate.

The Commission may impose on an applicant, at EMA's recommendation, the obligation to perform: a post-authorisation safety study and/or a post-authorisation efficacy study.

The authorisation issued by the Commission is valid in all the Member States of the European Union for 5 years, and can be renewed upon request. Once renewed the marketing authorisation will be valid for indefinite term, unless the Commission opts for a new period of validity of five years.

Generic medicinal products are also subject to the authorisation procedure, however in their case, when the active substance is equivalent to a previously authorized medicinal product, the results of the preclinical tests are no longer required. This procedure of authorisation of the generic medicinal products is known as the „**abridged procedure**", since while the new medicinal products require the submission of preclinical tests providing data about the product safety, efficacy and quality, article 10 of Directive 2001/83 sets forth that the manufacturers of generic medicinal products may use and rely on the data and results already obtained by the original manufacturer. With reference to the **generic medicinal products** of the medicinal products of reference authorized by the EU, these can be subject to a decentralized authorisation procedure provided that the Europe-wide harmonization is maintained.

With reference to the medicinal products for **veterinary use**, these follow the rules applicable to the medicinal for human use, subject to the specific adaptations.

The refusal to issue a marketing authorisation in the centralized procedure shall be deemed a prohibition to market the medicinal product on the whole territory of the EU.

Any marketing authorisation for a medicinal product not followed by the actual marketing thereof for three consecutive years becomes invalid.

After its placement on the market, in order to ensure the people's protection by preventing, detecting and assessing the adverse reactions of the medicinal products for human use, inasmuch as the safety profile of the medicine cannot be fully known except after its marketing, the supervision of medicinal products (pharmacovigilance) is instituted. In respect of the medicinal products manufactured in the EU, the authorities responsible for pharmacovigilance are the relevant authorities of the Member States that have issued the authorisation. With reference to the medicinal products imported from a third country, the responsible relevant authorities are the issuers of the import authorisation. These will inform the Committee for medicinal products and the Commission about any case where the manufacturer or importer do not comply with their obligations. The holder of a marketing authorisation for human use or veterinary use is obligated to implement all the necessary changes, taking into account the manufacture methods

and technical and scientific progresses, in accordance with the Directives 2001/83/CE and 2001/82/CE.

Whenever urgent action is essential to protect human health or the environment, a Member State may suspend the use on its territory of an authorized medicinal product.

Notwithstanding the legislative efforts of the European Commission and of the Council, one cannot talk as yet about a single pharmaceutical market of all the EU Member States, mainly because the health provisions are the responsibility of each State, and their governments apply differentiated policies in terms of social, ethical values or GDP level. However, inasmuch as nowadays a harmonization has been achieved on large scale in the European Union in respect of the marketing authorisation system and mutual recognition and related formalities, the distortion effects regarding the operation of the single market are created by the regulation of the medicinal product pricing. In the majority of the Member States, the price of the prescribed medicinal product has to be determined prior to its release and based on the social security system, in order to maintain the control of the health budget. Thus, certain national policies encourage the sale of generic medicinal products, by fighting the practices of request and establishment of supply prices, and obligating the pharmacies to offer the cheapest product. Other Member States have instituted medicinal product pricing control measures.

7. Supplementary protection certificate for medicinal products

In all the invention domains the actual lifetime of the patents is shorter than their term of validity (which is 20 years from the regular filing date). However, in the case of the medicinal products, due to their specificity, in particular the long and costly research entailed by them, but also the tests and formalities required for the purposes of their placement on the market (which can last more than twelve years[5]), a compulsory condition for their marketing, the actual lifetime of the patents is shorter than in any other field.

As already mentioned, the expenses incurred to create a new medicinal product and placing it on the market have increased over 40 years by 1,000% (from 138 million to 1.38 billion dollars). However, the protection through patent of the new medicinal products, within the limits of the actual patent lifetime, does not allow the recovery of the investments in the achievement of new medicinal products, and implicitly is not likely to encourage the activity of research and development in this field. That is why all over the world means have been sought for to achieve a balance between the interests of the industry (investment recovery and profit) and people's health interests (new and state of the art medicinal products), respectively solutions likely to make attractive the achievement of new medicinal products for the benefit of the pharmaceutical industry and the consumers.

Similar solutions were adopted in US in 1984, when the intellectual property law was amended to provide the possibility to extend a patent term through a „patent term extension certificate", followed by Japan in 1988, which adopted an extension procedure called the „registration of extension of a patent right term".

Similar measures were adopted in Europe at the end of the 80s of last century in France, Italy and Germany, which made possible the extension of the patents for medicinal products for human use and veterinary use, and for phyto-pharmaceutical products in the countries where the longer protection term allowed the recovery of investments and obtaining of higher profits.

However, at the same time the development of certain heterogeneous laws in the European Communities could also create hindrances against the circulation of products within the single market, therefore a new instrument has been created to solve the problem Community-wise: the supplementary protection certificate for medicinal products, and a similar one for plant protection products.

The supplementary protection certificate for medicinal products was instituted by the **Regulation (EEC) no. 1768/92** of the Council of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (CSPM), the **European Medicines Agency** being established under the same act. This Regulation was repealed by the **Regulation no. 469/2009** of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products, which however did not significantly change the previous text, actually the new act codifying the prior regulation and its successive amendments.

Subsequently, the Parliament and the Council passed the **Regulation no. 1901/2006 on medicinal products for pedriactic use** and amending the Regulation (EEC) no. 1768/92, Directive 2001/20/EC and Regulation (EC) no. 726/2004, whereby: a **Paediatric Committee** has been established within the **European Medicines Agency**, and the right to the **extension of the supplementary protection certificate for medicinal products of paediatric use by another 6 months** has been regulated to reward the research, preclinical tests and clinical studies required in respect of this class of medicines, and designed to guarantee their safety, high quality and efficiency for use by the target population.

Four years after the passing of the Regulation no. 1768/92, the European Parliament and the Council passed the **Regulation no. 1610/96 of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products**,

[5] In the case of the medicinal product for human use called "Circadin" the obtaining of its marketing authorization lasted more than 15 years. Thus, at the authorization issue date, 28 June 2007, the patent was due to expire within less than five years.

designed to ensure a protection level for the innovations in this domain equivalent to that secured for the medicinal products, having regard to the contribution of this class of products to the continuing improvement of good quality food, and with a view to ensuring an effective protection to cover the research investment, and generate the resources required to maintain a high level of such research.

In the Romanian law, provisions regarding the obtaining of such supplementary protection certificates have been included in art. 30 of the Patent Law no. 64/1991[6], the Law no. 28/15.01.2007, however the text as revised[7] merely makes reference to the first two regulations (**Regulation (EEC) no. 1768/92**, respectively **Regulation no. 469/2009** and **Regulation no. 1610/96)**, without referring as well to the **Regulation no. 1901/2006 regarding the extension of the supplementary protection certificate for medicinal products for paediatric use**. However, even in the absence of any specific reference in the Romanian patent law to this last regulation as well (on medicinal products for paediatric use), such regulation is, like all the other regulations[8], of direct applicability in the Romanian law. The authority competent to issue the supplementary protection certificate for medicinal products is the State Office for Patents and Trademarks.

Previously, in order to comply with the criteria of accession to the European Union, the Law no. 581/2004 on the supplementary protection certificate for medicinal products and plant protection products was passed, which was to become effective at the date of Romania's accession to the European Union[9]. However, this law had no effects, and was specifically repealed by the Law no. 107/2007, because as of the date of our country's accession to the EU the aforementioned regulations have become of direct applicability in our country as well, therefore the supplementary protection certificates are granted by the national authority pursuant to the implementation as such thereof.

The basic patent related to the supplementary protection certificate may also be a European patent, granted by the European Patent Office[10]. Article 63 of the European Patent Convention referring to the term of the European patent stipulates under paragraph (2), point b) the **possibility to extend its term**, and confers the contracting parties the possibility to extend the term of a European patent in respect of products requiring authorisation immediately after the expiry of the legal term of the patent[11].

8. Subject matter of the supplementary protection certificate

The subject matter of the supplementary protection certificate is the „product", which means the „***active ingredient or combination of active ingredients of a medicinal product***". Medicinal product means any substance or combination of substances presented for treating or preventing disease in human beings or animals and any substance or

[6] In the form prior to the amendment brought by the Law no. 83/2014 on employee inventions, the provision referring to the supplementary protection certificate being included under art. 31. Subsequent to the law modification, the texts have been renumbered, and this provision is now included under art. 30 thereof.

[7] Art. 30 paragraph (3) of the Law no. 64/1991 republished has the following contents: *„In respect of the patented medicinal products or plant protection products a supplementary protection certificate may be obtained in accordance with the terms of the Regulation (EEC) of the Council of 18 June 1992 concerning the supplementary protection certificate for medicinal products, and of the Regulation (EC) no. 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products."* The Guideline no. 146 of the general director of OSIM concerning the supplementary protection certificate for medicinal products and plant protection products was published in BOPI no. 12 of 29.12.2006.

[8] Art. 288 al. (2) of TFEU provides for that the treaty „shall be directly applicable in all Member States".

[9] The Law no. 93/1998 has introduced the „**transitional protection certificate**" for the „inventions having as subject-matter substances obtained by nuclear and chemical methods, pharmaceuticals, methods for diagnostic and medical treatment, disinfectants, food stuffs and spices and new plant varieties, bacteria and fungi strains, new animal breeds and silkworms", in favor of the holders of patents having a priority date before 21 January 1991, issued in a Member State of the Paris Union for the Protection of Industrial Property or of the World Trade Organization, and not patented in Romania. This transitional protection certificate is subject solely to the regime established by the patent law, and has the same subject matter of the invention, and the conferred rights are identical to those conferred by the basic patent. The transitional protection starts at the date on which an application is filed with OSIM, and ceases at the date on which the validity of the patent for invention expires, or on which the patent is cancelled or at the date of forfeiture of the patent owner's rights, and does not exceed 20 years of the date of the regular filing in the country of origin.

[10] This office was established by the Munchen European Patent Convention of 5 October 1973, effective as of 7 October 1977. Its establishment is the expression of the joint political will of the European countries to create a uniform patenting system in Europe. **The European patent has the same effects in Romania as the national patents issued by OSIM, subject to the compliance with the conditions laid down in art. 6 paras. 2-5 of the Law no. 611/2002 regarding the adhesion of Romania to the Convention on the Grant of European Patents**. In pursuance of art. 64 para. (1) of the Convention, ***„A European patent shall confer its proprietor from the date on which the mention of its grant is published in the European Patent Bulletin, in each Contracting State in respect of which it is granted, the same rights as would be conferred by a national patent granted in that State***". Some authors have stated that the „patent thus issued must be validated in each nominated State in order to be effective" (Bernard Remiche, Vincent Cassiers, Droit des patents d`invention et du savoir-faire. Bruxelles, Larcier, 2010, p. 49), while others are of the opinion that after being issued, in the countries nominated by the applicant, patents are subject to the national law of each State. According to art. 63 of the Munchen Convention, the patent thus issued „shall confer its proprietor in each Contracting State the same rights as would be conferred by a national patent granted in that State". This means that only a patent thus issued may be cancelled in accordance with the law of the State of destination, however we do not believe that the validation is required, or that OSIM may decide to revoke the patent.

[11] Romania adhered to this Convention and to the Act revising it adopted at Munchen on 29 November 2000 by the Law no. 611/2002 (OJ no. 844/22.11.2002).

combination of substances which may be administered to human beings or animals with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in humans or in animals.

Therefore, there is no full identity between the subject matter of a patent for medicinal protect and the subject matter of the supplementary protection certificate. Unlike the patent, the **supplementary protection certificate does not refer to the entire medicinal product**; it only covers the **product** referred to under art. 1(b), respectively the **active ingredient or combination of active ingredients of a medicinal product, and not the medicinal product as a whole**, the last one also comprising those components that make the active ingredient therapeutically usable (adjuvants).

The recital 10 of the Regulation explains the **definition of the product** as follows: „*The protection granted (by the SPC) should furthermore be **strictly confined to the product which obtained authorisation to be placed on the market as a medicinal product***". And art. 4 of the Regulation defines the subject matter of the protection through supplementary certificate as follows: „***Within the limits of the protection conferred by the basic patent, the protection conferred by a certificate shall extend only to the product covered by the authorisation to place the corresponding medicinal product on the market** and for any use of the product as a medicinal product that has been authorised before the expiry of the certificate.*"

The definition given by the Regulation to the „product" making the subject matter of the SPC demonstrates its double nature: on the one hand basic patent, and on the other hand administrative authorisation of placement on the market of the medicinal product. Furthermore, the Regulation institutes quantity and quality limits as regards the subject matter of the protection conferred by the supplementary certification relative to the subject matter of the protection conferred by the patent.

Quantity limits because if **a granted patent refers to several products**, the certificate may be obtained **solely for those in respect of which a marketing authorisation for medicinal product exists**, but also because if there are **several patents of products with the same active substance a single supplementary protection certificate will be granted**, and **not as many certificates as patents for products with the same active substance an owner holds**[12]. However, with reference to **owners of patents for different products comprising the same active substance**, **as many supplementary certificates as owners of patents for different products** having applied for the protection supplementation will be granted[13].

Quality limits because the supplementary protection certificate does not have a subject matter identical to that of the patent, respectively of the patented product, but only to the essential part thereof, being the active ingredient or combination of active ingredients, as the case may be. In the case of the combinations of active ingredients, supplementary protection certificates may be obtained as well for an individual active ingredient, if this complies with the basic condition to be deemed an active ingredient.

The case law of the national courts, in agreement with the interpretations given to the provisions of the Regulation no. 469/2009 by the ECJ, has ruled that a combination between an active ingredient and a polymer, when the active ingredient is already known, cannot substantiate the issue of a supplementary protection certificate. The specialized literature also affirms that a substance without its own therapeutic effect, serving only to obtain a certain pharmaceutical form of the medicinal product, cannot be deemed an „active ingredient", which in its turn allows the definition of the „product". A substance like that, associated with a substance having its own therapeutic effects, cannot create a „combination of active ingredients" within the meaning of article 1 point (b) of the Regulation no. 469/2009. The fact that the substance without any own therapeutic effect allows the obtaining of a pharmaceutical form required for the therapeutic efficacy of a substance endowed with therapeutic effects is not of a nature to invalidate this interpretation[14].

The patent claims are important because they determine the subject matter and extent of the patent protection. The claims, in the case of medicinal products, should however refer as well to the therapeutic indications, inasmuch as the medicinal product does not tend to protect a substance in general, but its use as a medicine in the treatment or prevention of certain affections. In that regard, the ECJ has ruled that article 3 point (a) of the Regulation (EC) no. 469/2009 concerning the supplementary protection certificate for medicinal products must be interpreted as precluding the competent industrial property office of a Member State from granting a supplementary protection certificate where the active ingredients specified in the SPC application include active ingredients not identified in the wording of the claims of the basic patent relied on in support of that application[15].

Where the claims in relation to one and the same patent refer to a single active ingredient but entail the grant of several marketing authorisation, a single supplementary certificate will be granted, and its coverage will not be limited by the specialty of either

[12] Frederic Pollaud-Dulian, Propriete intellectuelle. La propriete industrielle, Paris, Ed. Economica, 2011, p. 323.
[13] ECJ, Case C 482/07, AHP Manufacturing BV vs Bureau voor de Industriële Eigendom
[14] Bernard Remiche, Vincent Cassiers, Droit des patents d`invention et du savoir-faire, Bruxelles, Larcier, 2010, p. 197.
[15] Case C-6/11, Daiichi Sankyo Company c/ Comptroller General of Patents, Designs and Trade Marks, Order of 25 November 2011.

one of the authorisations. At the same time, if two patents have as subject matter (different) processes for obtaining the same active product, only one certificate may be obtained.

Accordingly, the regulation concerning the plant protection products defines under article 1 the „plant protection products" as the active substances and preparations containing one or more active substances, intended to protect plants against all harmful organisms, influence the life processes of plants, destroy undesirable plants, or prevent undesirable growth of plants. The Regulation comprises definitions of the active substance, preparations, plant products, harmful organisms, which have allowed a more clear interpretation of the regulation in these matters, however not entirely unambiguous. The definitions of the „product", „basic patent" are similar to those under the regulation concerning the medicinal products.

A more accurate definition of the terms of „product" and „active ingredient would facilitate, however, the establishment of those forms of active ingredients in a medicinal products that may be deemed to represent the product within the meaning of the regulation.

The **ECJ** has had the occasion to rule in relation to several cases on the meaning of „**active ingredient**", and it is interesting that the court has referred in its solutions also to considerations of appropriateness of instituting the certificate, and not only to the legal rules and principles and its case law.

Thus, in the case C-631/13, Arne Forsgren c/ Österreichisches Patentamt settled by the judgment of 15 January 2015, the Court ruled under paragraph no. 51, the same as in other occasions, that „***It is appropriate, consequently, to refer to the fundamental objective of Regulation No. 469/2009, which is to ensure sufficient protection to encourage pharmaceutical research, which plays a decisive role in the continuing improvement in public health"***, concluding that „*In that regard, it follows from paragraph 25 above that the term «active ingredient». for the purposes of applying Regulation no. 469/2009, relates to* ***substances which produce a pharmacological, immunological or metabolic action of their own*** *(....)",* and that *„In the light of the* ***wording*** *and* ***purpose*** *of Regulation No. 469/2009, it must be held that Article 1(b) of that regulation does not permit an «active ingredient» to be categorised as a carrier protein conjugated with a polysaccharide antigen by means of a covalent binding, unless it is established that it produces a pharmacological, immunological or metabolic action of its own*".

In the case C-210/13, Glaxosmithkline Biologicals SA and Glaxosmithkline Biologicals, Niederlassung der Smithkline Beecham Pharma GmbH & Co. KG c/ Comptroller General of Patents, Designs and Trade Marks, settled at 14 November 2013 by motivated order (considering, therefore, that the answer to a question referred for a preliminary ruling by a British court may be clearly deduced from existing case-law or admits of no reasonable doubt), the court concluded that, „*Article 1(b) of Regulation (EC) No. 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products must be interpreted as meaning that,* ***just as an adjuvant does not fall within the definition of «active ingredient»*** *within the meaning of that provision, so* ***a combination of two substances****, namely an* ***active ingredient*** *having therapeutic effects on its own, and* ***an adjuvant*** *which, while enhancing those therapeutic effects,* ***has no therapeutic effect on its own, does not fall within the definition of «combination of active ingredients» within the meaning of that provision***".

In the case C-443/12, Actavis Group PTC EHF and Actavis UK Ltd c/ Sanofi, settled by the judgment of 12 December 2013, the ECJ ruled that, *„In circumstances such as those in the main proceedings, where, on the basis of a patent protecting an innovative active ingredient* ***and a marketing authorisation for a medicinal product containing that ingredient as the single active ingredient, the holder of that patent has already obtained a supplementary protection certificate for that active ingredient*** *entitling him to oppose the use of that active ingredient, either alone or in combination with other active ingredients, Article 3(c) of Regulation (EC) No 469/2009* ***must be interpreted as precluding that patent holder from obtaining – on the basis of that same patent but a subsequent marketing authorisation for a different medicinal product containing that active ingredient in conjunction with another active ingredient which is not protected as such by the patent – a second supplementary protection certificate relating to that combination of active ingredients***".

In the case C-484/12, Georgetown University c/ *Octrooicentrum Nederland, settled by the Judgment of 12 December 2013, the ECJ ruled that, „It should be noted in that regard that, where the holder of a patent obtains an SPC relating to an active ingredient on the basis of the MA for the first medicinal product placed on the market comprising, among its active ingredients, the active ingredient protected by the basic patent (…), such as, in the main proceedings, an SPC relating to HPV-16 on the basis of the MA for Gardasil,* ***the wording of Article 3(c) of Regulation No 469/2009 itself precludes that holder from obtaining, on the basis of that same patent, another SPC relating to the very same HPV-16 as a «product»*** *on the basis of a subsequent MA for another medicinal product which also contains HPV-16,* ***unless, in that other medicinal product, the «product» that is the subject of the SPC application relates in fact to a different HPV-16 falling within the limits of the protection conferred by the basic patent relied upon for the purposes of that application*** *(...)".*

In the case C-493/12, Eli Lilly and Company Ltd c/ Human Genome Sciences Inc settled by the Judgment of 12 December 2013, the ECJ ruled that, *„Article 3(a) of Regulation (EC) No 469/2009 must be interpreted as meaning that, in order for an active ingredient to be regarded as «protected by a basic patent in force» within the meaning of that provision,* ***it is not necessary for the active ingredient to be identified in the claims of the patent by a structural formula. Where the active ingredient is covered by a functional formula in the claims of a patent issued by the European Patents Office, Article 3(a) of that regulation does not, in principle, preclude the grant of a supplementary protection certificate for that active ingredient****, on condition that it is possible to reach the conclusion on the basis of those claims, interpreted inter alia in the light of the description of the invention, as required by Article 69 of the Convention on the Grant of European Patents and the Protocol on the interpretation of that provision, that the claims relate, implicitly but necessarily and specifically, to the active ingredient in question, which is a matter to be determined by the referring court*".

9. Conditions for the grant of the supplementary protection certificate

The application for the supplementary protection certificate has to be submitted by the holder of a basic patent or his successor in rights to the **intellectual property office of the country that has issued the first marketing authorisation for the medicinal product**. The application for the grant of a certificate has to comply with the requirements under art. 8 of the Regulation no. 469/2009.

The certificate application has to be lodged within six months of the date on which the first market authorisation was obtained for the respective product as medicinal product. If the marketing authorisation was obtained prior to the grant of a basic patent, the certificate application has to be lodged within six month of the date on which the patent was granted.

The supplementary protection certificate cannot be granted unless in the State where the grant of the certificate is applied for, and at the date of submission of the application for the grant of a certificate:

(a) **The product is protected by basic patent in force;**

The patent has to be in force in the country where the marketing authorisation for the medicinal product was obtained. The patent may be national, similar to the national one or a European patent. If the same basic patent protects several different „products", it is possible, in principle, to obtain several SCPs in relation to each of those different products provided, *inter alia*, that each of those products is „protected" as such by that „basic patent" within the meaning of article 3, point (a) of the Regulation no. 469/2009 read in conjunction with article 1, points (b) and (c) thereof, and is included in a medicinal product in respect of which a marketing authorisation has been obtained.[16]

(b) **A valid authorisation to place the product on the market as a medicinal product has been granted** in accordance with Directive 2001/83/CE or Directive 2001/82/CE, as appropriate;

This authorisation has to be granted by the relevant authority in the country where the grant of the supplementary protection certificate is requested, the competence to grant the supplementary certificate belonging to the intellectual property office where it operates, and which has granted the marketing authorisation.

The medicinal product patent and the marketing authorisation are independent, that is, if any medicinal product may be marketed only if authorized for placement on the market, the medicinal product does not necessarily has to be patented. However, in order for a supplementary protection certificate to be granted, it is required both a basic patent and a valid marketing authorisation for the medicinal product containing the active ingredient or combination of active ingredients in respect of which the supplementary certificate is applied for.

(c) The product has not already been the subject of a certificate;

This condition connects the patent, authorisation and certificate. Only the patented product, in respect of which a marketing authorisation for medicinal product has been obtained, may benefit from a single protection supplement. In other words, this condition is inferred from the unicity of the certificate for the same active product and holder of patent or patents relating to the same product.

In the case of several holders of patents where the active ingredient is the same, each one of them may obtain a supplementary protection certificate. In other words, the unicity of the product or combination of active products is relevant in connection with the holder(s) of the patent(s). Where several patent holders exist, each having a marketing authorisation for his product with the same active ingredient, each patent holder is entitled to obtain a supplementary certificate for the same active ingredient and same product.

In the case of the combination of active ingredients in respect of which a single basic patent exist, the solution to the problem is different. The ECJ has ruled that where, on the basis of a basic patent and a marketing authorisation for a medicinal product consisting of a **combination of several active ingredients**, the patent holder **has already obtained a supplementary protection certificate for that combination of active ingredients**, protected by that patent within the meaning of Article 3(a) of Regulation (EC) No 469/2009, Article 3(c) of that regulation **must be interpreted as not precluding the proprietor from also obtaining a supplementary protection**

[16] ECH, Judgment of 12 December 2013, Actavis Group PTC and Actavis UK, C-443/12, paragraph 29.

certificate for one of those active ingredients which, individually, is also protected as such by that patent holder[17].

The ECJ has also ruled that where a basic patent includes a claim to a product **comprising an active ingredient** which constitutes the sole subject-matter of the invention, for which the holder of that patent **has already obtained a supplementary protection certificate**, as well as a subsequent claim to a product comprising a combination of that active ingredient and another substance, article 3, points (a) and (c) of the Regulation (EC) no. 469/2009 precludes the holder from obtaining a second supplementary protection certificate for that combination[18].

(d) **The authorisation referred to in point (b) is the first authorisation to place the product on the market as a medicinal product.**

The Regulation no. 469/2009 does not specify whether the first authorisation to place the product in the market is that from the Member State or that from the Community. However, the interpretation given by the specialization literature and the case law in in the sense that, „it follows without doubt from the general context of the Regulation that for the purposes of examining the pre-conditions under art. 3, point (d), the first authorisation to place the product in the market is that obtained in the respective Member State".

This condition has to be examined solely where multiple authorisations to place the product (active ingredient) in the market exist, no issue arising in the case where a single authorisation exists. The case where the holder of rights over the patent has obtained multiple authorisations for the same product also does not raise any special issues, the first one within the meaning of art. 3(d) of the Regulation 469/2009 being the first one in the chronological order of their granting. Where the authorisation(s) to place a product on the market as medicinal product is required, obtained or held by one of the same person, things are simple. No special issues can arise as well where several holders of patents for medicinal products with the same active ingredient obtain each authorisations for placement on the market of the medicinal product: in respect of each one of them entitled to obtain a supplementary certificate, the first authorisation will be taken into consideration.

However, what happens where an authorisation for a medicinal product for veterinary use is obtained, and thereafter an authorisation for a medicinal product for human use, both medicinal products having the same active ingredient, and consequently supplementary protection certificates are requested for both of them?

Asked to rule on the question: *"Is the grant of a supplementary protection certificate in a Member State of the Community on the basis of a medicinal product of human use authorized in that Member State precluded by a marketing authorisation for that product as a veterinary medicinal product granted in another Member State of the Community (...), or is the sole determining factor the date on which the product was authorized in the Community as a medicinal product for human use?",* the ECJ ruled that, "having in view the fact that the term «product» used in the regulation refers to any active ingredient in the medicinal product, and a certificate may be granted for the product under the authorisation corresponding to a medicinal product, irrespective of its human or animal use (…), it follows, first, that the decisive factor for the grant of the certificate is not the intended use of the medicinal products, and, second, that the purpose of the protection conferred by the certificate relates to any use of the product as a medicinal product without any distinction between use of the product as a medicinal product for human use and as a veterinary medicinal product use." However, in these circumstances the Court ruled that, „The grant of a supplementary protection certificate in a Member State of the Community on the basis of a medicinal product for human use authorised in that Member State is precluded by an authorisation to place the product on the market as a veterinary medicinal product granted in another Member State of the Community (….).

However, recently the ECJ has refined its position, ruling that, *"Articles 3 and 4 of the Regulation (EC) no. 469/2009 (...) are to be interpreted as meaning that, in a case such as that in the main proceedings, the mere existence of an earlier marketing authorisation obtained for a veterinary medicinal product does not preclude the grant of a supplementary protection certificate for a different application of the same product for which a marketing authorisation has been granted,* ***provided that the application is within the limits of the protection conferred by the basic patent relied upon for the purposes of the application for the supplementary protection certificate***"[19].

The issue of the first authorisation is important for the third parties willing to manufacture generic medicinal products, which are interested in the expiry of the protection term, computed as regards the certificate from the date of the first marketing authorisation. The specialized literature has stated that, „the status of the first authorisation of placement on the market within the Community is necessarily related to the product, and cannot be interpreted as being related to the applicant, since in the case of

[17] ECJ, Judgment of 12 December 2013 in the case C-484/12, Georgetown University c/ Octrooicentrum Nederland.

[18] ECJ, Judgment of 12 March 2015 in the case C-577/13, Actavis Group PTC EHF and Actavis UK Ltd c/ Boehringer Ingelheim Pharma GmbH & Co. KG.

[19] ECJ, Judgment of 19 July 2012 in the case C-130/11, Neurim Pharmaceuticals (1991) Ltd c/ Comptroller-General of Patents. Subject matter: Medicinal products for human use. Supplementary protection certificate. Regulation (EC) no. 469/2009. Article 3. Conditions for obtaining a supplementary protection certificate. Medicinal product having obtained a valid marketing authorization. First authorization. Product subsequently authorized as a veterinary medicinal product and a human medicinal product.

several authorisations for the same product only one of these can be the «first»".

Mention: In accordance with art. 10(5) of the Regulation no. 469/2009, the Member States may provide for that a certificate may be granted by the authority referred to in article 9, paragraph (1) without examining the conditions laid down in article 3, points (c) and (d) of the Regulation. Romania has not formulated such a reserve, therefore the compliance with the conditions has to be verified as a whole.

10. Rights conferred by the supplementary protection certificate

In accordance with art. 5 of the Regulation no. 469/2009, the supplementary protection certificate confers the same rights as conferred by the basic patent, and is subject to the same limitations and the same obligations, however such protection "shall extend only to the product covered by the authorisation to place the corresponding medicinal product on the market and for any use of the product as a medicinal product that has been authorized before the expiry of the certificate".

With reference to the duration of the certificate, art. 13 of the Regulation provides for that:

(1) The certificate shall take effect at the end of the lawful term of the basic patent for a period equal to the period which elapsed between the date on which the application for a basic patent was lodged and the date of the first authorisation to place the product on the market in the Community, reduced by a period of five years.

(2) Notwithstanding paragraph 1, the duration of the certificate may not exceed five years from the date on which it takes effect.

(3) The periods laid down in paragraphs 1 and 2 shall be extended by six months in the case where Article 36 of Regulation (EC) No 1901/2006 regarding the extension the supplementary protection certificate for medicinal products for paediatric applies. In that case, this period may be extended only once.

As regard the expiry of the supplementary protection certificate, except for the cases applicable to patents as well (elapse of period of validity, holder's renunciation, failure to pay the relevant taxes), this becomes invalid also where and as long as the product covered by the certificate is no longer authorized to be placed on the market pursuant to the withdrawal of the corresponding marketing authorisation(s), in accordance with Directive 2001/83/CE or Directive 2001/82/CE. The authority that has granted the certificate may decide on the lapse of the certificate either of its own motion or at the request of a third party.

In pursuance of article 15 of the Regulation, (1) the certificate shall be invalid if:

(a) It was granted contrary to the provisions of Article 3 of the Regulation;

(b) The basic patent has lapsed before its lawful term expires;

(c) The basic patent is revoked or limited to the extent that the product for which the certificate was granted would no longer be protected by the claims of the basic patent or, after the basic patent has expired, grounds for revocation exist which would have justified such revocation or limitation.

Any person (who has an interest, we believe) may submit an application or bring an action for a declaration of invalidity of the certificate before the body responsible under national law for the revocation of the corresponding basic patent. In the case of Romania, only the courts are competent to declare the invalidity of a certificate.

Article 16 of the Regulation no. 469/2009 regulates the revocation of a certificate extension, possible only in the case of medicinal products for paediatric use. The Regulation no. 469/2009 provides for that the extension of the certificate duration may be revoked if it was granted contrary to the provisions of article 36 of Regulation (EE) no. 1901/2006 regarding the extension of the supplementary protection certificate for medicinal products for paediatric use. Any person may submit an application for revocation „to the body responsible under the national law for the revocation of the corresponding basic patent". Since the revocation can only be declared by the body that has granted the certificate, it follows that this is the relevant authority to order the revocation upon request. However, this solution is valid in our jurisdiction solely where the act whose revocation is requested has not entered the civil circulation.

In accordance with art. 31 of the Patent Law no. 64/1991 as republished, the protection coverage is determined by the content of the claims, which is interpreted on the basis of the relevant description and drawings.

Throughout the validity thereof its holder enjoys the exclusive monopoly of exploitation on the territory of Romania of the product and/or the process making the subject matter of the certificate, that is, the manufacture, use, offering for sale, sale or import for the purposes of using, offering for sale or selling such product, in its pure form or processed as a medicinal product.

Any deeds committed in breach of the provisions of art. 31 of the Law no. 64/1991 as republished shall be deemed counterfeiting. In respect of any losses caused to him the holder is entitled to damages in accordance with the general law, and may request the courts to order the confiscation or, as the case may be, destruction of the counterfeited products. The same sanction may be imposed as well in respect of the materials or equipment that have directly served to the commission of the counterfeiting deeds. Not only the certificate holder but also the beneficiary of a license is entitled to relief, in accordance with the general law.

However, the fact has to be taken into consideration that albeit the certificate is a protection

title granted on the basis of a patent, these two represent different protection titles, and distinct from intellectual property, therefore the rights pertaining to the payment of damages or the confiscation measure granted in relation to an action brought forward by a patent holder cannot be automatically extended to the supplementary certificate. In other words, a distinct action has to be brought forward in court in respect of each of these two titles.

The limitations regarding the rights of the certificate holders refer mainly to the exceptions laid down in article 33 of the Invention Law of Romania, possible in the case of medicinal products, as follows:

- The right to exclusive private and non-commercial use (art. 33, point c);

- Use for experimental, solely non-commercial purposes of the subject matter of the patented invention, that is, in respect of which a supplementary protection certificate has been obtained (art. 33, point e). However, the fact should be noticed that in the case of medicinal products the use for experimental purposes of commercial nature is allowed, since the Directive 2001/83/EC on the Community code relating to medicinal products for human use provides for under art. 10, paragraph (6) that, *"Conducting the necessary studies and trials with a view to the application of paragraphs 1, 2, 3 and 4 and the consequential practical requirements shall not be regarded as contrary to patent rights or to supplementary protection certificates for medicinal products"*. The aforementioned paragraphs refer to the studies and authorisations regarding generic medicinal products, however these **clearly are aimed at marketing these medicinal products**.

Of course, the class of limitation of rights within the meaning of art. 5 of the regulation may also include the existence of certain licenses, which if validly executed in respect of the patent may extent over the certificate, inasmuch as that is stipulated in the agreement. The compulsory licenses (art. 43-45 of the Law no. 64/1991) also apply to the protection certificates. However, it has to be noticed that the time limits provided for by the law in respect of the patents cannot apply to the supplementary protection certificates, the case law having not ruled on the issue of the interpretation of the cases of non-application or insufficient application of the invention.

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TAXATION OF PERFORMERS' RIGHTS IN ROMANIA

Mariana SAVU[*]

Abstract

*In accordance with the Law no. 8/1996 („**the Law**"), the performers are required to exercise their rights through **collective management** for a range of economic rights provided for in article 123[1] of the Law. A number of non-profit associations of various intellectual property right holders were established in this sense.*

*Among them, CREDIDAM is the **Performers'** Association, apart from that of authors (UCMR-ADA) or of that of phonogram producers (UPFR). Thorough a series of ORDA's Decisions, these Associations have each of them received a certain role in the collection of the rights which must be collectively managed.*

CREDIDAM activity is strictly regulated by Law; the duties and activities that it can carry on are performed under the provisions of the special law, the Law 8/1996 on copyright and related rights, and under their own Articles of Association. As a trustee, CREDIDAM activity consists in collecting the remuneration due to performers by the companies that use their artistic performances, and distribution of the appropriate remuneration to the artists, depending on the actual use of the Repertoire based on which they empowered CREDIDAM."

Keywords: *Performers' Association, intellectual property right, collecting the remuneration, artistic performances, distribution of the appropriate remuneration to the artists.*

1. Introduction

The rights related to copyright or "neighboring rights" as they were referred to in the French doctrine and jurisprudence, were regulated for the first time by the Romanian law by Law no. 8/1996 on copyright and related rights[1]. Romanian Legislator was inspired by the provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed in Rome on October 26th, 1961[2] and the Convention for the Protection of Phonogram Producers against Unauthorized Copy of their Phonograms, signed in Geneva on October 29th, 1971[3].

The rights related to copyright are intellectual property rights, other than copyrights, which are enjoyed by the performers, for their own performances, the producers of audio recordings and the producers of audiovisual recordings, for their own recordings, and the broadcasting and television organizations, for their own shows and program services.

The collective management of copyright and related rights emerged when the first laws on copyright and related rights began for the first time to be adopted, a practice that has developed over the centuries with the evolution of scientific progress. Thus, we may say that copyright has been collectively managed since the late 18th Century.

The first Performers' Associations were established in France. At first, the roles of professional associations – that of fighting, inter alia, for the full recognition and consideration of copyrights – were combined with the elements of the collective management of rights.

Establishment of the first organization of this kind is strongly related to the name of Beaumarchais. He was the one who led the legal „battles" against the theatres which had certain legal reservations in respect of the recognition and consideration for moral and economic rights of authors.

In Romania, the collective management of related rights was regulated for the first time by Law no. 8/1996 which, by the amendments brought to it by Law no. 285/2004 in June 2004, by Government's Emergency Ordinance no.123/2005 in September 2005, and by Law no. 329/2006 in 2006, has undergone significant amendments and supplements.

Following the adoption of this Regulation, many organizations were created in Romania for the management of copyright and related rights, currently operating a number of 17 Collective Management Organizations.

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[1] Published in the „Official Gazette of Romania", Part I, no. 60 of March 26th, 1996, as amended and supplemented by Law no. 285/2004, published in the „Official Gazette of Romania", Part I, no. 587 of June 30th, 2004, as amended and supplemented by Government's Emergency Ordinance no. 123/2005, published in the „Official Gazette of Romania", Part I, no. 843 of September 19th, 2005, as amended and supplemented by Law no. 329/2006 on the approval of Government's Emergency Ordinance no. 123/2005 for the amendment and supplementation of Law no. 8/1996 on copyright and related rights, published in the „Official Gazette of Romania", Part I no. 657 of July 31st, 2006. (All the remarks hereinafter referred to regarding the Law no. 8/1996 shall always refer to its form as amended and supplemented by Law no. 329/2006).

[2] Romania joined the Rome Convention on the Protection of Performers, Phonogram Producers and Broadcasting Organizations by Law no. 76 of April 8th, 1998 as published in the „Official Gazette of Romania", Part I, no. 148 of April 14th, 1998.

[3] Romania joined the Geneva Convention on the Protection of Phonogram Producers against Unauthorized Copying of Phonograms by Law no. 78 of April 8th, 1998, as published in the „Official Gazette of Romania", Part I, no. 156 of April 17th, 1998.

2. Content

A) On the Romanian territory, CREDIDAM is the most representative Collective Management Association for Performers' Rights.

CREDIDAM represents both performers from Romania and from abroad, the latter having the possibility to receive their due remuneration either by direct CREDIDAM membership, or by means of a foreign collective management association that has a Management Bilateral Agreement signed with CREDIDAM for mutual representation. Thus, CREDIDAM has both the right and obligation to collect the related rights due to performers from a series of legal entities, which are bound to pay such remunerations, for a number of over 12000 performers – members - and of nearly 1000000 foreign performers represented under the 33 international bilateral agreements. Such activity involves, on the one hand, maintaining a permanent communication with performers and with representatives of the Authorities regulating the activity of Collective Management Associations and, on the other hand, the development and organization of collecting and distribution capacity of the amounts owed by various debtors.

In accordance with the legal provisions, CREDIDAM undertakes the obligation of collecting and distributing the remunerations under the management mandate as granted by the right holders. The distribution of collected amounts is performed subject to the law, to the Articles of Association and to the Distribution Rules, as approved by the General Assembly. Amounts from the remunerations collected by CREDIDAM are directly distributed to the holders of rights, the performers, depending on the actual use of their own performances, after deducting a management quota (fee) in order to cover the operating expenses.

The management quota (fee) for the members of this Collective Management Association - CREDIDAM – complies with the maximum percentage as provided by Law no. 8/1996, with subsequent amendments and supplements. For the non-members, the management quota (fee) is given by the actual expenses borne for the management of rights (both collection and distribution), but it does not exceed 25%.

The remaining amounts are taxed according to the provisions of the law on taxation. Distribution of remunerations to the beneficiaries of rights is carried out every six months.

If bilateral agreements concluded with the partner Management Associations from abroad provide otherwise, the distribution to foreign beneficiaries shall be made according to the agreement.

Because of the great number of debtors from which CREDIDAM is required to collect the amounts due to performers, the association is often in a position to initiate Court actions in order to recover due amounts. Consequently to such actions, the amounts to be recovered arrive at a distance of three or four years from the date that they should have been paid by the debtors. The large number of such actions (there are over 568 active cases on trial before the Courts of Justice) leads to a time-lag between the moment the amounts would be due and the one when the amounts can be effectively recovered from the debtors and distributed to the performers. The number of legal actions also involves an additional effort in coordinating the work of attorneys representing CREDIDAM's interests in disputes with users. The communication of legal solutions as well as the supervision for developing a unitary jurisprudence is essential for CREDIDAM activity.

As artistic performances of some performers, members of CREDIDAM, are also broadcasted abroad, CREDIDAM proceeded to signing the 33 bilateral agreements as well as to "uploading" the repertoire in international joined databases. (IPDA[4] and VRDB[5])

Upon his/her enrollment as a member in the Association, each performer pays a fee of RON 10. Subsequently, the actual collection activity of the amounts owed by the debtors that use the repertoire managed by CREDIDAM is conducted by withholding a management quota/fee of the money due to artists, governed by a special Law No. 8/1996 on Copyright and Related Rights and which may not exceed the maximum of 15%.

According to the Law on Copyright and Related Rights, the management quota/fee which CREDIDAM enjoyed was up to 15% of the collected and distributed amounts, amount which has to be used for both the collection activity and the distribution one of the collected remunerations. By way of example, within the collection activity CREDIDAM uses the management fee for the issuance of the approximately 10500 invoices/year, for notifying the users, paying utilities (rent, phone bills, internet connection subscription, subscription for „internet boxes" allocated for use to each member by the organization, based on USERNAME and PASSWORD, salaries, postage, stamp duties, expert fees, attorney fees, arbitration fees – a single arbitration carried out in order to develop certain methodologies means costs of approximately RON 50000, and in 2012 we had four arbitrations which were subsequently cancelled by the Courts or their solutions were modified), as well as for expenses caused by the distribution of collected remunerations.

The authorization granted by artists is a special delegation both from the point of view of its granting method (under Law no. 8/1996 on Copyright and Related Rights) and from the point of view of costs, because the Principal does not transfer money into the

[4] International Performers Database Association
[5] Virtual (Musical and Audiovisual) Recordings Database

account of the organization. In order to receive the management fee, CREDIDAM is the one that has to endeavor to collect and distribute the amounts of money in order to withhold the management fee in order to be able to run its activity. Any economic blockage affects the activity of this collective management organization. A major issue is the one regarding VAT. Although the collective management associations are non-profit organizations without carrying out economic activities, they are subject to VAT payment. If the organization has issued an invoice in order to collect remuneration, and the user refuses to pay it until the due date, CREDIDAM is bound to pay the relating VAT to the State Budget by the 25th day of the following month, which, because of the fact that the amount was not collected, will be paid only from the management fee. The CREDIDAM Articles of Association does not allow this money to be covered from the amounts payable/due to artists.

From this brief description of the complex activity carried out by the Collective Management Association CREDIDAM, we have to ensure ourselves that the provisions of the Fiscal Code are legally applied to the actual facts:

- The activity carried out by CREDIDAM, a Collective Management Association, is governed by Law 8/1996 on Copyright and Related Rights,
- The revenues gained by CREDIDAM are revenues from the intellectual property due by the users to the holders of rights related to copyright, more precisely to the performers,
- Community Principles on the generating event and on the chargeability of VAT establish that revenues due for the period before becoming a VAT payer, are not subject to VAT.

To the extent that such an association deems that one of its rights is affected by the tax authorities as far as the interpretation and application of legal provisions in tax matters are concerned, then it may address to the Court of Justice.

According to art. 8 paragraph 1 of Law no. 554/2004,

„A person who/which incurred damages regarding one of his/her/its legal rights or regarding a legitimate interest because of an unilateral administrative act, and received an unsatisfactory response to his/her/its prior complaint or has received no response within the period of time as provided by art. 2, paragraph 1, letter h, may notify the competent Administrative Court in order to request for the cancellation of all or part of the act, the repair of caused damage and, possibly, the repairs for moral prejudice. The person who/which considers that he/she/it incurred damages regarding one of his/her/its legitimate rights or interests because of failure to settle it within due time or by an unjustified refusal to settle an application/request, as well as by a refusal to perform a certain administrative operation required for the exercise or protection of such legitimate right or interest, may also notify the Administrative Court."

Likewise, according to art. 11, paragraph 1, letter c of Law 554/2004,

„The requests for cancellation of an individual administrative act, of an administrative contract, for the recognition of a claimed right and for the repair of the caused prejudice, may be submitted within 6 months since: (...) c) the expiry of the deadline for solving the prior complaint (...)"

According to art. 2, paragraph 2 of Law no. 554/2004, „the unjustified refusal to solve the request regarding a legitimate right or interest or not responding the applicant within a due legal term, are assimilated to the unilateral administrative acts".

Accordingly, under art. 8, paragraph 1, in conjunction with art. 11, paragraph 1, letter c and with art.2, paragraph 2 of Law 554/2004, the entity is entitled to submit a file to the Administrative Court by which, as a result of failing to settle the Tax Complaint within the legal term, requests for the cancellation of the assimilated harmful tax administrative acts.

The practices of the Supreme Court also comes to support the above, the High Court of Cassation and Justice ruling as a principle, by the Decision 1224/2009 on the plea of inadmissibility of the action raised by the Tax Authorities for not solving the appealed Tax Complaint, that the latter is culpable for not solving such Tax Complaint within due legal term, for which reason the Supreme Court held as admissible the direct intimation of the Court, learning that „the refusal of the Defendant obviously constitutes the grounds for not solving the administrative complaint, which resulted in prejudicing the Plaintiff and to the right of the latter to notify the Court of this case of unsolved prior complaint within the legal term".

The Supreme Court considered the Constitutional Court's Decision no. 409/2004, which established that the procedure of appealing against the tax administrative acts before the Tax Authorities, which is currently regulated by the provisions of art. 205 and seq. of the Fiscal Code, does not grant jurisdiction, having the nature of a prior complaint, as the one provided by art. 7 of the general Law no. 554/2004. In this case, by silencing the special law, the general rules in art. 11, paragraph 1, letter c) of law 554/2004, which completely value the right to notify the Court supposing that the prior complaint was not solved within the legal term, become incidental if the Tax Authority failed to solve the complaint within the legal term.

Basically, after the expiry of the legal term for solving the preliminary procedure (the tax complaint), within which the competent authorities, culpably, has not issued any solution, by granting the Administrative Courts the proper jurisdiction to settle the case for the cancellation of the tax administrative act and of the assimilated act, represented by the lack of response to the complaint, the bodies which had to solve the complaint are automatically discharged from solving the administrative procedure, they no longer having the right to issue any solution.

The 45 day term provided by art. 70, paragraph 2 of the Fiscal Code for solving a complaint, is an imperative deadline provided by law, not a simple recommendation, similar to the 30 day term required for the taxpayers, within which they can submit the tax complaint (as provided by art. 207 of the Fiscal Code) and which is an imperative deadline, provided under the penalty of forfeiture. Therefore, in case of exceeding the 45 day term for solving the administrative procedure, the competent bodies are deprived of the right to issue a solution.

To construe otherwise the regulations of the fiscal procedural law would mean a serious violation of taxpayers' right of access to justice, by being forced to wait indefinitely (sine die) for the issuance of a solution by the tax authorities in the prior administrative procedure and could lead to serious abuses by tax authorities, which could deliver anytime a solution in the preliminary procedure, even after solving the dispute before the Litigation Courts, the issuing moment being practically at their discretion.

B) The Tax Administrative Act as negotium, subject of the cancellation action.

The presence of elements that lead to the cancellation of the tax administrative acts issued during tax inspections also bring the cancellation of the assimilated administrative act represented by the lack of an answer to the administrative complaint.

The legal report of taxation right emerges after the issuance by the competent Tax Authorities of the tax administrative act, a document by which taxpayer's duties are regulated. On this report, the creditor is the State, which is the rightful collector and it has the obligation to pursue for the accurate collection of the amount which is to be paid by the taxpayer – i.e. the debtor. The Tax Negotium includes several rights and obligations of the subjects in the Tax Report, which emerge in certain tax administrative acts, of instrumentum[6]. Such tax administrative operation, generically called negotium, is so contained in a number of interdependent acts, that give substance to the tax decision and which lead together to its effectiveness.

Unilateral acts may be seen as producing final legal effects only when they become irrevocable. Only from this point the rightful subject is aware of the entire content of the legal report generated by the Tax Administrative Authority, the right and obligations established by the latter and especially their grounds.

The opposite of this principle could lead to legal uncertainty which is impermissible particularly in the field of taxation law, where the consistency and predictability of the acts are core principles. As Professor Antonie IORGOVAN claims, related to prior complaints in the administrative law, this preliminary stage of the administrative complaint (appeal), where the will of the two fiscal subjects of the taxation report meet, „values exactly the principle of revocability of administrative acts"[7].

In this respect it is also the art. 216 paragraph 3 of the Fiscal Code, which provides that, if the tax administrative act is cancelled, a new one shall be concluded „which will take in consideration the only the reasons of the decision". Thus, the decision for solving the complaint appears as the last form of consent of the Administrative Authority, a binding and final form both for the taxpayers and for the Tax Administrative Authority.

The role of complaint's settlement decision is to show the reasons, to confirm or to deny the acts previously issued by the tax authorities, together forming a whole, a single tax administrative negotium, which creates rights and obligations for taxpayers. In this respect it is also art. 213, paragraph 1 of the Fiscal Code which provides that: „In solving the complaint, the competent body shall check the grounds de facto and de jure which gave rise to the issuance of the tax administrative act."

The decision for the settlement of the complaint completes the decision of the administrative authority by adding the instrumentum to the tax control instruments, by which the Tax Authority finally decides upon its obligations, the decision for solving the complaint no longer being administratively revocable. The finality is provided right in the end of the Decision for the Settlement of the Complaint, which generally provides that „this decision is final in the administrative complaint system".

By developing the preliminary procedure of the administrative complaint, in general, and the tax complaint, in particular, procedure which is performed before the issuer of the act, a new phase in issuing the tax administrative act has been established. This phase, which gives the possibility to the issuing authority to revoke the administrative operation or to strengthen the tax negotium, leads to the emergence of a new instrumentum. All these instrumentums compose the challenged tax administrative act and the illegality grounds for any of the former entail the cancellation of the whole.

C) The collective management associations do not owe any income tax

The collective management associations which rights emerge only from the intellectual property rights do not pay income tax. From checking the records of the Ministry of Finance, we see clearly the factual

[6] The taxation law doctrine lists, among the rights and obligations of the taxation law subjects, the following: achievement of prior procedure acts; finding taxable earnings and assets or issuance of tax debt securities, amendment of the obligations included in the tax debt securities and payment of financial debts – budgetary. In this respect: R. BUFAN, B. CASTAGNEDE, A. SAFTA and M. MUTAŞCU: *Treaty of Taxation Law. General Part*, Volume I, Ed. Lumina Lex, 2005, pag. 302 – 303

[7] This principle also emerges from the jurisprudence of the European Community Court of Justice which held that the principle of revoking the administrative acts that create subjective rights involve, in particular: a person's right to be heard before the individual measure is taken, the person's right of access to their own file and the obligation of the Administration to motivate its decision. A. IORGOVAN, L. VISAN, A-S. CIOBANU, D-I. PASARE: *The Law of Administrative Offenses. Comments and Jurisprudence*. Universul Juridic 2008, pag. 169 – 173.

basis of these claims for the collective management associations, of which the most important are: UPFR, UCMR-ADA, ADPFR, ARDAA, UNART, COPYRO, DACIN-SARA, PERGAM.

Both ORDA[8] and the European Association of Performers (AEPO - ARTIS[9]) sent detailed information about the lack of any incidences of economic activities for the purposes of tax on revenues (corporation tax) over the field of collective management associations.

However, the tax inspection bodies argue that for the management fees which are imperative in order to support the operational expenses, the collective management associations should pay an income tax. In my opinion, the reasoning of tax inspection bodies is based on misunderstanding the manner in which the copyright and related rights collective management system is organized both in Romania and in the EU Member States. Although the collective management associations are non-profit organizations that participate in the fulfillment of legal obligations of debtors and, although the operation and organization method of this activity is established by normative acts, the control bodies have thought that this is an economic activity.

Directives and treaties to which Romania is part of, define:

- „revenues/incomes from intellectual property rights" mean revenues collected by a collective management association on behalf of right holders, whether they come from an exclusive right, from a remuneration right or from a right to compensation. By way of example here we have the compensatory remuneration for private copying;
- „management fee" means the amount charged by a collecting society (in Romania by a collective management association) in order to entirely cover the costs relating to the management services for copyright and related rights;

The Tax Inspection bodies think that the activity of collection of rights related to copyrights is an economic activity carried out by CREDIDAM with the purpose of gaining profits, subject to the laws governing the economic activity specific to NGOs as provided by art. 15, paragraph 3 of the Fiscal Code.

This point of view is inconsistent with Law no.8/1996 on copyright and with CREDIDAM Articles of Association, both leading to one conclusion only, that such management quota (fee) obtained as a result of the collecting activity should be included as in-cash or in-kind contributions of members or sympathizers as provided by art. 15, paragraph 2, letter b of the Fiscal Code.

C.1) Operation of CREDIDAM activity as a collective management organization

In accordance with art. 124 of the Law, „the copyright and related rights collective management organizations, as referred to as collective management bodies/organizations within the law text, are, for the purposes of this Law, legal entities established by freedom of association which main object of activity is to collect and distribute those rights which management is entrusted to them by the right-holders." In order to exercise this rights' collecting and distribution activity, the organizations should be based on Articles of Association providing for, according to art. 127 of the Law, inter alia:

(1) the Articles of Association of the collective management organization has to include provisions regarding:...

i) the methods for establishing the commission fee due by the right-holders to the collective management organization in order to cover the operative required expenses;...

From these legal provisions it results that, precisely according to the law, CREDIDAM has the right to receive a commission fee in order to cover only its operating expenses.

Such commission fee is apart from the membership fee which is a small one, and it is paid upon registration of a new member.

The reason for the existence of such commission fee is the one of a contribution fee received from the members, through which they participate to the common expenses of the organization. Besides that, the Explanatory Dictionary of the Romanian Language defines the contribution fee as follows: "money/cash contribution to a common expense paid by the members of an organization". This commission fee is determined by art. 18, paragraph 2 of the Articles of Association:

The amounts resulting from the remunerations collected by CREDIDAM are directly distributed to the right-holders in proportion to the real use of their own performances, deducting a management quota (the commission fee) for covering the operation expenses.

The management quota (the commission fee) for the members of the CREDIDAM collective management association is the maximum percentage provided by the Law no. 8/1996...

These provisions of the Articles of Association are therefore supplemented even by the legal provisions:

Art. 134 (2) The collective management shall be exercised according to the following rules: ...

b) the commission fee due by the right-holders who are members of a collective management organization for covering the operation expenses of the same, as provided by art. 127 paragraph (1) letter i), combined with the commission fee due to the collective management organization which is a sole collector in accordance with the provisions of art. 133 paragraph (2) letter c) and paragraph (4), cannot exceed 15% of the annually collected amounts;

All these provisions should have leaded the Tax Inspection Bodies to the obvious conclusion that it is not a economic activity, but to the conclusion that it is only a contribution of the members to the CREDIDAM operation expenses.

[8] Romanian Office for Copyright, public control body/authority, which oversees and controls the collective management organizations
[9] International Structure of Performers' Collective Management Organizations

C.2) CREDIDAM does not carry out an economic activity classified by gaining a profit

The Fiscal Code defines the activity as any activity performed by a person with the purpose to gain profit. The revenues are accounting elements defined by Order 3055/2009 as being an increment of the economic benefits registered during the accounting period, as inflows or increases in assets or reduction of debts, which are reflected in increases in equity, other than those resulting from contributions of the shareholders.

Consequently, the taxable activity, in terms of tax on returns, is the one pursuing for economic benefits that would result in an increase in equity.

The same concept also emerges from the economic activity in terms of VAT, which is characterized by the purpose of continuously gaining income (art. 127 paragraph 2 of Fiscal Code) Even if this definition is mainly used in relation to VAT, the thing which characterizes an economic activity in all fiscal areas contrary to any other simple activity is the continuity purpose of gaining income, i.e. the continuity in increasing the equity of the taxpayers.

These considerations are not applicable in respect of an amount that a collective management organization shall retain in order to cover its expenses. There can be no economic activity, for the continuity in obtaining benefits in order to increase equity in relation to an amount for which retention is required by a legal provision, and the management quota (fee) which any collective management organization may withhold is covered by a special law which governs the operation of such legal entities.

CREDIDAM does not play the role of a company collecting debts/receivables, a company having as object of activity the purchase of receivables due and unpaid at a lower price in order to generate a profit by their recovering at the original price. The undersigned is an organization which, for the purposes of the law, performs a service to a certain category of taxpayers, thus approaching more to an organization performing a public service based on a special authorization granted by the artist.

The CJUE (Court of Justice of the European Union) stresses in the Case C-467/08, *Padawan*, that CJUE has established that, regarding the remuneration for private copying, this payment system: complies with the requirements of this "proper balance" to be provided that persons who have the equipments, devices, and digital reproduction supports and, on that basis, make this equipment, de jure or de facto, available to private users or provide the latter with a reproduction service, are debtors of the obligation to finance an equitable compensation, to the extent that they are able to pass on the real task of such funding on the private users (paragraph 50).

The Law 8/1996 requires a certain mechanism for collecting copyrights, which has a dual role:

- To facilitate the communication between lenders, performing artists and debtors, the persons who use their works, and
- To facilitate the collection of fees and taxes due by performing artists for these amounts – instead of checking over 12000 performing artists, the inspection bodies analyze a single entity.

Such an explanation was also retained by the Courts which concluded:

„Copyrights and related rights are not part of the category of trade deeds covered by art. 3 letter 'c' of the Commercial Code, which is limited to publishing companies, bookstores and art objects, when they are sold be persons other than the authors.

Criticism regarding the civil nature of this dispute as established by the Court is not well grounded. The Commercial Law provides that, even if carried out by a trader, deeds concluded with the author or the artist himself/herself by which the latter capitalizes his/her property rights derived from the artistic creation, are not classified as commercial deeds.

This is our case here, the Plaintiff is the agent of the holders of the related rights, and the activity carried out by the Defendant for the purpose of cable retransmission of phonograms does not entail the commercial nature of a legal report existing with the Plaintiff and which only limits to the collection of remunerations due to artists" Civil Judgment nr.809/R/2008 of Cluj Court of Appeal.[10]

Withholding a commission fee in order to cover CREDIDAM operation expenses does not represent an economic activity. It represents the contribution of the members required for the proper operation of the collecting and distribution of the collected amounts mechanism as established by law. Within this mechanism CREDIDAM acts as agent which existence is required by law.

This contribution is not an income generated by an economic activity but a method enforced by law to the members, in order to support the activity for which the association was established. Even if covered expenses would be less than the amounts resulting from the application of the commission fee (which, in reality, it is hard to imagine), the remaining amounts were not subject to tax on profits, but represented amounts for future expenses.

In conclusion, the Tax Inspection Bodies misinterpreted the commission fee withheld by the collective management organization under the provisions of its own Articles of Association, as approved by ORDA, and of the Law no. 8/1996, as being the result of an economic activity, the same representing in fact a form of in-cash contribution of the members which is enforced by the Law no. 8/1996, and CREDIDAM cannot exclude it from its Articles of Association and on which it depends the carrying out of CREDIDAM activity as being the only source of

[10]Available at: http://jurisprudentacedo.com/Casarea-acesteia-si-trimiterea-cauzei-spre-solutionare-Judecatoriei-Cluj-N-iar-in-subsidiar-modificarea-sentintei-in-sensul-respingerii-actiunii-ca-neintemeiata.html.

income from which it covers all the expenses related to the operation of the association (see art. 134, paragraph 2, letter 'b') of the special law).

D) Tax on nonresidents' revenues

The Tax Inspection Bodies appreciate that the tax rate on nonresidents' revenues is of 16% instead of 10%, taking into consideration that such revenues also gained from intellectual property rights would benefit from a different rate in relation to the nationality of the recipient.

Both from the provisions of art. 118, paragraph 1 of the Fiscal Code and from the Double Taxation Conventions concluded with the States toward which the distributed amounts were sent by CREDIDAM, it results that tax cannot exceed 10% of the paid amounts. Because we have here amounts payable to beneficiaries of the European Union Member States, we will apply the most favorable taxation rate, i.e. the 10% one.

Moreover, the percentage of tax treatment differences between Romanian citizens and the European Union ones would be a violation of the principle of freedom to provide services and of freedom of people migration. Knowing that revenues from Romania are subject to 16% taxation rate and not to 10% taxation rate, for the simple fact that they are not residents in Romania, performers from Europe would cease to transfer broadcasting rights toward the Romanian area.

In case C-290/04, FKP Scorpio Konzertproduktionen GmbH, the European Union Court of Justice has determined that, in the matter of income tax due for artistic performances, the mere existence of withholding procedures to the source for nonresidents' revenues which is not applicable to residents, is a violation of the freedom to provide services under European Union treaties (paragraph 28-39).

If the mere existence of different procedural provisions implies the violation of Community principles, the existence of different tax percentages even more represents a breach of Community regulations.

In accordance with the provisions contained under the Title Withholding tax on taxable revenues obtained by nonresidents from Romania, art.116, paragraph (4) of Law 571/2003 on Fiscal Code, "Tax is calculated, respectively withheld at the moment when the revenue is paid and should be paid to the State Budget until the 25th day, inclusively, of the month following the month in which the revenue was paid.[…]"

E) Correct calculation and payment of due VAT

In my opinion, as far as the collected VAT is concerned, it is important to correctly understand the timing of the chargeable event and chargeability of VAT. The Tax Inspection Bodies think that they depend on the issuance of an invoice and not from the actual performance of the service. As a starting point for understanding the method by which VAT is construed, one should take into account that collection and distribution operations are carried out by the collective management organizations under a legal mandate grated by its members.

Any expenses related to the initiation and completion of a taxable operation is susceptible of being subject to VAT deduction. Thus, in case C-32/03, Skatteministeriet, CJUE (the European Union Court of Justice) has determined that even the services required in order to close a company which no longer carries out any business, are subject to VAT deduction (paragraph 23).

Based on the provisions of the Fiscal Code and on the VAT principles, the reasoning for VAT calculation and payment was the following:

- VAT is due at the moment of taxable debt chargeability.
- According to art. 134^{2} of the Fiscal Code, chargeability of the tax is liable when its generating event occurs. Only by way of exception, the tax chargeability becomes liable upon the date of issue of the invoice, only if the invoice was issued before the date when its generating event occurs;
- According to article 134^{1} of the Fiscal Code the generating event occurs either on the date of goods' delivery or on the date of services' performance.

The generating event is represented by the services enjoyed by debtors through using the rights related to copyright of CREDIDAM members. Such related rights are born, according to Law 8/1996, on the date of fulfilling the legal conditions depending on the method of use. They are due for each year, as the licenses for use are granted on annual basis.

Therefore, if the VAT generating event is reflected over a period of time during which CREDIDAM was not a VAT payer because its revenues did not exceed the limit as provided by law, such operations are not subject to VAT, regardless of the date on which the invoice is issued.

Such reasoning results:

- Either from the provisions of point 45 paragraph 2 of the final thesis of Methodological Norms according to which:

By exception to the provision of art. 155 paragraph (19) of the Fiscal Code, the invoice does not have to include a specification regarding the VAT registration code for the operations carried out before the taxable person, according to article 153 of the Fiscal Code, becomes subject to VAT liability.

- Or from the Letter no. 270105/15.02.2006 of the Ministry of Public Finance – General Department for Indirect Taxes' Legislation[11], which retains the same solution regarding the invoicing of amounts due by users before the date when the Undersigned became a VAT payer.

In conclusion, there is no reason to justify VAT collection for the operations carried out before the date

[11] Unpublished

of registration of the collective management organization as a VAT payer.

F) The social security contributions withheld at the source for revenues from intellectual property rights

The withholdings at source for the remunerations distributed to the holders of related rights, i.e. the performers, are:

a. The Unemployment Fund individual contribution due by the persons who gain professional income (with the remark that starting with 01.07.2012 CREDIDAM has no longer the obligation to withheld this contribution);

b. The Unemployment Fund contribution for professional income;

c. Social Security individual contribution due by the persons who gain income from intellectual property rights;

d. Health Insurance individual contribution due by the persons who gain income from intellectual property rights.

The remunerations collected by CREDIDAM are not directly transferred into the property of right-holders. Distribution of such amounts is carried out, at 6 months legally predetermined periods of time depending on the criteria as set by the Distribution Rules and Law 8/1996. Since the time of collection and up to distribution, amounts collected by CREDIDAM are kept in special bank accounts and produce interests. These interests, which are entirely distributed to the artists together with the main amount of their due rights, were taxed by CREDIDAM as revenues from intellectual property rights or as revenues from interests.

This was also the opinion of the Ministry of Public Finance, National Agency of Tax Administration, General Department for Complaints Settlement, asserted in a Point of View dated October 31st, 2013, we quote: „in our opinion, the interests distributed to the members of the association neither can be classified as revenues from interests, as long as the holders of bank deposits are not the CREDIDAM members, but the association itself, nor as revenues from other sources, as long as they represent a civil fruit of the remunerations received on the basis of an invoice from all the categories of users provided by law.

We estimate that revenues from such interests are classified as revenues from intellectual property rights, because they are covered by the legal nature of the main amount which generated them."

Tax Authorities' classification of interests as revenues from other sources instead of revenues from intellectual property rights, is not in compliance with the legal provisions.

Tax Authorities' reasoning is erroneous considering the following provisions:

- The Art. 52, paragraph 1 of the Fiscal Code classifies the revenues from intellectual property rights as revenues from independent activities, i.e. the relationship of a part from the whole[12].
- The Art. 48, paragraph 2, letter b of the Fiscal Code provides the rules for determining the annual gross revenues from independent activities (self-employment). It is expressly emphasized that interests are part of the gross revenues gained from independent activities[13]. If they are incorporated into the category of revenues from independent activities, as a whole, and being their civil fruit; likewise they are part of the category of revenues from intellectual property rights, as their civil fruits.
- The Art. 52, paragraph 2 of the Fiscal Code sets that for such revenues from intellectual property rights, the percentage withheld at source shall be of 10%.

For reasons related to the proper management of revenues due to holders of related rights, the collective management organization CREDIDAM was prudent enough to also collect the interests related to the period of time prior to the distribution.

The Law no. 8/1996 does not allow to the collective management organizations to apply to the remuneration due to right-holders any accounting treatment specific to credit institutions to distinguish between actual remuneration and interests. Consequently, according to this accounting treatment, the revenues distributed and paid to the right-holders was treated in terms of taxation according to the income tax rules, thus we withheld at source the corresponding 10% taxation rate by way of advance tax, in accordance with the legal rules regarding NGOs, as nonprofit organizations. Consequently, there is no additional payment liability to be borne by the collective management organizations as difference relating to the tax on interests, because in reality, the Law makes the revenues' beneficiary (i.e. the performer) responsible for such a liability, i.e. the 6% difference which is regulated by the Annual Statement no. 200.

It is obvious that the amounts owed by the debtors of copyright related rights are receivables of the CREDIDAM members, and the interests relating to them are also part of the amount of gross revenues relating to such rights. The interest represents, under these circumstances, a civil fruit of the revenues which are deposited in the bank account up to the moment of the effective distribution. The only role played by these interests is to maintain the value of the amounts by reporting them to the period of time during which they stay under the property of the collective management organization, i.e. for maximum 6 months.

Furthermore, according to articles 117 and 124 of the Fiscal Code, the taxpayers have the right to gain interests for the amounts which were paid to the State Budget but which were not due. The principles of legal

[12] ART. 52 Withholding at source the tax representing prepayments for certain revenues from independent activities (1) For the following revenues, the taxpayers that are legal entities or other entities which have to manage accounting, are required to calculate, withhold and transfer the tax by withholding at source, representing prepayments from the paid revenues: a) revenues from intellectual property rights;

[13] (2) Gross revenues include: a) collected amounts and the equivalent in RON of the in-kind revenues resulted from activity performance; b) **interest** revenues from trade receivables (claims) or from other receivables (claims) used in relation to an independent activity;

certainty as well as the avoidance of enrichment based on unjust cause, lead to the conclusion that such interests should be calculated starting with the date on which the undue amounts have been paid.

3. Conclusions

De lege ferenda

According to the Fiscal Code, non-profit organizations are exempt from the income tax (corporation tax) for certain types of income listed exhaustively, including fees and registration fees of members and contributions in-cash or in-kind from members and sympathizers. Compared to these legal provisions, it is necessary to clarify the tax treatment of the fee payable by the holders of copyrights and related rights to the collective management association for covering the expenses necessary for its operation, by changing the relevant provisions of the Tax Code.

Clarification regarding the exemption subjects. The fiscal code defines the non-profit organizations as any association, foundation or federation established in Romania, in accordance with the law in force, but only if the revenues and assets of the association, foundation or federation are used for an activity of general, community or non-patrimonial interest.

According to Government's Ordinance no. 26/2000 on associations and foundations, the common law regarding the non-profit organizations, associations and foundations are defined as non-profit legal entities, of which associates pursue to perform certain activities of general interest or in the interest of communities or, as appropriate, in their non-profit personal interest.

On the other hand, the collective management organizations are defined by Law no. 8/1996, on copyright and related rights, as legal entities established by freedom of association, which main object of activity is to collect and distribute those rights which management is entrusted to them by the right holders. According to art. 125, paragraph 1 of Law no. 8/1996, the collective management organizations operate as non-profit associations.

Therefore, although the legislator uses non-unitary vocabulary, susceptible of creating confusion, the collective management organizations are undoubtedly non-profit organizations, as their operation as associations, their object of activity and their non-profit purpose are all expressly regulated by the Law no. 8/1996.

Consequently, the collective management organizations are susceptible to benefit from the exemption from the revenues tax regulated by the Fiscal Code.

1. Clarification regarding the categories of exempt revenues

The Fiscal Code exempts the non-profit organizations from the payment of revenues tax for the contributions and registration fees of the members and for the in-cash or in-kind contributions of members and sympathizers. To a certain extent, also the revenues from economic activities carried out by non-profit organizations are exempt.

In terms of the revenues of non-profit organizations, the Government's Ordinance no. 26/2000 also expressly distinguishes in art. 46, between the contributions of members and the revenues from direct economic activities.

Therefore, it is a clear distinction between the revenues of non-profit organizations from economic activities and other categories of revenues. As far as the collective management organizations are concerned, the art. 127 of Law no. 8/1996 regulates the charging of a commission fee for covering the expenses required for the operation, which fee shall be withheld from the holder of copyrights or related rights from the amounts due to each of them, after calculating the individual distribution. Therefore, the commission fee, as a category of revenues, is distinctly and expressly regulated by the legislator, apart from the revenues from economic activities and having a precise destination, to cover the operation required expenses.

From this point of view, the management fee paid by the holders of copyrights is a real contribution required for the effective operation of the specific activity of collection and distribution of copyrights or related rights by the collective management organizations.

Since the reasoning of this fee is the same as the one underlying the regulation of contributions or donation as revenues of non-profit organizations and since this fee does not correspond to an economic activity, but for financing the specific activity to the interest of the performers, the tax treatment of such fee should be the same.

Since the vocabulary used by the legislator for defining the non-profit organizations and their specific categories of revenues is non-unitary, as mentioned above, the express listing of management contributions within the category of incomes for which the non-profit organizations are exempt from the payment of revenues tax is compulsory.

2. Proposal for the amendment of the Fiscal Code

Therefore, the art. 15, paragraph 2, letter f of the Fiscal Code shall appear as follows:

„b) in-cash or in-kind contributions of the members and sympathizers, as well as the commission fees owed by the right-holders to the collective management organizations, according to the special law".

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SMALL AND MEDIUM ENTERPRISES (SMES) – DETERMINANTS FOR INTELLIGENT GROWTH AND SUSTAINABLE DEVELOPMENT OF LOCAL COMUNITIES

Constantin BRAGARU[*]

"Smart, sustainable, inclusive growth is the key to job-creation and the future prosperity of Europe".

Jose Manuel Barroso

Abstract

The EU Cohesion Policy faced many challenges over the last five years, especially because of the long-term consequences of economic crisis. The recession generated regional and intra-regional disparities within European Union and undoubtedly created economic and social contrasts between member states. In order to remedy this situation, European Union reformed its Cohesion Policy for the next period of time, 2014-2020, focusing on fewer key priorities mainly on investments in local growth, capabilities, local economic potential and support for small and medium-sized enterprises.

The present paper presents the impact of economic crisis on European SMEs and, in particular, on the Romanian SMEs decline. The article also highlights the Romanian SMEs perspectives in terms of financial support that will be provided by the European Reformed Cohesion Policy for the next six years to come in order to build sustainable local communities.

Keywords: *capabilities, growth, investments, potential, support, small and medium-sized enterprises, local communities.*

1. Introduction

The European Commission had significantly increased the SME financial support through 2007-2013 operational programmes. Furthermore, in March 2008, European Council expressed strong support for an initiative to further strengthen SMEs' sustainable growth and competitiveness, named the "*Small Business Act*" (SBA) for Europe that was rapidly adopted.

The "*Small Business Act*" aimed to improve the overall policy approach to entrepreneurship, to irreversibly anchor the "Think Small First" principle in policymaking from regulation to public service, and to promote SMEs' growth by helping them tackle the remaining problems which hamper their development. This initiative also set 10 principles to guide the conception and implementation of policies both at EU and Member State level, namely:

- Create an environment in which entrepreneurs and family businesses can thrive and entrepreneurship is rewarded;
- Ensure that honest entrepreneurs who have faced bankruptcy quickly get a second chance;
- Design rules according to the "Think Small First" principle;
- Make public administrations responsive to SMEs' needs;
- Adapt public policy tools to SME needs: facilitate SMEs' participation in public procurement and better use State Aid possibilities for SMEs;
- Facilitate SMEs' access to finance and develop a legal and business environment supportive to timely payments in commercial transactions;
- Help SMEs to benefit more from the opportunities offered by the Single Market;
- Promote the upgrading of skills in SMEs and all forms of innovation;
- Enable SMEs to turn environmental challenges into opportunities;
- Encourage and support SMEs to benefit from the growth of markets[1].

After five years of insecure economic environment, the statistics say that the European SMEs

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[1] COM(2008) 394 final - Communication from the Commission to the Council, the European Parliament,the European Economic and Social Committee and the Committee of the Regions: "*Think Small First"* A *"Small Business Act"* for Europe, Brussels, the 25th of June 2008. European Commission, Enterprise and Industry, 2013 SBA Fact Sheet, Romania. The Small Business Act (SBA) Fact Sheets are produced by DG Enterprise as part of the SME Performance Review (SPR), which is its main vehicle for economic analysis of SME issues. They combine the latest available statistical and policy information for the 28 EU Member States and nine non-EU countries which also contribute to the EU's Competitiveness and Innovation Framework Programme (CIP). Produced annually, the Fact Sheets help to organise the available information to facilitate SME policy assessments and monitor SBA implementation. They take stock and record progress. They are not an assessment of Member States' policies but should be regarded as an additional source of information designed to improve evidencebased policy-making. For example, the Fact Sheets cite only those policy measures deemed relevant by local SME policy experts. They do not, and cannot, reflect all measures taken by the government over the reference period. More policy information can be found on a database accessible from the SPR website.

resisted the crisis better than large enterprises[2]. Member states implemented SBA and adopted policies to avoid financial market collapse. But all this policies couldn't assure growth, competitiveness and maintaining control of public spending. 2012 was the year that registered a loss of 610.000 jobs at EU level and SMEs contribution to the GDP diminished from €3.44 trillion that was collected in 2011 to €3.39 trillion in 2012. Annual Report on European SMEs 2012/2013 (based on Eurostat Statistics) provides an overview of the position of SMEs in the European economy between 2008 – 2013 (and a trend analyze for each SME size), in terms of business demography, employment and added value and reflects through its statistics the decline and low performance of SMEs.

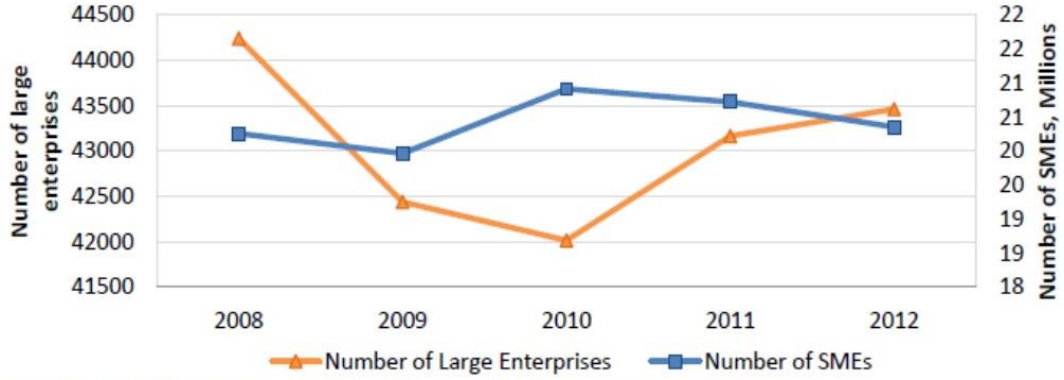
2. The dynamics of business demography 2008 - 2012[3].

Between 2009 and 2010 the number of SMEs reached almost 21 million firms and from 2010 till 2012 the total number of SMEs decreased, returning to the levels of 2008.

The number of micro-enterprises underwent large fluctuations. Between 2009 and 2010, the number of micro-firms increased with a net growth of almost 1 million units. In 2011, however, their number reduced by more than 200,000. The negative trend continued throughout 2012 albeit at a lower rate. In 2012, the number of micro-enterprises was just 120,000 units above the 2008 level.

The number of small firms was negative. Despite a 2.4% growth in 2010-2011, of the 1.37 million small companies that existed in 2008, there remained only 1.35 million in 2012.

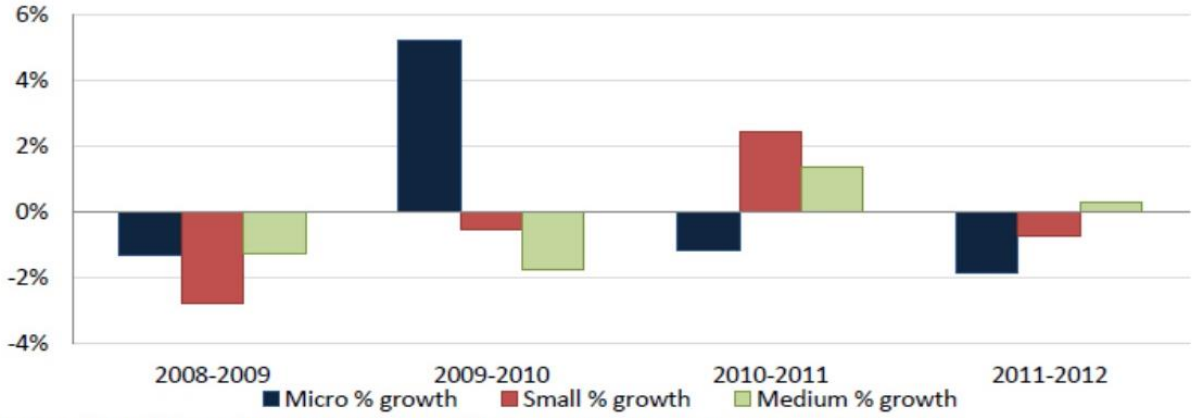
The trend in the number of medium firms was negative until 2010. Although it is acknowledged that a number of large enterprises crossed over to the SME size-class, between 2008 and 2010, the sector lost approximately 6,000 firms (with their number reducing by almost 3%). Slight growth was recorded in 2012, which brought the number of medium sized firms to a total of 220,000



Note: Number of Large Firms: Left Axis; Number of SMEs in million: Right Axis

Source: Eurostat, National Statistical Offices, DIW, DIW econ, London Economics

Trend analyze for each SME size

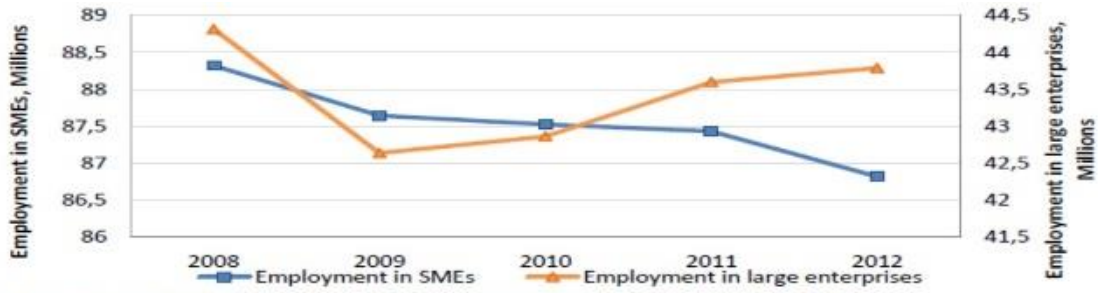


Source: Eurostat, National Statistical Offices, DIW, DIW econ, London Economics

[2] European Commision, *A recovery on the Horizon? - Annual Report on European SMEs* 2012/2013, October 2013

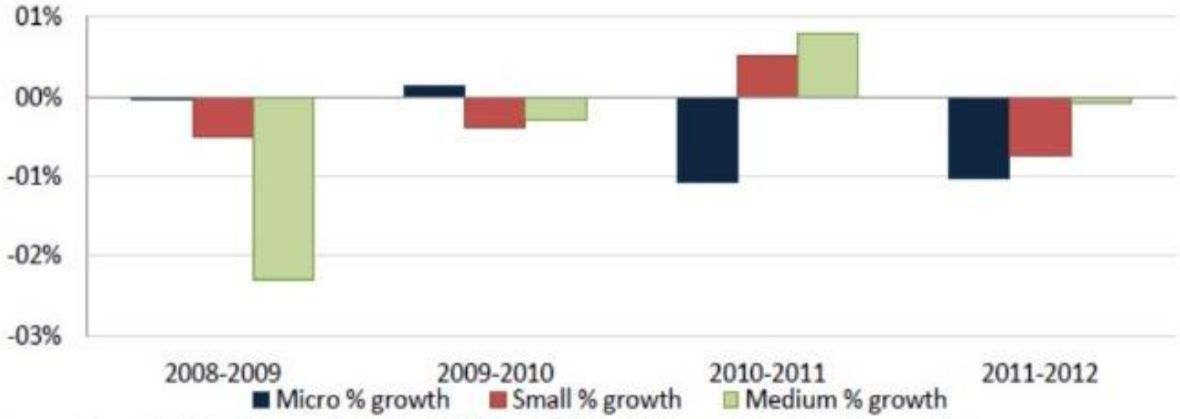
[3] Ibidem

Employment dynamics 2008 - 2012[4]. 2009 was a very difficult year for the European SMEs because there were registered 677. 000 job losses.



Note: Employment in SMEs in million: Left Axis; Employment in Large Firms: Right Axis.
Source: Eurostat, National Statistical Offices, DIW, DIW econ, London Economics

Trend analyze for each SME size



Source: Eurostat, National Statistical Offices, DIW, DIW econ, London Economics

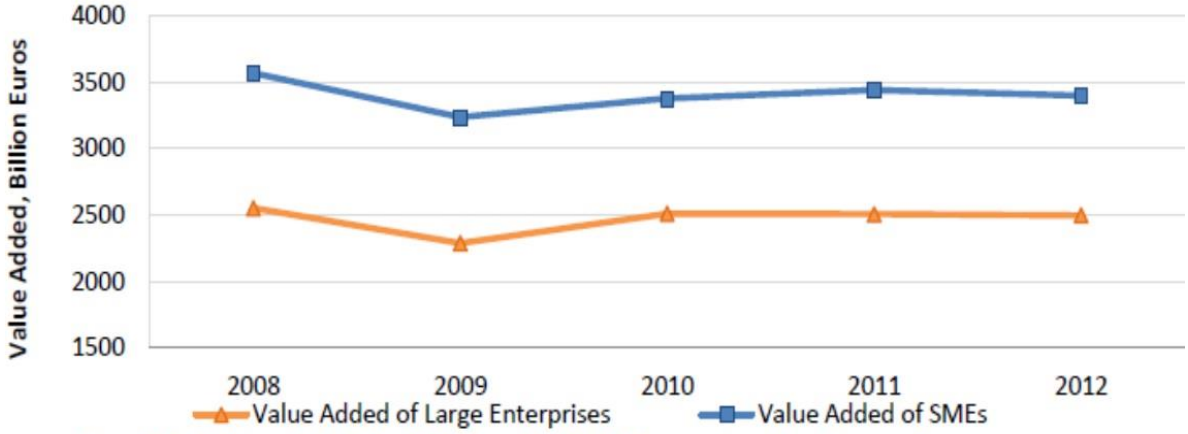
Micro-enterprises performed well between 2008 and 2010, but they showed a negative trend in 2011 and 2012. In 2012, micro-enterprises lost 387,250 jobs. Between 2008 and 2012 the total loss of employment was of 757,400 jobs.

The trend for small enterprises was negative. Enterprises employing between 10 and 49 people performed very poorly during the 5-year period of interest. The trend was negative. In 2012, small sized enterprises lost 202,600 jobs bringing the count to more than 300,000 jobs lost between 2008 and 2012.

The major source of job losses in 2009 was in medium sized enterprises, which lost over 530,000 jobs. Medium sized enterprises reversed this trend in the following year. In 2012, medium sized enterprises took a further hit registering a loss of 20,000 jobs. In that year they employed 438,500 fewer people than in 2008.

Value added dynamics 2008-2012[5]

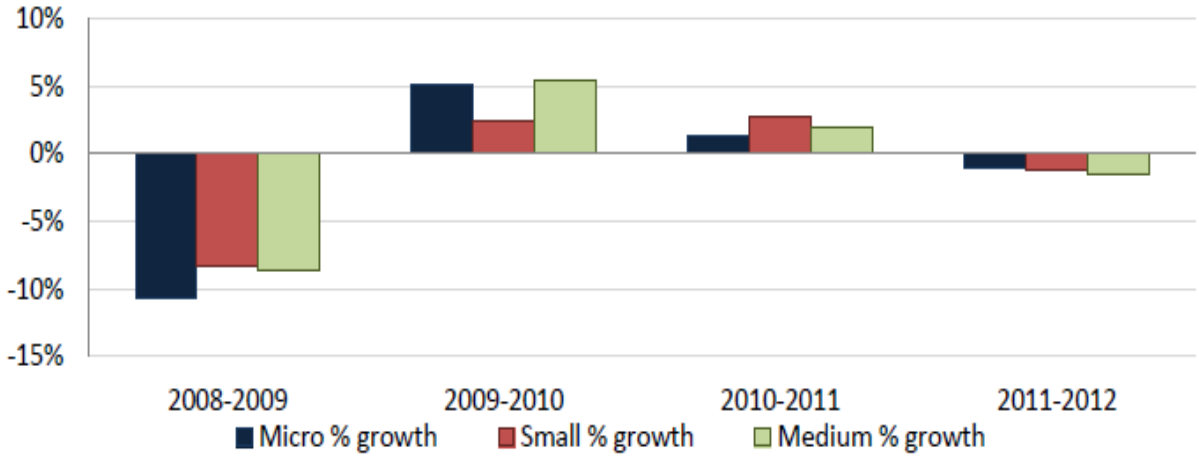
(The dynamics of value added was similar for SMEs and large enterprises)



Source: Eurostat, National Statistical Offices, DIW, DIW econ, London Economics

Trend analyze for each SME size

[4] Ibidem
[5] Ibidem



Source: Eurostat, National Statistical Offices, DIW, DIW econ, London Economics

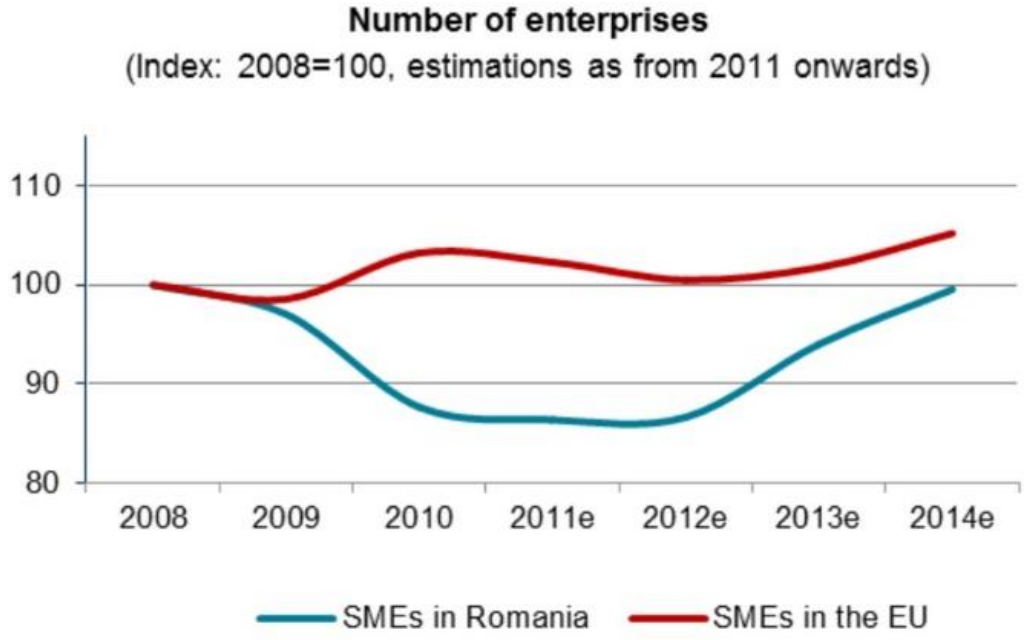
Micro-enterprises experienced the largest loss in 2009, losing €141 billion in value added. The following year, some of this loss was recouped but, at the end of 2012, the value added lost by micro-enterprises was €78 billion. In 2012 alone, micro-enterprises lost circa €14 billion in value added.

Small sized enterprises did not perform much better. In 2009, the value added of small firms reduced by €95 billion. Over the next two years, only a third of this loss was recouped and, in 2012, small companies recorded a further loss of €13.2 billion.

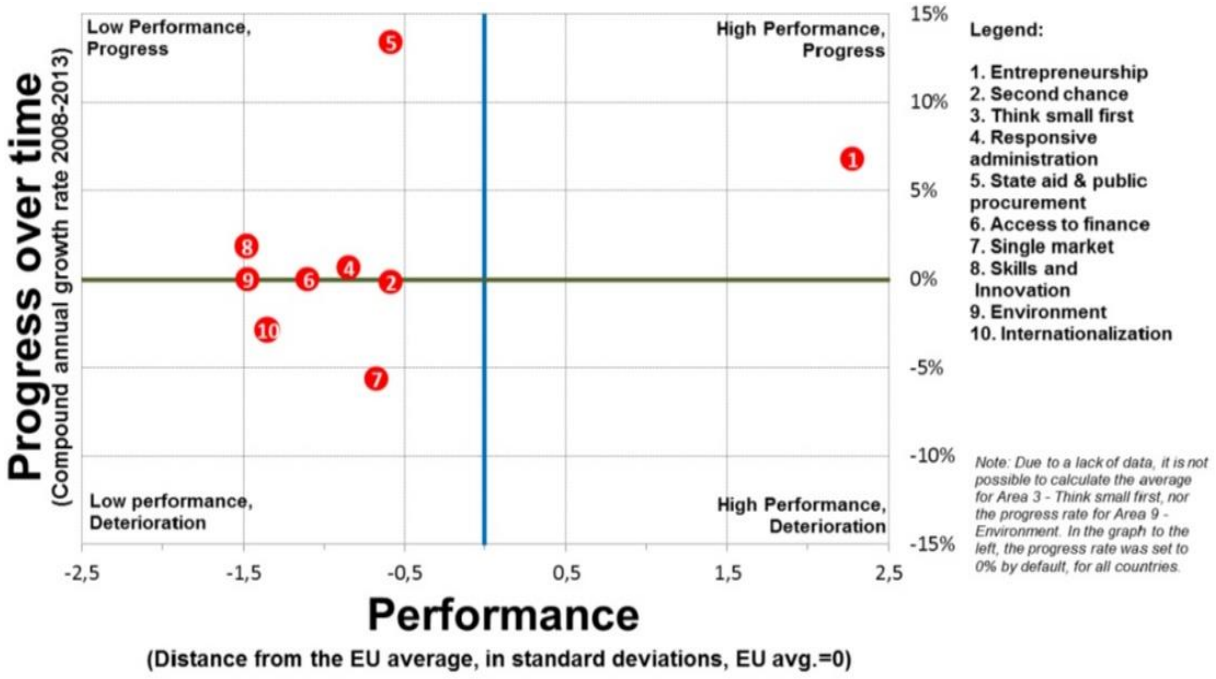
Medium sized enterprises experienced the same dynamics: in 2009, they lost €96 billion in value added; they partially recovered in 2010 - 2011 and lost again €16.9 billion in 2012.

3. SMEs in Romania

Analyzing Romania's economic situation for the last five years, DG Enterprise (under European Commission) considers that Romanian SMEs are below average and its SBA profile has changed little. "*The country's performance is below par for seven out of nine SBA principles and is above average only for 'Entrepreneurship', albeit there by a large margin. In 2012, only a few new measures in the areas of the single market, state aid and public procurement, the environment and internationalization were actually introduced. Overall, it is acknowledged that the economic crisis and general instability have severely hampered progress on SME policies*."



Romania's SBA performance: Status quo and development 2008-2013



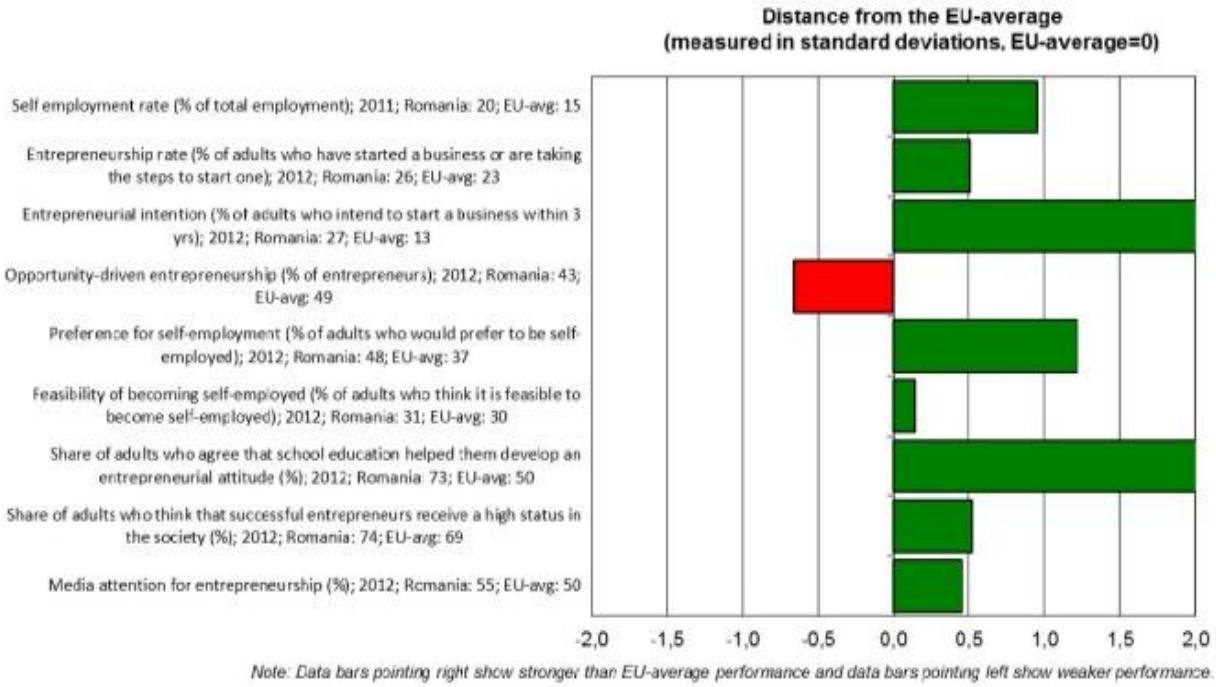
It is important to take a look over the implementation of SBA principles in Romania.

1. Entrepreneurship

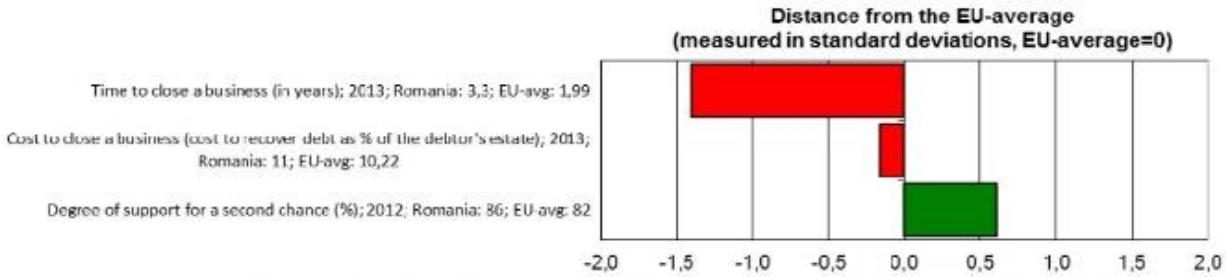
Entrepreneurship is by far the best performing SBA area for Romania. Entrepreneurial culture in Romania is widely seen as well established and entrepreneurs are willing to start their own businesses despite the numerous and relatively well-known obstacles and challenges they face.

2. Second chance

'The indicators measuring 'Second chance' reveal a relatively unfavourable environment for re-starters. Honest entrepreneurs whose businesses have failed and who want to start again have to put up with longer times for closing a business (3.3 years in Romania compared with an EU average of 2 years), even though the corresponding cost (11% of the debtor's estate) is similar to the EU average.



Note: Data bars pointing right show stronger than EU-average performance and data bars pointing left show weaker performance.



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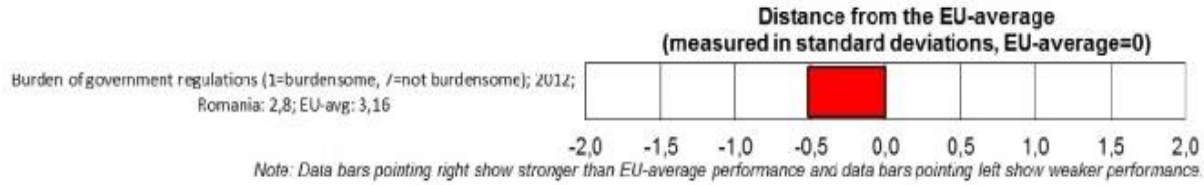
3. Think small first



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For 'Think small first', there is only one indicator available, which measures entrepreneurs' perception of the burden of government administrative requirements for permits and reporting. It is worse than the EU average. However, it is not possible to draw any general conclusions on this basis.

4. Responsive administration

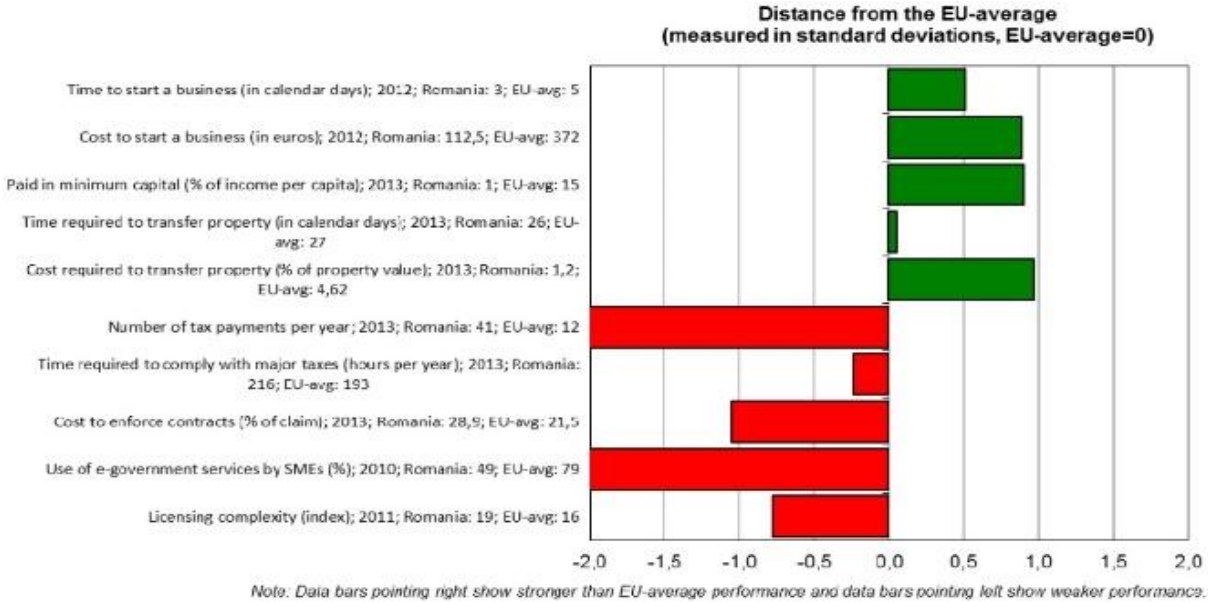
Romania provides a less business-friendly environment for SMEs than the EU average, despite its comparatively good performance on start-up conditions and property registration and transfer procedures. In Romania, it is possible to start a business in three days at a cost of around €100-125, which is both faster and cheaper than the EU average.

Despite significant progress, reducing the number of yearly tax payments from 66 to 41, the gap with the EU is still considerable, suggesting that further improvements are both possible and necessary.

5. State aid and public procurement

Romania scores slightly below the EU average on state aid and public procurement, but recorded the highest jump in the past five years. Romanian SMEs make better use of e-procurement services than their EU counterparts, and also seem to receive payment quicker from public authorities. But the share of state aid earmarked for SMEs decreased to only 1 % in

2011, and SMEs' share of the value of public procurement contracts was still very low in 2008, at 27% compared with an EU average of 38%.



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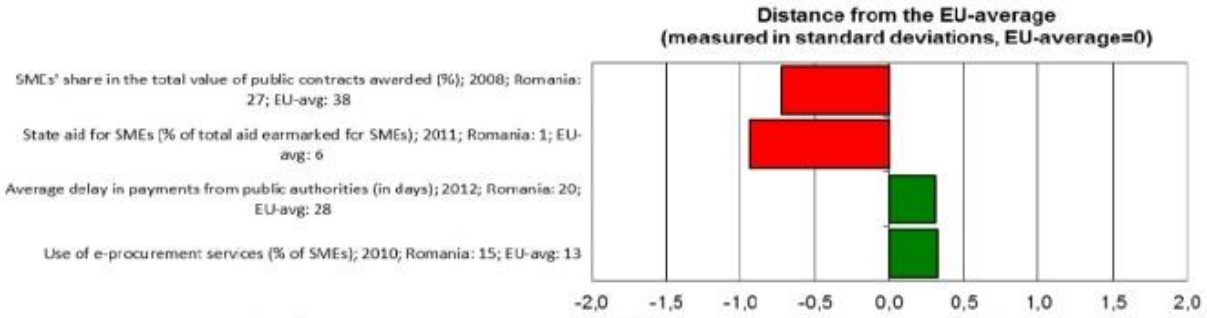
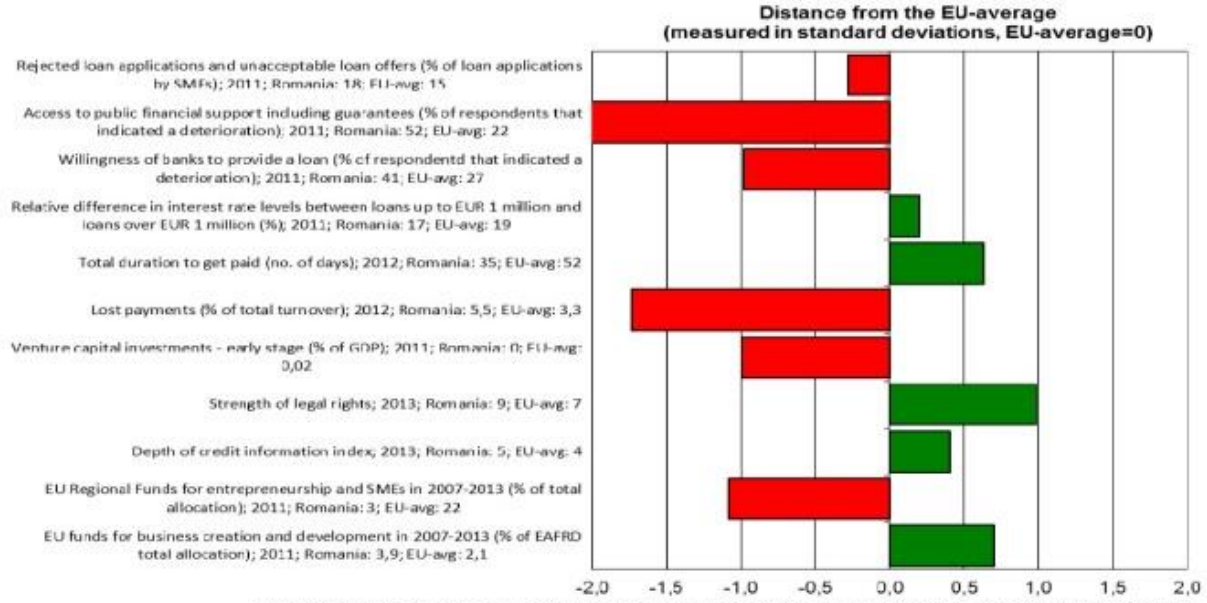


Note: Data bars pointing right show stronger than EU-average performance and data bars pointing left show weaker performance.

6. Access to finance

Access to finance remains difficult and costly for SMEs in Romania. The latest figures on loans date from 2011. The proportion of Romanian business owners who report a deterioration in banks' willingness to provide loans has remained stable at 41%, which is high and well above the EU average of 26%.



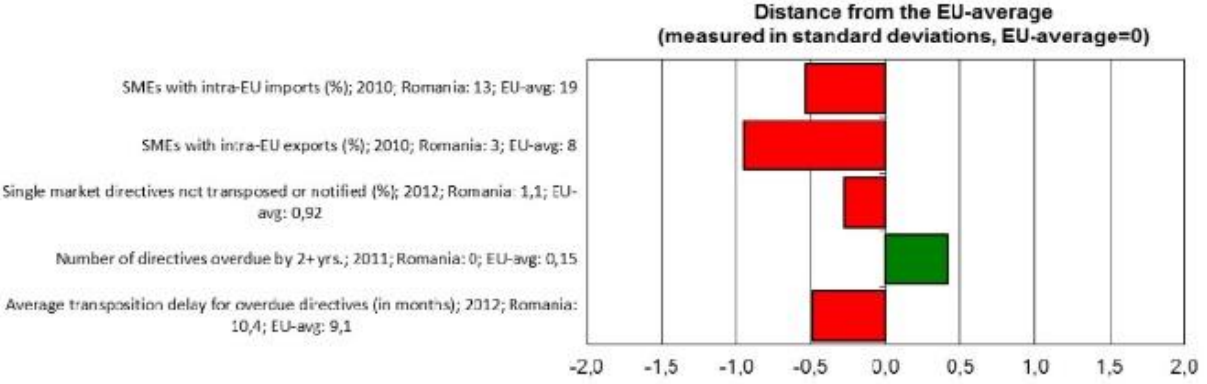
Note: Data bars pointing right show stronger than EU-average performance and data bars pointing left show weaker performance.

7. Single market

Romania's score on single market issues is below the EU average and reflects Romanian firms' low competitiveness on the internal market and beyond.

8. Skills and innovation

Romania lags far behind in this area, which covers both skills/training and innovation aspects. All but one of the core indicators relating to innovation are below the EU average. Romanian SMEs are less likely to introduce innovation, to collaborate with each other or to innovate in-house. However, firms that do innovate are more successful than their EU peers in turning these new products and processes into sales

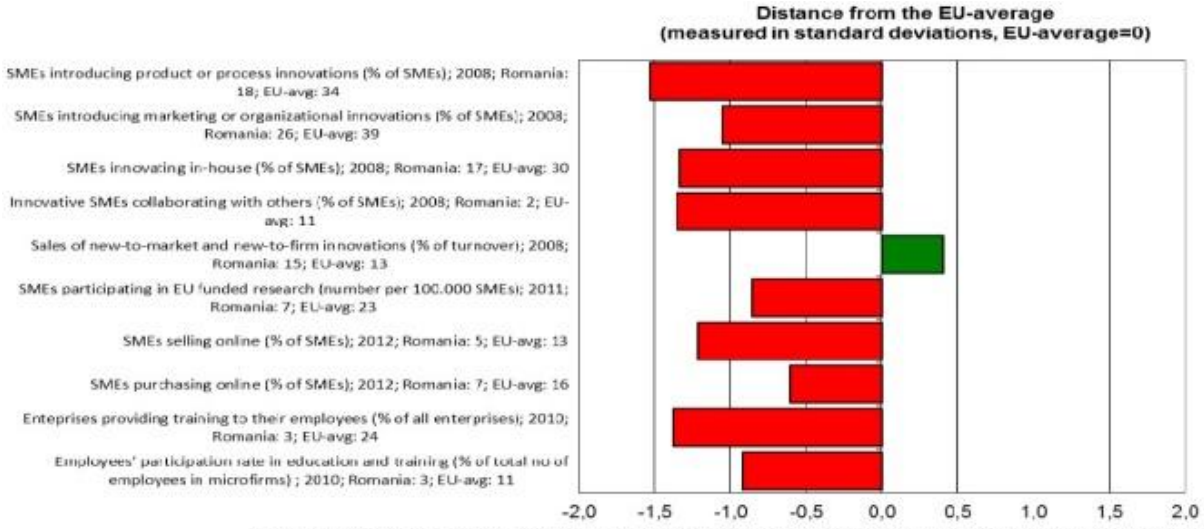


Note: Data bars pointing right show stronger than EU-average performance and data bars pointing left show weaker performance.

revenue. Apart from the innovation-related indicators, Romanian SMEs also perform below par in other aspects, such as IT-readiness, which is defined as ability to sell products and make purchases online. Also, Romania is not successful in attracting and retaining talent — e.g. R&D scientists and talented executives — and in providing them with competitive salaries.

10. Internationalisation

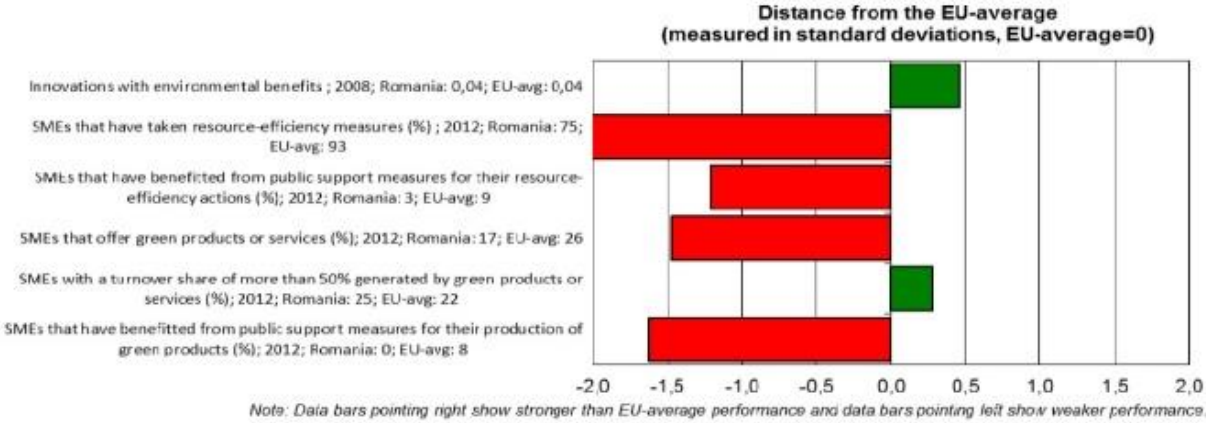
Based on the available indicators measuring internationalisation, Romania is well behind the EU average. The general framework conditions for trading are — without exception — less favourable than in other EU countries, on average. It is therefore not surprising that the indicators reflecting the performance of Romanian companies in markets outside the EU remain modest.



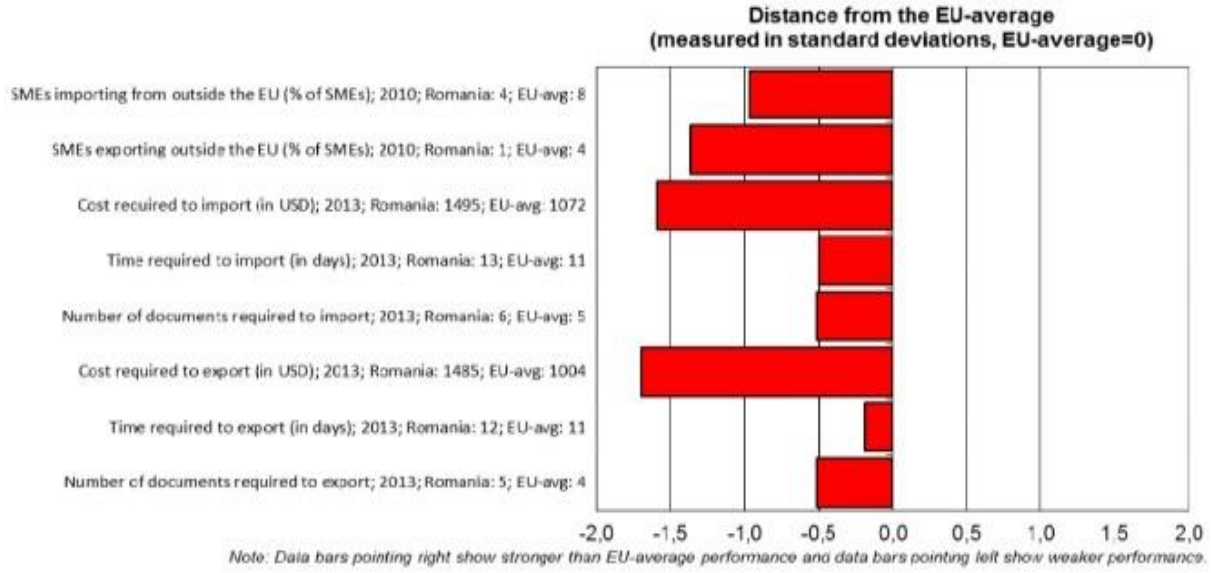
9. Environment

Romania scores well below the average on this dimension, but its performance varies somewhat across the individual indicators. Romanian SMEs are much less likely to take steps to increase their resource-efficiency compared with the European average. This is partly because they do not receive public support for such measures to the same extent as their European peers. Similarly, only 17% of companies in Romania, compared with an EU average of 26%, have begun to exploit the opportunities offered by demand for green products and services, although those who have done so are more successful in generating a significant proportion of their revenues by selling these green products. Overall, the trend towards environment-friendly processes is felt in Romania, but is much weaker than in the rest of the world.

As the Annual Report on European SMEs 2012/2013 noted *a further consequence of the crisis was that the distribution of losses in employment and value added was very unevenly distributed among the Member States*. Romania is one of that states in which SME performance in terms of value added and employment was negative.

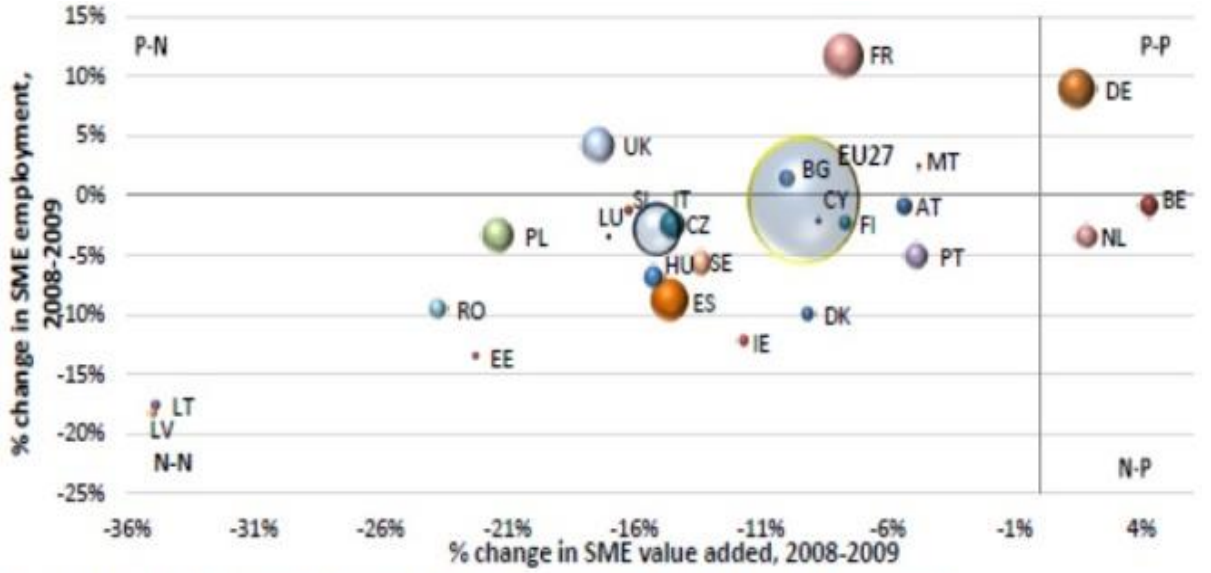


In 2013 European Commission issued for Romania among eight country specific recommendations one dedicated to improvement of SMEs economic performance. EC advised that the Romanian authorities should ensure a coherent e-government and undertake efforts to ease access to finance and to reduce the administrative burden on SMEs. Romania should also improve the efficiency and independence of the judiciary system and the



effectiveness of policies to prevent and combat corrupt practices, notably in the area of public procurement[6].

development. The objective under the reformed Cohesion Policy will be to double the current support to around €140 billion for 2014-2020, partly through the increased use of financial instruments.



Source: Eurostat, National Statistical Offices, DIW, DIW econ, London Economics

4. What's need to be done to reach Intelligent Growth and Sustainable Development in Romanian Communities. Future approach of European Cohesion Policy 2014 – 2020

Enhancing the competitiveness of small and medium-sized enterprises (SMEs) is one of the key priorities of European Cohesion Policy 2014 – 2020.

Cohesion Policy Funds[7] will promote entrepreneurship and support SME's growth by tackling the problems which hinder their

This increased investment will help SMEs to:

- Access finance with grants, loans, loan guarantees, venture capital, etc.
- Tap into business know-how and advice, information and networking opportunities including
- cross-border partnerships.
- Improve their access to global markets and mitigate entrepreneurial risk.
- Exploit new sources of growth such as green economy, sustainable tourism, health & social services, including the "silver economy" and cultural and creative industries.

[6] *2013 European Commission's recommendations for Romania in brief,* http://ec.europa.eu/europe2020/europe-2020-in-your-country/romania/country-specific-recommendations/index_en.htm

[7] EU COHESION POLICY 2014-2020**,** *Targeting Investments on Key Growth Priorities,*

- Train entrepreneurs, managers and workers to be adaptable to new challenges.
- Invest in human capital and in organisations providing practice-oriented vocational education and
- training.
- Forge valuable links with research centers and universities to promote innovation.
- New simplified and common rules and measures make it easier for SMEs to access Cohesion Policy Funds in 2014-2020. These include:
- online reporting of how the Funds are used;
- clearer eligibility rules;
- more targeted and less frequent audits for small operations; and
- wider scope and simplification of the set-up and access to financial instruments.

Romania, as member state and within The Small Business Act for Europe, should draw up a "strategic policy framework for inclusive start-ups" presenting a comprehensive vision of entrepreneurship support. It also should include actions to raise awareness and develop entrepreneurial skills, as well as measures to help start-ups to launch and access to finance, notably micro-finance.

5. Conclusions on revitalizing Romanian SMEs

In the present paper we tried to describe Romanian SMEs performance over the last five years based on the statistics offered by the European commission databases. We also wanted to raise the awareness of the importance of developing this sector and the fact that Romania must accelerate positive developments for SMEs, like a basse for intelligent sustainable development,by reducing unemployment and increasing common weal of local communities.

Although entrepreneurship chapter has a raising trend, our country must further on encourage entrepreneurship, private initiatives and improve business support infrastructure. Encouraging the development of microenterprises will have a positive impact on the local communities economy. Some governmental programmes to simplify administrative burden is necessary. In order to reach intelligent growth in local communities Romania must implement actions supporting entrepreneurship by reducing time needed for and the cost of registering new businesses, offering specialised (electronic) services to the business community, and new strategies and plans for better and accelerated development of SMEs and the business environment at substantially reduced cost (further promotion of The One-Stop Shop)[8].

In the next period of time European funds are vital for our sustainable development and, of course, for SMEs. The access to equity is one of the most important obstacles for SMEs in seed and development phases. Private financial funds are particularly seen as difficult to access, while bank loans and guarantees, sometimes vital for business development, are too costly and lack flexibility[9]. This obstacle must be taken into consideration by the Romanian government and new measures to ease the access to investments funds must be adopted and implemented. Mistrust in financial institutions is a negative factor with dramatical consequences on local economies. Alongside mistrust, another negative factor that affects Romanian SMEs performance in the terms of absorption of european funds is the uncertainty linked to the extremely burdensome reporting process and the time taken to receive payment/reimbursement of structural funds.

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[8] Ibidem
[9] Ibidem

- 2013 European Commission's recommendations for Romania in brief, http://ec.europa.eu/europe 2020/europe-2020-in-your-country/romania/country-specific-recommendations/index_en.htm;
- http://epp.eurostat.ec.europa.eu;
- http://ec.europa.eu/enterprise/policies/sme

CONSUMER'S BEHAVIOUR – AN APPROACH FROM THE PERSPECTIVE OF BEHAVIOURAL ECONOMICS

Viorel CORNESCU[*]
Roxana ADAM[**]

Abstract:

The consumer and his behaviour have concerned all economists, no matter if they are theoreticians or practitioners. Naturally, research in the domain has revealed new aspects, new theories and has led to the creation of schools of thought in time. Standard or neo-classic economics, which lays stress on absolute rationality, the maximization of results, modelling etc., cannot wholly decipher economic mechanisms or efficiently explain and guide the economic life of society. That is why, if we take as a starting point the observation that man lies at the heart of economy, we understand that the attempts to explain his role and the manner in which he behaves in economic life are more and more numerous and involve the use of concepts from different domains of study: psychology, sociology, etc. The present study aims at analysing the consumer's behaviour from a perspective which already has a consistent and well-outlined profile in the economic science and is known as behavioural economics.

Keywords: *standard economics, limited rationality, consumer's behaviour, behavioural economics.*

JEL Classification: A12, B12, B29, D03, D11.

1. Introduction

The theory regarding consumer's behaviour refers to the manner in which the consumer, who is supposed to be a rational individual, takes decisions as regards the purchasing of goods. The phrase **consumer's behaviour** refers to buyers and clients of products and services, as well as to persons who use these products and services. This lexical construction **denotes** the decision of buying in itself and not only. Consumer's behaviour is a way of acting, which implies the decision-making process of the consumer (as an economic agent), as well as all the activities he performs for being informed, being able to purchase, use, evaluate, etc., some consumer goods.

The consumer's behaviour and actions have interested researchers for a long time; once the consumer society started to develop, the interest paid in this topic increased. Recent studies (Kotler and Keller, 2012) have revealed that the consumer's behaviour has become a factor with a direct impact on a business performance although *for more than 300 years, economists like: Nicholas Bernoulli, John von Neumann and Oskar Morgenstern have studied the fundamentals of the consumer decision-making process* (Richarme, 2005). In order to understand the consumer, that is – his decisions, the *utility theory* was created, according to which the consumer is *"an economic and rational individual" (*Zinkhan, 1992), who only manifests self-concern. *Utility theory* has provided a theoretical framework for analysing the decision-making process under uncertainty circumstances; according to this theory, individuals choose the result that enhances their welfare.

Traditionalist economists have analysed human behaviour in a quite rigid manner (total rationality), from a purely economic perspective (standard economics), failing to consider psychological and sociological aspects in their analysis. Recent research (Simon, 1955; Kahneman and Tversky, 1979) have pointed out that consumers are not completely rational. The utility model revealed to have major faults; subsequently, Herbert Simon developed the concept of *"satisficing"*[1] (Simon, 1977, p. 37), according to which the individuals' rationality is limited to cognitive and emotional capacities. Prospect theory, which is a contribution brought by Daniel Kahneman and Amos Tversky, has described certain economic behaviours that could not be explained through the previously developed theories that had considerably approved predictions regarding decision-making.

When approaching consumer's behaviour, the elements of behavioural economics are indispensable; however, we consider that the basic elements of the standard theory cannot be neglected; thus, it is only the harmonization of concepts related to the consumer behaviour as revealed by the two economic approaches that can help us outline a rather complete perspective over the consumer and his behaviour.

2. From neo-classic to behavioural economics

Neo-classic (standard) economics used an empirical approach and, similarly, theoretical

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[1] The original phrase used to define this theory is: the theory of "satisficing".

modelling, which has quite rarely been reflected in empirical reality. At the same time, empirical research used by the neo-classic theory ignores some limitations, of which some are very important depending on circumstances. Nevertheless, behavioural economics – which is new in the theory of economics – has been analysed from a neoclassic perspective as an unsophisticated theoretical result based on abnormal empirical results (Sontheimer, 2006, p. 237). Considering the characteristics and arguments revealed by the two theories, we appreciate that the statement - according to which the general framework of neo-classic theory is rather simplified in comparison with the one proposed by behavioural economics - is appropriate; however, one cannot ignore important contributions brought by neo-classic theories, such as the demand and offer law, etc.

Angner (2012, p. XV) states that behavioural economics has developed as a reply given to neo-classic economic theory and that important parts of behavioural economics can be understood only in contrast with the standard theory. According to behavioural economics, standard economics is a normative theory. According to Simon (1997), traditional economics and behavioural economics have evolved separately, postponing the synthesis that we need to fully understand the economic world around us. Discussing about the tension that exists between the supporters of the two concepts, Sontheimer (2006, p.237) underlines the fact that: *"neither of the two parts sees the other one correctly"*, while MacFadyen (2006, p. 188) considers that: *"instead of regarding these two approaches as contradictory in nature, we should regard them as being convergent"*.

According to Mullainathan and Thaler (2002, p. 2), behavioural economics takes the standard economic models as a starting point: "*The research programme of behavioural economics has included two components: 1. the identification of the manner in which behaviour is different from the standard model; 2. pointing out the manner in which this behaviour matters in the economic context.*"

The standard theory appreciates that: (i) agents have well-defined and stable preference, (ii) agents use in the decision-making process all the information that is available and (iii) agents act in order to enhance objective functions. Sontheimer (2006, p.237) mentions 3 characteristics that distinguish behavioural economics from neo-classic economics in practice: (i) unconditional and dominant commitment of behavioural economists to empirical research; (ii) there is an insistent concern with maintaining a link between empirical deeds and the economic theory; and (iii) the stress laid mainly on procedural rationality and less on rationality.

The main connection between the two theories is given by the individual's economic behaviour. Both theories put the stress on intentional behaviour, which individuals adopt in order to achieve their motivation-driven goal; their decisions are not usually made at random or in an arbitrary way. Intentional behaviour does not have the restrictive meaning of neoclassic economics, i.e. the one of an optimizer, maximizing factor or rationality supporter, in the sense of consistency and it excludes the neurologically-impaired persons' behaviour. Thus, if there is a change in the paradigm in the future, this could derive from the study of decision-making factors in relation to emotions and feelings (Sontheimer, 2006, p. 245).

Behavioural economists enjoy a wider and wider appreciation from researchers. For those who are familiar with this concept or those whose interest in the domain is still a novelty, such as Herbert Simon, George Akerlof, Daniel Kahneman, Amos Tversky, Richard H. *Thaler*, Vernon Smith or Gerd Gigerenzer, such theories are well-known. In fact, these authors have built and raised the foundation of behavioural economics. Since the charm of science is to search for a better understanding of the world in which we are living and since history has proved that the new theories are most often created by improving or contesting the existing theories, the appearance and development of behavioural economics has generated a series of contradictory debates as to the precedent theory, neoclassic economics and the new theory, behavioural economics.

In specialized literature, the concept of rationality has been insisted upon; disruptive analyses have been made for understanding standard concepts which were generally accepted until not long ago and opinions were supported or contested, etc. Another perspective developed by economists was to build links between the two concepts or to search for common approaches that were rooted in the former theory. In this respect, in order to highlight the great neo-classicists' concerns in relation to the complex human behaviour, we intend to present a few ideas that are underlined in behavioural economics and whose roots are much older.

Camerer and Loewenstein (2004, p. 5), while analysing the historical context in which behavioural economics has evolved, write about Jeremy Bentham[2] whose concept of utility formed the foundation of neo-classical economics; Jeremy Bentham wrote about the psychological basis of the utility concept, and his knowledge in utility determinants starts to be appreciated only now (Loewenstein, 1999). They remind of Francis Edgeworth and his *Theory of mathematical psychology* in which his famous "box" charter illustrates the results of two negotiators and has included a simple model of social utility, in which a person's utility has been affected by the other person's earning.

Until recently, the best known masterpiece of Adam Smith was the book *The Wealth of Nations*, written in 1776, thanks to the concept of the *invisible*

[2] Jeremy Bentham was a British philosopher, jurist, and social reformer. He is regarded as the founder of modern utilitarianism.

hand, which explained general welfare through the idea that each individual pursues one's own interest; however, in the last decade another work of Adam Smith has drawn attention, *The Theory of Moral Sentiments*. Adam Smith anticipated ideas that can be linked to the existing concepts developed in behavioural economics, such as: correctness, the power of the will, aversion towards loss. In the next lines, we are going to present some of these perspectives.

The approach of rational agents - which are run by selfishness and aim at maximization - has often made Smith famous; consequently, we would like to present one of the first perspectives that was developed by Smith as to human nature and that contradicts the precedent perception over his work. Thus, Smith (1759/1892) states that: *"however selfish man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though they derive nothing from it except the pleasure of seeing it."* We can notice that the author regards with understanding the people's likability for the others; in other words, individual "selfishness" is depicted as part of the moral system of our society. According to him, cruel selfishness could manifest itself when honour is at stake and when honour is also wrongly understood. Words like "happiness", "disappointment", "expectations", etc. offer the human being a human dimension that was neglected by many economists that studied his works. Similarly, we may say that the previous quotation reflects a form of altruism, too, if we think that people experience a form of pleasure when they act for the others' welfare unconditionally.

About 200 years before Kahneman and Tversky (1979), Smith identified the regular nature of choice-making which has come to be known as *aversion towards risk* (Ashraf, Camerer and Loewenstei, 2005, p. 132). The most remarkable statement made by Adam Smith is the one quoted by Camerer and Loewenstein (2004, p. 5): *"we suffer more [. . .] when we fall from a better to a worse situation, than we ever enjoy when we rise from a worse to a better"* (1759/1892, p. 311). We consider that this paragraph speaks for itself about Smith's level of comprehension as regards the economic agent, i.e. man. Another reference made to the recently developed concepts is: *"the pleasure which we are to enjoy ten years hence, interests us so little in comparison with that which we may enjoy to-day"* (inter-temporal choices); *"the chance to win is more or less overrated by any person and the chance to lose is underrated by most people"* (overconfidence); many other references on this matter have been made by Ashraf, Camerer and Loewenstein (2005).

Albanese (2006) considers that Adam Smith did not say that the individual attempts to satisfy his own interest in a selfish manner. We can forget once and for all the wrong interpretation that the *economic agent* is selfish (Albanese, 2006, p. 16).

Converging towards the macro level and trying to understand the theory of consumption, we cannot fail to mention John Maynard Keynes' contribution in the area. D'Orlando and Sanfilippo (2010, p. 1036) appreciate that Keynes' representation of economic behaviour seems to be seriously grounded on the psychological features of human beings. According to the two authors, particularly in the consumption theory developed by Keynes, references to a maximizing behaviour are absent; however, the theory seems to have more in common with behavioural economics than with the traditional neo-classic approach, especially for the crucial role granted to the *rules of thumb*. Peach and Milan (2009, p. 891) appreciate that Keynes' works constantly underlined the importance of psychological factors in the human decision-making process and that these factors were included in his analysis of economic issues. Keynes explicitly brings into evidence the importance of the psychological dimension in analysing human behaviour, which he uses to support his departure from neo-classic tradition; he uses ideas like: salary rigidity, animal spirits, the illusion of having money, conventions and uncertainty; all of them suggest that Keynes refused to impose the concept of rationality as a decisive criterion for human behaviour.

Carabelli (2003, p. 218) appreciates that "*for Keynes, the substance or the object of economics (as a science) was represented by the economic agents' thoughts and opinions. The deliberate nature, reasons and human actions represent, at this point, the material of economics (as science)"*. According to Baddeley (1999, pp. 197-198) *"Keynes argues that the scientific theories should be capable to face the real world and should not force deeds to comply with theoretical hypotheses"*.

This short introduction to neo-classic economic theories is meant to bring into evidence the fact that ideas and concepts which are developed and debated by behaviourists are rooted in the neo-classical economists' approaches. In consequence, we can state that behavioural economics has followed the natural direction of development in research in an attempt to answer more questions which, asked or not, were difficult challenges to neo-classical supporters. Considering the above references, we appreciate that the main difference between behavioural economics and the standard theory consists in the behavioural supporters' luck to enjoy the foundation built by neo-classic economists and to find the right concepts to answer the questions that have troubled both groups in time.

The new trend created by contemporary economists is also to learn from outside the "classical" sphere of the economic area, i.e. from *psychology and/or sociology* in order to determine a clear image about the *human decision-making process*, in comparison with the one offered by rational choice

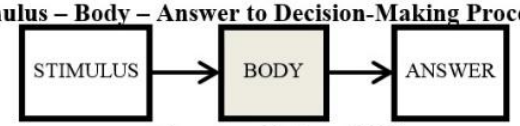
theory. In 2002, Daniel Kahneman, the behavioural economist and experimental psychologist, won the Nobel Prize in Economics for his work and for the research activity that he pursued with Amos Tversky. In his research activity, Daniel Kahneman approached different topics: heuristics and the biases[3] which people tend to have in relation to certain tasks and judgements (including provisions and evaluations) under uncertainty circumstances, the risky choice model – the prospect theory, loss aversion in riskless choice, categorizing effects and their implications for the rational agent's models; intuitive judgement and choice, the connection between preferences-attitudes, etc.

Other research activities in the area have revealed that choices made by individuals are based on intuition even if they do not rely on a minute decision-making process, while distinguishing between intuition and rationale[4] (Daniel T. Gilbert, 1989; Timothy D. Wilson, 2002; etc.). These two "systems of thought" with different capacities (Stanovich and West, 2000) have also been approached by Thaler and Sunstein (2008, p. 19) under the name of reflective system and automatic system. System 1 (automatic system) is implicitly characterized through automatism, associations, judgement based on experience (intuition), unconscious processes and affective associations. While the implicit system (system 1) refers to judgements that directly illustrate impressions which arise from the easily accessible mental content (Higgins, 1996), one of the functions revealed by the second system (the explicit system) is to monitor or verify mental and behaviour operations (Kahneman and Frederick, 2002). In comparison with system 1, system 2 is more analytical, and its limitations are associated with the concept of limited rationality (Samson and Wood, 2010, p.2).

The cognitive approach is another important approach in behavioural economics and it derives from cognitive psychology. Notes on cognitive psychology have existed ever since the first philosophical theories were created: Socratic thinking which gravitates around self-knowledge (Plato, 360 BC); the first theories about human memory that were developed by Aristotle and St. Augustin, who define it as follows: *"when we have knowledge and perception instead of things, we have memory"* (Aristotle, 1972, p. 50) or when the individual has a representation of the self: *"something which, I do not know, scares me […] this is my soul and this is who I am."*(St. Augustin, 1998, p. 354); or as Descartes defines it in his *Meditations* (Descartes, 1640), in which he analysed the way knowledge is mentally represented. Even if these philosophic ideas were born early, cognitive psychology was created as an area of study in the 1950's (Cziko, 2000) (see Figure 1), once Hebb developed his model.

In contemporary studies, Cognitive Psychology emphasised the existence of a large number of factors considered fundamental in inter-personal processes, of which we mention: perception, learning, memory, thinking, emotion and motivation (Sternberg, 1996). In the decision-making process, consumers are influenced by psychological factors that act at cognitive level; they do not have to be carefully analysed to understand the way in which consumer behaviour is reflected. To understand how subtle these factors are, we are going to refer to *motivation* in relation to a study whose subjects were a group of children that waited to be (and were) rewarded with a bow and a gold star for drawing a few images. In the subsequently made analyses, these subjects played less with the drawing materials in comparison with the children that were unexpectedly rewarded and in comparison with the children that did not receive any outer motivation (Lepper *et al*., 1973). In this case, psychological research indicated the fact that outer rewards can do more than justify choice and finally can reduce inner motivation. This example is part of an incomplete list of manifestations which can occur individually, by activating influence factors and it serves for underlying the complex and diverse nature of the inherently subtle matters that these factors may arise.

Figure 1: Stimulus – Body – Answer to Decision-Making Process Model



Source: Cziko, 2000.

Standard economics neglected human nature a long time and promoted an idealist economic behaviour, which described how rational people behave and should behave. We can say that the term *"rational"* used to be the bible of the neo-classic economics and individuals who did not act

[3] Bias, English term that could be translated by „tendențiozitate", „părtinire" or „idee preconceptă". For a while the term was translated as „prejudice"; however, this is not an accurate translation because, on the one hand, it has the same meaning as the English term *prejudice*, and, on the other hand, because the Romanian term *tendențiozitate* refers to an attitude which manifests itself not only – and not basically – at the rational level of judgement; bias manifests itself at the level of attitude, emotion, motivation or at the level of will. (Translation from English by Dan Crăciun; Kahneman Daniel, *Gândire rapidă, gândire lentă*, Ed. Publica, Bucharest, 2012).

[4] Psychologists Keith E. Stanovich and Richard F. West suggested using the name „*System 1*", as an equivalent of the intuitive system, which is defined through the actions of the involuntary mind that manifest themselves fast and automatically, whereas „*System 2*" is defined as an equivalent of the judgement system, defined through mental actions that are tiring and require a lot of conscious concentration, e.g. difficult calculations in mathematics. These terms are mainly used in the study of psychology, but they have been adopted and introduced in behavioural economics by Kahneman D., too.

"*rationally*" were some sinners occupying a marginal position in society. The analogy made has a religious connotation and is used metaphorically in order to point out the fact that the term *"rational"* may have been used and accepted by researchers for a too long time; departures from this interpretation perspective were treated as exceptional cases or behavioural errors. Although the concrete definition of rational behaviour was avoided and most often the term was vaguely defined, the term *"rational"* seemed unanimously accepted as good for a long time; whatever fell out of the so-called sphere of it (i.e. *"the irrational"*) used to have, in general, negative connotations.

Now, making a retrospective analysis, we know that *the rational*, as applied in economics, was used to label behaviour that illustrated the different economic behaviours that we discussed before. What we consider to be weak point of neo-classic theory is the fact that many theories did not distinguish between what should happen and what really happens. In other words, out of the wish to treat many of the normative theories as being positive, the ideal behaviour was associated with real behaviour and, thus, economic theory found itself enshrined in a foggy veil. According to Richard Thaler's vision, according to the standard theory, the individuals' behaviour corresponds to the one of Econs, which is different from the one of the Humans, characterized by limited calculation capacity and influenced by feelings, emotions, etc.

The economic agent's rationality – as developed by the classic theory – was contested by Herbert Simon[5], who firstly introduced the concept of limited rationality. This concept comes up with the idea that the individuals' rationality involved in the decision-making process is limited because of the limited information that they have access to, because of cognitive limitations, the individuals being obliged to make a decision within a strict period of time. It is well-known that on the basis of subjective utility, as it was developed by Savage (1954), one can build theories of limited rationality by modifying one or more hypotheses; some of the examples given by Simon are: replacing the fixed set of decision-making alternatives with a method that provides alternatives; replacing the maximization of a utility function with a satisfaction strategy. The main departures from Savage's theory have to do with the limited cognitive capacity that human beings have for discovering alternatives, for calculating through different methods the consequences of these alternatives under certain or uncertain circumstances or for making comparisons. *The term "limited rationality" is used to denote rational choices which are made by consumers depending on their cognitive limitations and in relation to their knowledge and calculation capacity. Limited rationality is a central topic in the approach of behavioural economics and it is mainly concerned with understanding how the real process of decision-making influences the adopted decision.* (Simon, 1997, p. 291)

Simon's studies reveal that economic agents lack the capacity and do not have all the resources to reach an optimal value; they actually look for a satisfying solution. The author made an analogy with the two blades of the scissors: one represents the individual's cognitive limitations, while the other one represents the environmental structures. *"Exactly as someone cannot understand how the scissors cut if that person looks at one blade only, in the same way a person cannot understand human behaviour if he/she studies either just knowledge or just the environment. This seems to be self-understood; however, psychology basically follows the path of mentalism, trying to explain human behaviour through attitudes, preferences, and logic or brain imagery, ignoring environmental structures in which humans live."* (Gigerenzer, 2012, p. 112)

According to Simon (1978, p. 2) the matter of allotting rare resources can be positively or normatively dealt with. In the economic theory, the positive or the normative one, this matter has not been studied from a simple perspective, but from the perspective of the *rational* allotment of resources. The rational individual illustrated by the standard theory is a utility maximizing factor, who will always choose the best solution. Differently from other researchers, who are contemporary with Simon, Simon approached human rationality in its daily meaning, which is different from the meaning given by economists to the concept of maximizing factor; the author is more concerned with the processes on which the choice relies rather than on the result of choices. Correlating this with rationality seen from the perspective of other social sciences on the basis of a functional analysis, the author considers that behaviours are functional if they contribute to the achievement of certain goals, no matter their nature.

Herbert Simon discussed about the need to focus on qualitative questions. According to him, before analysing quantitative aspects, it is necessary to identify the main cause that triggers the process. Institutions should be more concerned with questions like: *"which are the structural conditions that make the purchasing of the insurance rational or attractive*?", and not with questions like: *"how much insurance against floods is a person going to buy?"* At the same time, he sees mind as having limited resources, considering that maximization of utility or profit cannot be applied to situations in which the optimum action depends on uncertain environmental events or on other rational agent's actions (imperfect competition), and, no matter how complex computational models are, they are far from approximating the complex world in which we live.

[5] Winner of the Nobel Memorial Prize in Economic Sciences in 1978.

Simon (1978) made a distinction between substantive rationality and procedural rationality. Substantive rationality represents the measure according to which adequate actions are chosen and it is oriented towards the nature of choice (i.e. the choice) and the results generated by it. Procedural rationality is oriented towards choice within the limits of cognitive power, while focusing on the procedures that determined the choice (the manner in which the choice was made).

Consequently, limited rationality refers to human restrictions that are involved in the processing of information that is necessary for making a decision; these restrictions are due to different limitations: (i) knowledge (information), (ii) available time and (iii) calculation capacity (Simon, 1982; Gigerenzer and Goldstein, 1996). Limited rationality is not an equivalent of irrationality. For example, heuristic judgement (cognitive shortcuts taken in the decision-making process) can be regarded as rational thanks to its adaptation capacity and the exploitation of environmental structure (Gigerenzer, Todd and the ABC Research Group, 1999, p.13). This is optimal within the limits of human cognitive processing capacity. (Samson and Wood, 2010, p. 2).

3. Consumer's behaviour – a multi-disciplinary approach

In a simple approach, consumer's behaviour can be analysed starting from the question: *"*How do we know what we want?*"*– not as obvious a question as it may sound – to *"*What do we do with something we no longer want? *"* (Statt, 2001). For the beginning, it is important to clarify who the consumer is. Standard definitions that we find in dictionaries are rather dry. E.g.: the consumer is the *person who consumes goods resulted from the production process* (DEX, 1998) or the consumer is *the person who consumes material goods for satisfying his/her needs* (NODEX, 2002).

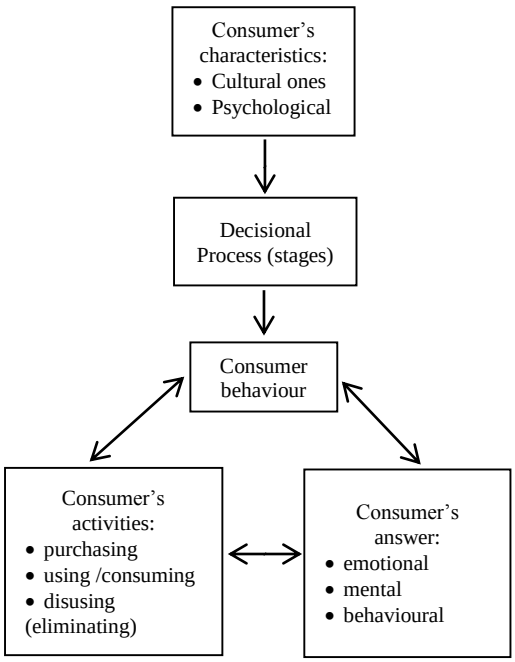
A more elaborate definition was given by Solomon (2006), according to whom the consumer is a person who identifies a need or a wish, makes an acquisition and then uses the product. Apart from these dictionary definitions that we find in economics textbooks or in specialized literature, the consumer is – in the everyday reality – represented by all of us: me, you, every family member, friends, acquaintances, unknown persons, etc., in other words, the consumer is the entity that consumes goods in order to satisfy certain needs. Consumers are bearers of needs and, in a large sense, they represent the population.

Consumer's behaviour has been defined in different ways in the course of time. Faison and Edmund (1977) laid the stress on people's needs; Engel et al. (1986) emphasised the actions performed by individuals; Kotler (1994) took buying as a landmark; in 1995, Solomon et al. brought into evidence the individuals, needs and processes on which consumer is based; in other recent studies (Englis and Solomon, 1995) the author has placed actions and needs in a central position.

An analysis of the definitions that can be found in specialized literature reveal the fact that *consumer's behaviour is regarded as part of the economic behaviour of the people, which, in its turn, is a form of manifestation for human behaviour in general* (Cătoiu and Teodorescu, 1997, p.13). Taking this idea as a starting point and correlating it with the definitions of the concept, we would like to represent the relationships between the most frequent frequently met elements and the researchers' attempts to define consumer behaviour.

Taking into consideration the scheme representing consumer behaviour according to Kardes, Cronley and Cline (2011) and correlating it with that proposed by authors like Hoyer and Maclnnis (2008), we would like to systematically represent our vision on consumer's behaviour in the chart below:

Figure 2: A graphical definition of the consumer's behaviour



Source: Adapted after Kardes, Cronley and Cline (2011, p. 8) and Hoyer and Maclnnis (2008, p. 1).

The systematic description starts from the premise according to which consumer's behaviour is made up of three areas: the characteristics of the consumer, the consumer's decision-making process and consumer behaviour, as a result of interaction between the segments that precede it. The pillars on which consumer's behaviour characteristics rely are – as specialized literature most often states – the following ones: consumer culture and psychological nucleus. The scheme splits consumer's behaviour into consumer activities and consumer's answers. The classification of consumer behaviour according to the

performed type of activity is useful because the consumer's answers to stimuli may be different since this is influenced by the need to buy, consume and disuse certain products or services (Kardes, Cronley and Cline, 2011, p. 9). At the same time, it is necessary to take into consideration the consumer's emotional, mental and behavioural answers to goods and to the used marketing method.

Understanding consumer's behaviour is a key matter for economic agents because consumer's behaviour is a complex process and many marketing decisions are based on hypotheses about the consumer's behaviour. At the same time, knowing the factors that influence decision-making is important for every individual because, understanding what determines us to take a decision, we may become more aware of the question whether a decision to consume a certain good in a certain quantity is – considering the theoretical aspects defined before – determined or influenced by one of those factors. If these factors could be gathered in a single model, we could know in totality and at the same time the intensity with which they influence consumer behaviour; consumer behaviour could be determined through mathematical formulas and on the basis of these formulas one could elaborate long-term forecasts as regards consumer's decisions.

Consumer behaviour is a complex phenomenon, well anchored in psychology and sociology; economists, psychologists and sociologists have tried to analyse the factors that influence the individual's decisions. The most important factors that influence consumer behaviour have been considered those of a personal, psychological and sociological nature. Personal factors include characteristics that are specific for a person, such as demographic factors: age, sex, etc. Social factors are represented by: opinion leaders, reference groups, family members' influence, social class, cultural level, etc. Psychological factors include: perception, motivation, personality, attitude, etc. At the same time, researchers have conceived categories of factors like: situational factors (Dickson, 1982), consumers' involvement (Rothschid, 1979), etc. For example, in a study written by Acebron *et al*. (2000) on the consumption of fresh food (prawns), the authors pointed out the consumers' habits and previous experience because they have a direct influence on the consumer's decision to buy. The authors consider that the image of the product has a serious impact on the decision to buy and recommends the continuous improvement of the product's image to encourage consumers to buy.

Frequently, consumer's behaviour is also approached and analysed from the perspective of marketing; the most common perspective is the one created by Acebron *et al*. (2000), i.e. encouraging consumption. Our perspective is different from the one of specialists in marketing; we consider that it is necessary for consumer's behaviour to be known in order to avoid economic dis-balance and to find a balanced approach between consumption, as it is economically defined, and human nature, as it is defined by humanists. The financial crisis in 2008 revealed, besides other financial aspects, the problem of the hyper-consumerist American society. This recent experience has proved that exaggerated consumerism does not bring economic benefits on a long term and that correlating this idea with the negative effects of consumerism over the environment and, most important, the psychological effects of hyper-consumption over the individuals (such as: inducing a negative state to individuals through publicity in order to determine consumers buy a certain product), we consider it is important to study and understand consumer behaviour not for encouraging consumption but for knowing the consumer better and for producing goods and services that should correspond to his needs.

As to the psychological characteristics that influence consumer behaviour, they may appear under different forms. The most often used concepts in specialized literature are: attitude, perception, motivation, personality, emotional states and memory (the capacity to learn).

Apart from psychological characteristics which influence the consumer's decisions, a person's features also play a key role in the decision-making process. These characteristics obviously make people different from each other. Demographic characteristics, such as: sex, age, income level, the level of education, etc. are fundamental for the consumers' decision to buy and may determine a departure from a consumer's general decision-making models (Lee, 2005). Yet, the most often encountered demographic variables are: age and sex.

In most specialized literature, social factors include: the reference group, opinion leaders, the social class, cultural level, etc.

Other factors that may influence consumer's actions are: the ability to process information, the level of knowledge and understanding, consumption preferences, as well as biases and heuristic elements.

The matter regarding the factors that influence consumer behaviour may be compared with an endogenous matter occurring in an econometric model; in other words, many of the above mentioned factors can influence each other; thus, the degree of importance is hard to establish for each of these factors. However, we consider that the main factors which influence consumers' decisions are the ones we have mentioned above; yet, they are not the only ones since they barely represent a part of the multitude of elements that influence consumer behaviour. We can say without being wrong that consumer behaviour is determined by multiple factors and is a multi-disciplinary concept.

4. Conclusions

Economics, as the most important domain of our society (opinion which we do not consider far-fetched, given the role of economics in today's society), has a continuous dynamic nature. This fact has determined us to try to understand and explain how economics functions; it has made us elaborate analysis methods, find solutions for the economic processes to run in our favour and for us to be able to ensure a good living standard; thus, economics has offered us the possibility to act and to develop the other domains of the social area. In this context, we understand the dynamics of economics, the evolvement of economic ideas, the efforts made by specialists to elaborate new theories and to upgrade the old ones, to extend economic research towards other social spheres and to study economic phenomena while being aware of the fact that man lies at its centre, with all his characteristics (psychological, educational, social, cultural etc.).

It is natural for new theories to appear, some of them leading to the creation of new schools of thought, which do not deny what has been accomplished in the history of economics in time, but which add knowledge, new elements, new perspectives for understanding economic life, by allowing new directions appear and develop. Behavioural economics is part of this analysis effort and it explains economic life by making reference to other sciences, particularly to psychology.

The consumer as an economic agent is identical with each of us and his behaviour should be approached from more perspectives, with the result that this fact will bring us benefits. Behavioural economics, which is based on standards economics, comes and amends the latter one with new concepts and ideas that enhance the explanatory power of economics, and, particularly, its power to economically act at micro, and at macro level.

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THE COUPLE'S COST-VALUE PERCEPTION IN THE ENTERPRISE MANAGEMENT

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Abstract

In this article, I will talk about the possibility to relate the costs and value created for the client. The customer is not a very precise mathematical model, value for the client will be considered a minimum variable. Accounting management tools being limited to the couple's cost-value research, it is necessary to other areas call for investigation related to these notions.

Keywords: *cost, value, target cost, ABC, ABM.*

1. Introduction

In recent decades, management accounting specialists have reported the following fact: cost control does not ensure sustainable economic success of the enterprise, more precisely, the higher production costs do not generate turnovers proportionate. Thus, the specialists in the domain have removed the operations without any added value, which increases costs, but the value remains the same[1].

The concern of the specialists in the domain was to develop the tools and integrative models that cost and value given together: "The challenge is to optimize the company's offer, adapting costs to the value that its product represent for the customer."[2]

Among the researchers who wrote in the domain, we mention Lorino 1995 with his paper "Conducting value processes" on Lebas and Mévellec 1999 with the paper "Managing simultaneously cost and value" or McNair et al. 2001with their paper "cost management and value creation: the missing link ".

We ask ourselves if we can manage our costs generated by the production activities of the enterprise and the customer value obtained. Modeling realities by management accounting tools is relatively difficult concept of customer value through its imprecise definition.

The scientific community has stated the following: costs are measurable, they are the result of both parties inside and outside the enterprise.

In most enterprises, formal systems are used for calculating costs and recurring products and customer service.

The study of customer value definition will lead us to say that it is not the price paid by the client in some cases.

The complexity of the concept of customer value, given by the cumbersome hierarchy of values, causes a problematic relationship between cost and value.

2. The value for the customer

In the year 1998, Ittner and Larcker spoke about the shareholder value that is different value for stakeholders: employees, customers, suppliers, communities.[3] Researchers in the domain have wondered whether the costs incurred by the customer and the value created by the company for the same customer can be put into a connection. They found that customer value is treated as either production costs or a service that determines the price his. A condition in which the management of the couple cost-value be the practical and conceptual interest is the following: the amount of cost to be decoupled.

An innovative direction is the consideration of the price as one of the attributes of the product could result in value.

The value is a "social construction" because customer value measurement is difficult because customers are numerous and have confused preferences.

About value, Smith spoke in 1776. He released two conceptions of value: use value and exchange value.

Value in use is the "value of property is assessed objectively and be of general (bread offers a number of calories), either subjective and therefore varies from one individual to another. Value in use is relative as necessary, the conversion value is relative to another good. "[4]

Exchange value is "the rate at which a product is marketed in another commodity. It is synonymous with the relative price"[5].

The classical economists stated that "use value is the sum of the costs necessary to produce good". In contrast, neoclassical economists believed that "use

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[1] Lorino 1989 p. 143-144; Baglin 1995, p. 63

[2] Bouquin 2004, p. 139

[3] Bourguignon 2005

[4] Echaudemaison 1989, p. 456

[5] Echaudemaison 1989, p. 456

value corresponds to the utility that a person has in an object"[6].

In the management cost-value for the customer, it is required to see which of the two values we mean: use value or exchange value. The neoclassical economists refer either to the value in use "good or service in question satisfy certain needs of the user"[7] or the exchange value expressed in monetary terms the price.

We wonder if the price of that good or only value indicates an attribute of him. Some researchers believe that customer value is the price it pays to acquire a good or service[8]: as Simon (2000), who wrote in his article on accounting and value that "price - found during a transaction on the market - is the value expression; or conversely, that the value of property is the basis for its price"[9], while Lorino finds that" price may be an indicator stood a sign of value, but not the value"[10] and McNair et al., 2001, said that " the market price is a proxy of the net present value that the customer will get from the product or service purchased."[11] Mévellec showed that " price is, however, crystallization of the value. "[12]

We conclude that the cost approximates the value, and the two concepts are not identical.If the price expresses the value of a product or service, the customer agrees to pay for product attributes.

Bromwich has defined attributes, showing that the attraction of a product to the consumer is due to a set of characteristics. "The products have a set of characteristics that offer customers. These attributes attract customers through various elements of quality, such as operational performance, reliability, warranty conditions, physical aspects as the finishing and service elements such as safety supply or after-sales service. "[13] Mévellec (2005) stated that the value source is in its attributes. He said: "The value is the result of a set of characteristics perceived by the client having a useful dimension."[14]

We must emphasize that, the quotations above, the price is not equal to the market price or the price on which the customer will pay in the end.

Although the management accounting systems easily keep track of prices paid by customers and the turnover generated, it is difficult to anticipate market price and the price on which a customer agrees to pay. We wonder if we can measure customer value as the price that he accepts to pay?

Another basic question is: If the client can be assimilated price to pay, then it is better not to use the term customer value, but limit price or turnover. Can the cost-value management replace the traditional costs - profit management? Can the term value for the customer explain the profit?

3. The price is an essential element of value

Other researchers considered the price a component of the value and the value is a synthesis of the various features of the property.

Aurier et al., in year 2004, had been continuing the previous definitions appeared in marketing literature, stressing that "the overall value of a product is the result of confrontation between benefits and sacrifices associated with consumption"[15]. The overall assessment of the utility of a product is the overall value of a product.

Barwa and Meehan, in year 1999, had been talking about perceived value ratio - price that determined the consumer behavior: " value perception by customer is given by assessing on which the client has for all benefits resulting from a product or a service compared to the total cost represented by its purchase price. "[16]

Lorino notes that "value appears in the relationship between features and price."[17] In 1997, he wrote: "The value is the judgment made by the company (which include market and potential customers), the usefulness of supply of services offered by the company in response to their needs. This decision is reflected in sale prices, quantities sold market share, revenue, image quality, reputation "[18]. His opinion refered to the idea that the customer appreciates the price first and then the value.

Porter, in year 1986, stated that "value is the amount that customers are willing to pay for a product or service offered."[19] He justified that "a higher value is produced by lower prices than competitors for equivalent benefits or providing unique benefits that only serve to compensate for a high price,"[20] showing that the value was a mix between price and customer benefits.

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[6] Simon 2000; Roche 2002
[7] Bourguignon 2005
[8] Mévellec 2000a, p. 33
[9] Simon 2000 p. 1245
[10] Lorino, 1995b, p. 126
[11] McNair et al. 2001 p. 33
[12] Mévellec 2000a, p. 32
[13] Bromwich 1990 p. 30
[14] Mévellec 2000a, p. 57
[15] Aurier et al. 2004, p. 2
[16] Barwise şi Meehan 1999
[17] Lorino 1995b, p. 127
[18] Lorino, 1997, p. 67
[19] Porter 1986 p. 54
[20] Porter 1986 p. 13

Researchers who say that price is one of the explanatory factors of value are almost strategy and marketing. Their approach to the current value has the following characteristics:

Barwa and Meehan, in 1999, had been noting that there was no value other than the value perceived by the customer. Jalla, in 2002, claimed that it is an assessment of mental representations of dependent clients' expectations.

Competitors' tenders define value. We affirm the value of a product or service may diminish without any of its attributes to be changed just because a competitor has changed its offer: "Economic value to the consumer is the relative value of a product offers to consumers in a particular application. This indicates the maximum amount he is willing to pay, assuming he is fully informed of product and tenders competitors. "[21]

4. The value is a "social construction"

All researchers argue that price is an indicator of value or one of its components.

The value is determined by the market and depends on customer preferences. However, it is not found and built by the company. There is a piece of information that should be sought outside the enterprise and can not be calculated internally against costs.

Value is issued market information is not independent of a given enterprise. This unequivocally we can get on the market.

Wishbone and Desrumeaux, in 2001, doubted the existence of a market as such, that had an independent life, independent of the actors that compose it. They considered that the value was a given business required from outside. They also compared the value with a building in which actors: individuals, organizations involved intervene in a manner on the market, fix the market value and try to form the rules of the game, priorities. They stated that "value is a reality constructed by actors and organizations that are on the market."[22]

At Gadrey, in 1988, we find the idea that the value is a notion of interpretation. He said that the production of a service depends on the social environment, the players and their systems of values. "These are the economic reports, social and institutional rules that decide what the outcome is essential service, its primary production."[23]. The value that a customer attributes of a good or service will be linked to its socio-economic environment, to its "value system".

For Lorino, the value is actually an interpretation. He says "products have value if they have the ability to satisfy a need felt by a social group"[24]. We ask ourselves if some products provide more value than others, if they consume more resources than create value is "a matter of law, a matter of interpretation of the complex relative usefulness of different types of features for different social groups."[25]

Bréchet Desrumeaux, in 2001, had been observing, analyzing client concept that this actor is not monolithic and coherent, but multiple and changeable. To define a basket of attributes that the client is sensitive and establish a hierarchy of these attributes is very difficult. They emphasized: "From the demand side, to appreciate what is good for the customer is achieved through a stack of attributes, or a gamble and experimentation. "[26]

For Mévellec, in 2000, "value concept is unclear, both because of fluctuations in customer behavior and because of the difficulty of interpreting signals received from the environment. "[27] For the minimum level, a list of attributes and their relative weight is a complex task, which leads to unstable results.

If customers are many and do not form a homogeneous group, they are traditionally classified into segments and treat customers one by one. List of significant attributes for each of the segments is not the same and the importance of each customer segment attached to different attributes is not the same.

In an interview in the magazine Marketing Magazine in 1997, Dubois reported: "We have shown that evolution was a mass marketing to segment marketing, niche marketing, and individual marketing."[28]

If the scale of analysis refers to a single customer, the list of attributes and user preference scales may not be stable over time.

The situational marketing, customer preferences and behavior of a dependent situation "because he no longer builds the basis of the characteristics of goods or consumers but based on situations that they face."[29]

Dubois spoke about a person changing consumer as "chameleon as is neither green nor red nor yellow, but can be effective, however, today's consumer is neither sensitive nor permanent mark or the price or quality."[30] We conclude that the list of attributes that determine the value is variable as the relative weight

[21] Teller, 1999, p. 235
[22] Wishbone şi Desrumeaux 2001, p. 209
[23] Gadrey 1988, p. 133
[24] Lorino 1995b, p. 125
[25] Lorino 1995b, p. 126
[26] Bréchet şi Desrumeaux 2001, p. 240
[27] Mévellec (2000b, p. 398
[28] Dubois 1997, p. 43
[29] Dubois 1996, p. 13
[30] Dubois 1996, p. 13

of attributes; they depend on the situations in which the customers are.

Organizations have not only customers and customer segments. They have other different customer groups, called quasi-customers. Their lists of attributes are different or have different values. For example, when undertaking Samsung Oţelinex Targoviste provides meals at school canteens municipal. Samsung's first customer is the recipient Oţelinex Targoviste school cafeteria table, then several categories of "quasi -guest" revolve around paying customer: the child, the parents who pay a part of the meal, the staff will dine, teachers who are working with children in the afternoon, school doctors. We wonder how we define the value of a product "table-room"? We have a mix of preferences for different categories of quasi-customers, some quasi customers are privileged over others? Who will define the list of attributes and their relative values?

Often, the term client is hiding behind various actors within the same organization. In the capital goods markets, a provider has several interlocutors: the company will acquire the equipment (which will focus on the cost of the piece goods), the purchasing department of the company will be more sensitive to its purchase price, the operator will use the machine and be more attentive to its functionality. We ask ourselves, who is the client and on which preferences and the company will build a list of attributes to determine the value of its bid.

Many studies of marketing show that the value created as it is perceived by the enterprise is in general different from the value created as it is perceived by the customer[31].

More events will interpolate between the value as it is produced by the enterprise (objective attributes of the product or service) and customer perceived value[32]: appropriate communication service that could increase unnecessarily expectations "super selling" service or past experiences that make the customer to change his expectations, value attributes and perceptions.

Value perception of customer fluctuates depending on the parameters that are not verified or verifiable by the company. Thus, it depends on other clients, influencing customer or degrade the image he had made about a luxury. It may depend on the subcontractors, suppliers less control.

So there is a gap between the value produced by the company and the value perceived by customers[33], the latter being the only way to change the customer's willingness to pay. Analyzing data collection modes and management decisions resulting from these two types of information, we find that are different[34]. Researchers propose models designed to manage customer value and cost without reference to the value created by the company or perceived by the customer, shows the relativity of the concept of value.

The concept of customer value was not dependent on a variety of clients and their situations. We will try to connect this value and the used costs in order to generate value and cost-value couples.

In 2001, McNair et al. showed that the challenge of connecting customer value, price and costs of various methods have been around tools of management accounting (ABC, target cost, ABM, TQM, Strategic Cost Management).These tests proved "incapable of evaluate specific relationships between internal cost structures and externally defined value. "[35] McNair et al. bring a few arguments to support their view. Gervais[36] identified and analyzed four tools for managing torque-cost value: management activities and processes, value analysis, target cost and cost characteristics. We will examine two of these tools, target cost and ABC / ABM to see to what extent they can contribute to explaining the cost-value relationship:

- cost target was chosen because it relates the features, customer value and cost management for future product. Value analysis techniques considered as one of the target service costs.
- ABC / ABM offered a broad vision of the organization, linking various operations and the end user connected costs and the value created for the customer. Gervais said: feature costs is a variant of ABC / ABM.

5. The target cost

De Ronge, in 2000, stated: "future product cost, called target cost is determined a priori and is the result required by the market selling price and profit level imposed by long-term strategy of the company."[37] The resulting target cost is decomposed using either organic method - the product is broken down into parts - or functional method - the product is decomposed into functions, similar to the notion of attributes "[38].

The definition of value for customer reserved for the target cost is explicitly the selling price. This method raises two fundamental issues that were mentioned by Lorino in 1994 and he resumed it in a book published in 2005 in the same terms:

1. "The description of a product as an additive combination of functions is always realistic and possible? A product has no systemic existence

[31] Carmon Ariely 2000
[32] Parasuraman et al. 1985
[33] Parasuraman et al., 1985
[34] Berry şi Parasuraman 1997; Malleret 1999
[35] McNair şi colab. 2001, p. 34
[36] Gervais, M. (2005) *Contrôle de gestion*. Economica, 8e édition, capitolul 11.
[37] De Ronge 2000
[38] Lorino 1994

whereby he would be nothing more than the mere sum of its parts, even if such parts are defined on a functional basis rather only on a technical basis and organic? "[39]

2. "The assumption that the cost structure must be identical to the structure of value is justified?"[40]

Meysonnier, in 2001, echoed these two aspects: "Two elements are essential in addressing the target cost. At first the idea that the overall value of a product for a client attributes can be properly decomposed into independent and cumulative. Then that must or for each component of the new product, the same level of importance in the cost amount that the value of a customer provides, if a component is 15% of customer perceived value, it must weigh 15% of the total cost.[41]

In the first scenario: the attributes are independent variables and they would combine in a manner forming additive value of a product.

Horvath's article, in year 1995, on the first hypothesis proposed an illustration of a target cost applications in French. The chosen example is linked to an alarm clock. A market survey was used to determine what features customers are looking for an alarm clock and what degree of importance (on a scale of 1-9) give them to these functions. These imports were then converted into percentages, but the conversion method is not explicit; the total percentage for all functions is 100, suggesting that the alarm clock customer value is equal to the sum of its functions.

First hypothesis contradicts intuition, by comparison with industrial processes and the development of marketing concepts, especially those applied to services.

1. No one can say that attributes are independent. For example, designing a clock will have value to the customer unless a basic function such as accuracy is accomplished correctly. There would therefore be independent of attributes, there would be no addition to the attribute values.

2. Comparison with concepts from industrial environments can illuminate and reinforce this point: the assembly industry (such as electronics), the reliability of a finished product depends on the reliability of components, but a multiplicative manner. Indeed, if 99 pieces are correct, but a centime is defective, the quality level will not be 99%, but 0% (the phone will not work); in the same way service management is sometimes enough detail defect (eg, a light above the sink in a hotel room can change the perception of quality that the customer will have a satisfactory service. In industry, we distinguish defects criticized by others: they have a decisive impact on the quality of the product made or perceived.

3. Naumann and Jackson, in 1999, made similar distinctions in marketing. For example, hygiene factors (those for which the supplier must meet a minimum quality required, otherwise resulting in dissatisfaction) and satisfaction factors generate positive perceptions. Parasuraman et al., in 1991, showed that most of distinguished clients a level of service "adequate", below which customers had a negative judgment of that service and a level of service "wanted" beyond which customers will be taken a positive decision.

Attributes have different roles: some can be eliminatory (as a note to an examination subject), some may be affected by a negative note, and others have impact on the total amount in all cases.[42] The value of a product can not be calculated as an arithmetic mean using the value attribute.

Lorino stated in 1994 that functional analysis attempted to provide an answer to the above-mentioned problem by distinguishing between "necessary functions" related to technical performance and use of an object and "reusable functions" or prestigious positions related of needs. The management accounting textbooks, Demestère and Touchstone, in 2004, stated that technical solutions, mentioned by Lorino, were not repeated and deepened.

Meyssonier in 2001, showed that the need to preserve "the identity of the whole product, even if it is sometimes at odds with logic decomposition and additivity of the attributes "[43] and Mévellec in 2005, denied that the overall amount would be equal to the sum of attributes: "However, it is difficult to claim that the overall amount is the sum of unit values of these characteristics."[44]

Due to the complexity hierarchy of attributes common analysis can treat dependent variables or preferably nonlinear variables. It can replace additive preferences with multiplicative preferences. Joint analysis can give an attribute value, but a marginal amount and the sum of these values will be the total marginal product.

In conclusion, the joint analysis by decomposing the overall value of a product in "sub-values" on attribute works well on two conditions:

- Firstly, the product can be effectively decomposed in attributes, which are not the cases with products that the client has retained as a "global experience", for example a play (Aurier et al 2004);
- Secondly, the customer is a consumer can collect frequently or ex-ante information to build his judgment. This condition can be difficult to meet, especially for services at which customer forms an opinion after he has experienced.

[39] Lorino 1994, p. 40
[40] Lorino 1994, p. 41
[41] Meysonnier 2001, p. 124
[42] Loosa 1997
[43] Meysonnier 2001, p. 125
[44] Mévellec 2005, p. 57

So one can establish a relationship between an attribute and a value.

In the second hypothesis, the optimal cost management and value can be obtained respecting proportionality between cost and value.

Horvarth, in 1995, wrote in his article on the second hypothesis: "The goal is that each target cost component generates an amount corresponding to the value that the consumer costs confer"[45]. He strengthens the above proposal on page 78, showing that there is a "zone of optimal value" the proportionality between cost and value is well defined.

Meyssonnier in 2001, said: "The application of such a principle can lead to a waste of product level attribute only to meet an adequacy between cost and value when a lower cost as possible."[46] It may be that a function of very high value to occur at a very low cost or indispensable function with a limited amount to cost a lot to produce.

In conclusion, the contribution approach the target cost to management of couple cost-value is:

- In general, it allows to verify the adequacy between the estimated cost of the product and the future market price; it can be seen that the concept of value is the same price;
- In particular, it can help to set objectives for components or characteristics of the product cost. It should be based on two premises to determine these objectives in relation to attributes value. If the second hypothesis is accepted, we must return to traditional methods of target-setting costs which are not related to customer value: comparison with previous products, internal goals.

The second hypothesis explains the development of tools that manage the couple costs-value, showing their great and attractive character, which makes these instruments be current.

6. Conclusions

In this article, we presented the joint management of costs and customer value is described with various difficulties. The definition of customer does not meet a unanimous opinion. Opinions differ when it comes to a synthesis between price and product functionality. Value builds in view of future profits that the client will get the use of a product, the price can be considered as an indicator of value. The appreciation of the benefits that a customer will get a product is not stable and steady because the client can change options and is not a homogeneous reality. The overall value of a product must be decomposed into its attributes or value, not in all cases, the amount of attribute values is equal to the total value of the product. Building a business model which will link costs and the value must consider two issues: a) large enterprises, given the complexity of work processes, we can not always isolate strictly necessary activities to achievement an attribute; b) costs precedes the value in time. Decisions are based on a comparison of the costs and the value of such aggregates that are not achieved at the same time.

Value is a term with positive connotations: any company is carrying values, but rarely has negative values. The value for the client in the company is focused on its customer service. The general interest is to create value for its customers before generating turnovers.

Practitioners in business enterprises do not agree with the concern of researchers for academic rigor in defining customer value or cost method to verify the validity of the assumptions target. Managers seek effective solutions, operational, the aesthetic and the rigor judgment are not essential. Managers take into account the nature of the processes within the enterprise. Management information systems support business decision. Managers will not use the information arising from the management system, they will select from several information of all kinds, will be completed with other information, will update and discuss with their collaborators.

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[45] Horvarth 1995, p. 76-77

[46] Meyssonnier 2001, p. 125

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ECONOMIC NATIONALISM'S VIABILITY UNDER GLOBALIZATION

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Abstract

The path undertaken by the world economy is irreversible - the world economic system is a system based on interdependencies, cooperation and multilateralism but economic openness is not full. Each country, in order to protect their national interest call, in different proportion, depending on the circumstances and of the economic-social and political interests, for different forms of the economic nationalism, forms that have adapted continuously to the demands required for integrating on the foreign markets. The recent global economic crisis intensified the rhetoric and the economic nationalism's practices but it is not about rebirth, but of renewal, of remodeling the nationalist policies, globalization being a premise of the new economic nationalism. The scope of this paper is to emphasize using empirical data the fact that nationalism and globalization, from an economical point of view, are not antagonistic policies, they coexist and influence each other, both generating contradictory effects, in terms of provided opportunities and risks.

Keywords: *globalization, economic nationalism, protectionism, national economy, neo-nationalism.*

1. Introduction

The feeling of economic insecurity instilled by the global economic crisis triggered in 2008 generated strong reactions against free movement of economic goods, labor force, technology and capital. This conjuncture represented the ideal ground for the economic and political nationalism's rise as a leverage to defend the national interest[1].

Moreover, the resurgence of nationalism, according to the experts from the Global Economic Forum in Davos, represents one of the 10 greatest challenges of humankind for 2015.

However, since most states have enrolled on the globalization and capitalism path, this concern seems unfounded from an economical point of view. The politician Clare Short, who stated that: "People have accused me of being in favor of globalization. This is equivalent to accusing me of being in favor of the sun rising in the morning"[2] suggestively highlights the globalization process irreversibility.

Because of this, in many countries, considering the strategic importance of integration on the global market, the economic nationalism was reassessed, remaining thus an important aspect in economic theory and practice. It means that economic nationalism never disappears, but during economic growth, it is dimmed, disguised.

It has been noted that, in time of economic crisis, there is an increase in the nationalist economic policies of the states, as a defensive method against fierce foreign competition. On consequence, national economies, although actors on the global economy's stage, continue to protect their internal markets.. this is because, to cope with the harsh conditions caused by the integration with foreign markets.

Although, protectionism through custom barriers was decreased together with the decrease and even elimination of duties, currently other levers are being used, non-tariff, like encouraging domestic businesses, anti-immigration measures, resources nationalism, invoking some causes such as population health, environmental protection, national culture, etc.. For example, in industry, some economic goods are produced within the national boundaries under the pretext of ensuring national security, avoiding thus the reliance on exports (France protects the agricultural sector, USA protects the defense sector). The argument for protection national industry is invoked also when foreign investments are restricted and the local investors' rights are supported. Nationalists, who value the national values, also support the production of cultural goods.

These practices derived from the belief of decision makers that a focus on domestic markets will lead to a faster and lasting economic recovery. In this case, to support the objectives feasibility, a historical one accompanies the nationalist discourse also. However, a long-term comprehensive approach of the nationalist slogans such as "by ourselves" or "we do not sell our country" is not possible in terms of the interconnection arising from economic globalization in all its aspects - commerce, production, finance and technology. Moreover, reality has shown that during the periods in which the protectionist measures have been reduced, economic growth was recorded.

Consequently, we can say that the two approaches of the international economic relations (unilateralism / nationalism, or multilateralism / globalization) are ubiquitous and indispensable but the intensity and forms under which they manifest differs from country to country, depending on the historical period, the socio-economic and political context.

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[1] Nouriel ROUBINI - Economic insecurity and the rise of nationalism, The Guardian, 2 June 2014)

[2] (http://www.atlantic-community.org/app/webroot/files/articlepdf/Globalisation%20and%20Nationalism.pdf)accessed 12/03/15)

It means that theory and especially practice cannot fit constantly in the proverbial bed of Procrustes, since they are volatile and constantly adaptable.

That is why, in order to be able to evaluate the advantages and risks of the economic nationalism's different approaches, the analysis ought to be comparatively addressed, from a historical perspective.

2. Brief review on the conceptual approaches regarding the economic nationalism

Nationalism, secular ideology, relies on creating a common identity, satisfying the humankind need of belonging, from a psychological, organizational, economic standpoint[3].

We speak of nationalism, considering as reference point the forming of the national sovereign state. States' sovereignty recognition and enactment was made by the Treaty of Westphalia in 1684, along with tree other fundamental principles: equality between nation states, respecting the treaties and prohibition of interference in other countries' internal affairs.

From this perspective, the economic nationalism is based on "the economic and political independence policy, the reason for defending national sovereignty, progress and prosperity of its own nation and state"[4].

Regardless of the period to which we refer, the economic nationalism refers to a set national policies, that regulate a country's economic relations with "the rest of the world", in order to protect their domestic economy.

The use of the "economic nationalism" concept is relatively recent although in practice the phenomenon is quite old (sec. XV). According to Polish economist Michael A. Heilperin's studies, the concept itself was first used "„in the title of a book by Leo Pasvolsky, published by the Brookings Institution in Washington in 1928: Economic Nationalism of the Danubian States".[5]

However, the historical roots start from the mercantilist economic doctrine embraced in Europe, in sec. XV - XVIII, whose representatives (Frederick List, Alexander Hamilton, Thomas Mun, William Petty, etc.) argued that a nation is stronger if the value of exports is greater than the value of imports. The mercantilists were followers of statism, of state interventionism with the purpose of defending the national interests.

Subsequently, at the beginning of the XIX century, the concept of protectionism was introduced, so that in the XX th century to implement the term-economic nationalism. Currently, protectionism is considered the economic nationalism traditional form of manifestation.

Throughout 19th to 21st century the nationalist economic policies approach has changed, constantly adapting to the historical periods specifics. Thus, the manifestation forms were differentiated by country, under the influence of historical and cultural particularities.

For example, the Western capitalist countries have used the nationalist politics as a shield in the way of the global spread of nationalism - socialism started in the 30s in Germany, in the context of the Great Depression of 1929 - 1930[6].

It is an exclusionist nationalism, that focuses on nation n not on the individual, on homogeneity, social and economic standardization, imposing limits on terms of ethnicity, language, culture.

The followers of this trend considered that state intervention for defending the branches considered of importance, the national interests, in general represented the only ingredient capable of ensuring the national economies' efficiency and effectiveness, and the international capital was seen as the main factor that triggered the Great Depression. Therefore, the need for a new marketplace, labour force international division and the increase in the international commerce were incompatible with the classical nationalism. This is graphically highlighted in an article published in the journal of Foreign Affairs on April 1934, where Leon Trotsky (writer, Marxist theorist) stated that: " Only twenty years ago all the school books taught that the mightiest factor in producing wealth and culture is the world-wide division of labor, lodged in the natural and historic conditions of the development of mankind. Now it turns out that world exchange is the source of all misfortunes and all dangers. Homeward ho! Back to the national hearth!.... The legend of the bed of Procrustes is being reproduced on a grand scale. Instead of clearing away a suitably large arena for the operations of modern technology, the rulers chop and slice the living organism of economy to pieces."[7]

After the Second World War, the nationalism of the `30s was to blame, and thus considered the source of many conflicts.

Consequently, as the global economic flows intensified, the national policies evolved, the classical nationalism being replaced with liberal nationalist

[3] Anwar Anaid - Globalist Nationalism: A Theoretical Approach To The Nature Of Nationalism In The Modern Global Political Economy, European Scientific Journal, vol.10, No.16, June 2014, pg. 129

[4] Ion MITRAN - Politology, The Romania de Maine Foundation Publishing House, Bucharest, 2000, pg. 121, from https://anasimion. wordpress.com/2011/03/20/natiune-si-nationalism-in-era-globalizarii-ii/, accessed 10/03/15

[5] Michael A. HEILPERIN - Studies In Economic Nationalism, Publications De L'institut Universitaire De Hautes Etudes Internationales - N° 36, Genève, 1960, pg 16

[6] Anwar Anaid - Globalist Nationalism: A Theoretical Approach To The Nature Of Nationalism In The Modern Global Political Economy, European Scientific Journal, vol.10, No.16, June 2014, pg. 133

[7] http://www.foreignaffairs.com/articles/69426/leon-trotsky/nationalism-and-economic-life, accessed 12.03. 2015

strategies, that focused on opening outwards from a political and economical point of view, based on territorial aspects, on the membership in a particular geographic area and not on social and political homogeneity and thus considered a globalist nationalism (neo-nationalism). Nationalist - globalists accept ethno cultural diversity created by globalization, being emotionally attached to a geographical space but open in relation to "rest of the world". The global economic agents maximize their results through marketing the differences, peculiarities and traditions[8].

Moreover, at the European Union level, the introduction of the euro, the existence of the European Parliament and of other integrative practices of the Eurozone, suggests the idea of a regional nationalism, the nationalism sentiment being transferred at a supranational level.

3. Succinct description of the manifestation empirical forms of the global economic nationalism

After 2008, the start year of the global economic crisis, the cross-border capital flows have slowed their growth rate to 1.9% annually, compared to the annual average of 7.9% during 1990-2007[9], which generated numerous debates, controversies on the appropriateness of nationalist strategies in the globalization context. This is because there is an intensification and diversification of the nationalists practices, in particular by increasing protectionist measures. The experts even fear a return to the nationalist methods of the '30s and a reduction of globalization. Yet, the high degree of national economies interconnect does not allow this. Of course, we are speaking about a "tamed" form of the economic nationalism, a globalist economic nationalism, adapted to the conditions imposed by the markets and by international institutions.

If during the interwar period, until the mid-70s, customs duties were extensively used as barriers to foreign competition[10], currently countries use much less this instrument.

Furthermore, the ascension of foreign trade and the involvement of supranational governmental organizations ((World Trade Organization, European Union, United Nations) led to a gradual reduction of customs duties and even to their elimination in some cases. Although tariff liberalization was more pronounced before the crisis (between 2002 and 2007 was noted a reduction in the custom duties average, by about 5%) it continued in the post-crisis period, but at a slower pace. Thus, according to data released by United Nations Conference on Trade and Development (UNCTAD) in 2012, the average level of the custom duties on a global scale was of 2% (les than 1% in developed countries and between 4% and 10% in emerging countries).

In contrast, non-tariff barriers have increased substantially. Thus, the modern economic nationalism appeals to new leverages, diversified so to sustain the national economy before foreign competition[11]:

- increases in trade restrictions under the pretext of environmental standards, national security, protecting national industries, particularly of branches regarded as strategic (quotas, administrative authorizations, health or technical guidelines or ordered marketing arrangements)
- policies of favoring domestic firms;

A relevant example in this sense is represented by France, where, in order to protect domestic industry from foreign investors, in 2005 by a decree signed by the Minister of Economy, have been established 11 sectors regarded as strategic and in which the sale, merger or transfer operations ought to be made only with the state. In 2014, in the context of a possible takeover of the French company Alston by the American company General Electric, the government created the necessary framework for safeguarding the national interest adding other five strategic areas: energy, transport networks, water supply, communications and public health protection.

- resource nationalism;
- the nationalism in consumption - for example, in Romania, the employees of French companies receive cars produced in Hexagon, BRD longer grants reimbursement for the purchase of cars Dacia, Renault, Nissan;
- campaigns "buy local products";
- Subsidy;
- preferential financing
- favoring national suppliers in procurement;
- Influencing the exchange rate through this intervention of the central banks, such as currency devaluation to boost exports, external debt reduction, discouraging the repatriation of foreign investors' profits;

In these circumstances, according to the report „Indirect Tax in 2013: With change comes complexity" drawn up by Ernst & Young, one of the largest financial advisory and audit companies in the world the WTO reported annually the implementation of new measures that restrict trade - for example, between October 2011 and May 2012 there were implemented no more than 182 measures.

Therefore, the US, France, Germany, countries known for their nationalist policies, currently maintain their trajectory. Great Britain after 1800 opened its

[8] Anwar Anaid - Globalist Nationalism: A Theoretical Approach To The Nature Of Nationalism In The Modern Global Political Economy, European Scientific Journal, vol.10, No.16, June 2014, pg. 141-142)

[9] http://www.economonitor.com/blog/2013/09/the-new-economic-nationalism-part-1-a-juche-world/, accessed 02/03/15)

[10] In 1930, through the law of Smoot - Hawley, the US imposed a custom tariff of 40% for all products, Great Britain gave up the tradition of free trade in 1921, establishing in 1931 and 1932 tax fees on three quarters of the products, etc

[11] http://www.economonitor.com/blog/2013/09/the-new-economic-nationalism-part-1-a-juche-world/, accessed 02/03/15)

borders to free trade, but now falls into the European nationalist trend. China and Japan have also adopted nationalist strategies. In these circumstances, the emerging countries and those dependent on the global economy must adapt because the shift towards domestic markets pose a challenge to countries with low economic resources or depend on export.

For example, Germany, the fourth largest economy in the world, is also extremely vulnerable, economy's welfare depending on exports, meaning, the willingness and ability of importers to buy their products.

Given that exports (half remaining in the EU) contribute with more than 50% to the country's GDP, the country's production capacity substantially exceeds the consumption capacity, even if they would have boosted domestic consumption. Germany depends therefore on these exports in order to maintain its economic growth, low unemployment level and social stability.

Economic nationalism represents a challenge for the emerging countries whose economic growth depends on foreign investments and international trade. Such is the case of Romania whose exports are mainly oriented towards the EU states and the products are with a lower degree of added value. Furthermore, 80% of present goods on store shelves are imported.

China has seen a remarkable growth in the recent years but, although it has enjoyed the benefits of an open economy, in order sustain growth they promoted a nationalist policy, imposing strict conditions for foreign investors, planning thus financing through a 5-year project, etc.

In short, all these practical situations lead to the conclusion that, given the high degree of interdependence in the global economy, the position action of the national states on the international stage is strongly influenced by the economic conjuncture and the socio-political interests on this stage, but also by their degree of development and the dependency to external markets.

Analyzing the economic nationalism phenomena both in terms of theory and especially of reality, I consider to be fully justified its comparison to a game of balls. Where the balls, being of different size, power and beauty collide with each other in order to determine the winner[12].

4. Conclusions

The global financial crisis generated a reorientation towards the nationalist policies and reduction of employment in the global economy, the advantages of economic and monetary integration fading in this context. The evolution of empirical data supports the idea that globalization and nationalism from an economical point of view are not antagonist polices, they coexist, influence each other, generating tensions and conflicts. Nevertheless, since the globalization process is dominant in terms of economic nationalism, according to J.M.Keynes, it requires a "rational and quantitative interventionist policy". Economic agents' pragmatism who aim to maximize their results put a mark on the economic system functioning, at all its levels. Therefore, although economies openness is not full, each maintaining certain barriers, the path undertaken by the global economy is irreversible- the global economic system is one based on cooperation and multilateralism.

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THE IMPACT OF COMPENSATION PAYMENTS ON EMPLOYMENT, IN REGIONAL STRUCTURES

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Abstract

Compensation payments are considered active labour market policies designed to increase efficiency, to mitigate unemployment and to sustaining employment. We tested this hypothesis for the period 1993-2013, in territorial structures (42 counties) through a dynamic panel model (confirmed by Granger causality tests – Toda-Yamamoto version), and by means of error correction model. We found that the dynamics of regional employment are positively related to expenditure incurred for active policies and there are negatively correlated with the ratio between the unemployment average indemnity (and support allowance) and the average net nominal monthly salary earnings. But, the connexion between employment and compensation payments converges extremely slowly for a long-term stable relationship.

Keywords: *employment, compensation payment, dynamic panel models, causality tests, error correction model.*

1. Introduction

This paper offers a presentation of econometric models for analysing the impact of economic policy measures on the dynamics of employment, on territorial structures (NUTS-3) level.

In details, we analyse the impact of expenditure incurred for active policies to stimulate the increase of employment on the dynamics of employment, during 1993 – 2013.

As a methodology, we used a dynamic panel data model and an error correction model (ECM) – built in the general frame of vector autoregressive (VAR) analysis.

2. The data

We used the data from national statistics, like:

- for the data concerning *expenditures for unemployed social protection* the source is National Institute of Statistics, TEMPO Online, table SOM102A - Annual expenditures to unemployed social protection by expenditure categories, macroregions, development regions and counties (thousand RON);
- for *unemployment* the source is National Institute of Statistics, TEMPO Online, table SOM101A – Registrated unemployed by categories of unemployed, gender, macroregions, development regions and counties, at the end of the month (number of persons);
- for *civil economically active population* the source is National Institute for Statistics, TEMPO Online, table FOM103A – Civil economically active population by activity of national economy at level of CANE Rev.1 section, gender, macro regions, development regions and counties: 1992-2008 and FOM103D – Civil economically active population by activity of national economy at level of CANE Rev.2 section, gender, macro regions, development regions and counties: 2008-2013, thousand persons;
- for *the average net nominal monthly salary earnings* – National Institute for Statistics, TEMPO Online, table FOM106A – Average net nominal monthly salary earnings by economic activities at level of CANE Rev.1 section, categories of employees, macro regions, development regions and counties, 1990-2008) and FOM106E – Average net nominal monthly salary earnings by economic activities at level of CANE Rev.2 section, sex, macro regions, development regions and counties: 2008-2013, RON;
- for *gross domestic product*, by macro-regions, development regions and counties – National Institute for Statistics, TEMPO Online, table CON103C – GDP by macro regions, development regions and countries, calculated according CANE Rev.1, for 1995 - 2008) and CON103I – GDP by macro regions, development regions and countries (ESA 2010), calculated according CANE Rev.2, for 2000-2012, millions of RON.

We are evaluated the econometric characteristic of these time series. To be exact, we tested for stationarity (Im, Pesaran and Shin unit root test for panel date series). The results are presented in the following table:

Im, Pesaran and Shin Unit Root Test
Null Hypothesis: Unit root
Probability of null hypothesis

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	ocup	d(ocup)	cha /gdp	cms /csn	gdp, %
BH	0.000	0.010	0.242	0.098	0.018
BN	0.229	0.001	0.081	0.136	0.035
CJ	0.627	0.006	0.147	0.012	0.002
MM	0.986	0.000	0.000	0.690	0.007
SM	0.329	0.008	0.112	0.015	0.094
SJ	0.325	0.000	0.341	0.134	0.005
AB	0.278	0.011	0.366	0.603	0.026
BV	0.421	0.015	0.226	0.911	0.002
CV	0.016	0.000	0.003	0.025	0.004
HR	0.897	0.009	0.025	0.008	0.009
MS	0.256	0.000	0.786	0.030	0.007
SB	0.756	0.002	0.020	0.034	0.033
BC	0.510	0.008	0.022	0.003	0.009
BT	0.546	0.022	0.056	0.147	0.016
IS	0.337	0.001	0.000	0.014	0.070
NT	0.124	0.006	0.008	0.010	0.109
SV	0.238	0.000	0.005	0.139	0.005
VS	0.439	0.000	0.017	0.016	0.014
BR	0.402	0.000	0.017	0.059	0.012
BZ	0.410	0.000	0.000	0.025	0.020
CT	0.505	0.015	0.097	0.038	0.000
GL	0.733	0.005	0.551	0.074	0.011
TL	0.164	0.002	0.371	0.054	0.039
VR	0.509	0.001	0.186	0.100	0.048
AG	0.733	0.002	0.197	0.205	0.026
CL	0.689	0.001	0.000	0.272	0.035
DB	0.025	0.001	0.009	0.008	0.019
GR	0.543	0.015	0.000	0.039	0.038
IL	0.940	0.008	0.095	0.136	0.071
PH	0.542	0.355	0.002	0.753	0.189
TR	0.865	0.007	0.243	0.020	0.019
IF	0.464	0.191	0.000	0.006	0.433
B	0.315	0.008	0.034	0.083	0.118
DJ	0.371	0.002	0.234	0.215	0.006
GJ	0.187	0.011	0.024	0.051	0.002
MH	0.156	0.000	0.121	0.359	0.007
OT	0.519	0.001	0.002	0.098	0.016
VL	0.369	0.000	0.010	0.001	0.003
AR	0.394	0.002	0.022	0.061	0.001
CS	0.039	0.000	0.002	0.477	0.001
HD	0.367	0.083	0.008	0.098	0.018
TM	0.519	0.013	0.004	0.022	0.002

The above results are generated by the software EViews-8.

Legend:

OCUP = employment (thousand persons);

GDP = gross domestic product (millions of RON);

CHS = unemployment indemnity (and support allowance, until 2006), thousand RON;

CHA = CPSS – CHS, expenditure for active labour market policies to stimulate the increase of employment (thousand RON), where:

CPSS = expenditures for unemployed social protection (thousand RON);
CSN = average net nominal monthly salary earnings (RON);
CMS = CHS/SOM, i.e., average unemployment indemnity (and support allowance), thousand RON/person, where:
SOM = unemployment (number of persons).
The above table shows the following characteristics of series:

Series	Nature of series:
OCUP	I(1)
$\frac{CHA}{GDP}$	I(0)
$\frac{CHS/SOM}{CSN/1000}$	I(0)
@pc(GDP)	I(0)

So, the series concerning civil employment is integrated of first order, denoted I(1), and the other are stationary, symbolized I(0).

3. Causality relationship between employment and active labour market policies

We analyze the causality relationship between dynamics of employment (OCUP) and expenditure incurred for active policies to stimulate the increase of employment (CHA), as share to gross domestic product (GDP), namely, $\frac{CHA}{GDP}$. The Granger Causality Test is applied on a model with two control variables: the first control variable is the ratio between the unemployment average indemnity (and support allowance – until 2006), CHS/SOM, toward average net nominal monthly salary earnings, CSN, namely, $\frac{CHS/SOM}{CSN/1000}$, and the second control variable is the percentage change in GDP, namely, @PC(GDP). The results are presented in the following table:

VAR Granger Causality/Block Exogeneity Wald Tests
Sample: 1993 2015
Included observations: 630
Dependent variable: d(OCUP)

Excluded	Chi-sq	df	Prob.
$\frac{CHA}{GDP}$	26.78092	2	0.0000
$\frac{CHS/SOM}{CSN/1000}$	7.404576	2	0.0247
@PC(GDP)	9.317361	2	0.0095
All	50.82695	6	0.0000

The above results are generated by the software EViews-8.

If we reject the hypothesis that expenditure for active labour market policies to stimulate the increase of employment (CHA), as share to GDP, $\frac{CHA}{GDP}$, does not Granger Cause the dynamics of employment, then the error is insignificant (less than 0.01%). Therefore, we reject the hypothesis of non-causality (as defined by Granger). Further, we reject both the hypothesis that the ratio between the unemployment average indemnity (and support allowance), CHS/SOM, toward average net nominal monthly salary earnings, CSN, namely $\frac{CHS/SOM}{CSN/1000}$, does not Granger Cause the dynamics of employment and the same relationship between the GDP growth and the dynamics of employment.

It is interesting that the relationships between dynamics of employment and the evolution of expenditure for active labour market policies to stimulate the increase of employment are not reciprocal interactions. In the next table, we can observe that if we reject the hypothesis that dynamics of employment does not Granger Cause the expenditure for active policies to stimulate the increase of employment (CHA), as share to GDP, $\frac{CHA}{GDP}$, then the error is about 78.6% (see table below), much higher than standard significance level (5%).

Also, the available data do not signal the existence of a causality relationship between expenditure for active policies to stimulate the increase of employment, as share to GDP, $\frac{CHA}{GDP}$, and the ratio between the unemployment average indemnity (and support allowance), toward average net nominal monthly salary earnings, $\frac{CHS/SOM}{CSN/1000}$. If we reject the hypothesis of non-causality between these two variables, then the error is larger than 30% (see table below).

Dependent variable: $\frac{CHA}{GDP}$

Excluded	Chi-sq	df	Prob.
d(OCUP)	0.4809	2	0.7863
$\frac{CHS/SOM}{CSN/1000}$	2.3779	2	0.3045
@PC(GDP)	169.16	2	0.0000
All	236.69	6	0.0000

The above results are generated by the software EViews-8.

Like in employment case, we do not reject the hypothesis that GDP dynamics is Granger cause on expenditure for active labour market policies to stimulate the increase of employment.

4. Vector Error Correction Model

Granger causality test assesses only the possibility of a link between two variables, without estimating direction and intensity of such a link. We evaluate further the possibility that between the dynamics of employment and expenditure for active policies to stimulate the increase of employment to be a long-term stable connection. Econometric test whether these series are cointegrated.

4.1. Tests for cointegration

Because the series are relatively short (1993 – 2013), for increased confidence, we use two panel cointegration tests: *Kao (Engel-Granger based) Residual Cointegration Test* and *Fisher (combined Johansen) Panel Cointegration Test*. The EViews-8 results are presented below.

Kao Residual Cointegration Test

Series: d(OCUP), $\frac{CHA}{GDP}$, $\frac{CHS/SOM}{CSN/1000}$, @PC(GDP)

Sample: 1993 2015

Included observations: 966

Null Hypothesis: No cointegration

Trend assumption: No deterministic trend

User-specified lag length: 1

Newey-West automatic bandwidth selection and Bartlett kernel

ADF	t-Statistic	Prob.
	-3.491228	0.0002
Residual variance	301.6127	
HAC variance	106.2654	

Augmented Dickey-Fuller Test Equation

Dependent Variable: D(RESID)

Method: Least Squares

Sample (adjusted): 1998 2012

Included observations: 630 after adjustments

Variable	Coef	Std. Error	t-St.	Prob
RES_{-1}	-0.85	0.0511	-16.7	0.00
$D(RESD_{-1})$	-0.24	0.0336	-7.1	0.00
R-sq.	0.60	MDV		-0.36
Adj.R-sq.	0.60	S.D. DV		17.51
SER	11.1	AIC		7.648
SSR	76819	SIC		7.662
LLh	-2407	HQC		7.654
DW stat	2.09			

According to *Kao (Engel-Granger based) Residual Cointegration Test, rejecting the Null Hypothesis* (no cointegration) involves an error of 0.02%, below the standard 5%. Accordingly, we reject the null hypothesis: we do not have econometric arguments to accept the hypothesis that the series are not cointegrated.

We present also the EViews-8 results for *Fisher (combined Johansen) Panel Cointegration Test* with no deterministic trend in the data, and no intercept or trend in the cointegrating equation:

Johansen Fisher Panel Cointegration Test

Series: d(OCUP), $\frac{CHA}{GDP}$, $\frac{CHS/SOM}{CSN/1000}$, @PC(GDP)

Sample: 1993 2015

Included observations: 966

Trend assumption: No deterministic trend

Lags interval (in first differences): 1 1

Unrestricted Cointegration Rank Test (Trace and Maximum Eigenvalue)

Fisher Stat				
Hypothesized No. of CE(s)	trace test	Prob.	max-eigen test	Prob.
None	1051.	0.00	762.4	0.00
At most 1	505.3	0.00	354.2	0.00
At most 2	256.8	0.00	202.6	0.00
At most 3	173.4	0.00	173.4	0.00

Probabilities are computed using asymptotic Chi-square distribution.

Individual cross section results

	Trace	Prob.	Max-Eign	Prob.
Hypothesis of no cointegration				
AB	56.406	0.000	26.970	0.020
AG	56.362	0.000	26.480	0.024
AR	80.931	0.000	38.168	0.000
B	62.208	0.000	32.898	0.003
BC	67.159	0.000	27.398	0.017
BH	90.797	0.000	38.968	0.000
BN	65.794	0.000	39.492	0.000
BR	99.082	0.000	77.596	0.000
BT	88.096	0.000	46.099	0.000

	Trace	Prob.	Max-Eign	Prob.
Hypothesis of no cointegration				
BV	63.898	0.000	36.014	0.000
BZ	73.876	0.000	31.224	0.004
CJ	91.145	0.000	51.769	0.000
CL	46.149	0.011	23.361	0.063
CS	125.100	0.000	86.681	0.000
CT	87.419	0.000	53.907	0.000
CV	94.344	0.000	49.253	0.000
DB	72.216	0.000	28.207	0.013
DJ	44.806	0.015	27.711	0.015
GJ	141.306	0.000	78.256	0.000
GL	54.067	0.001	24.893	0.039
GR	56.031	0.000	42.379	0.000
HD	96.898	0.000	64.974	0.000
HR	62.641	0.000	44.608	0.000
IF	33.911	0.185	15.493	0.465
IL	67.488	0.000	46.910	0.000
IS	62.347	0.000	33.836	0.001
MH	64.081	0.000	34.971	0.001
MM	91.822	0.000	56.949	0.000
MS	77.680	0.000	45.551	0.000
NT	77.154	0.000	42.409	0.000
OT	74.638	0.000	41.880	0.000
PH	74.782	0.000	34.150	0.001
SB	80.580	0.000	31.844	0.003
SJ	84.773	0.000	34.074	0.001
SM	48.808	0.005	26.109	0.026
SV	77.227	0.000	59.356	0.000
TL	87.922	0.000	48.547	0.000
TM	93.412	0.000	54.362	0.000
TR	54.431	0.001	33.903	0.001
VL	63.688	0.000	33.354	0.002
VR	71.855	0.000	36.420	0.000
VS	83.113	0.000	51.666	0.000

MacKinnon-Haug-Michelis (1999) p-values

In above table, in the first column, there are the 42 Romanian counties. In order to reduce the publishing space, we have not presented the final three tables of Johansen test (hypothesis of at most 1, 2 and 3 cointegration relationship).

The *Fisher (combined Johansen) Panel Cointegration Test* reject the null hypothesis: no cointegration relationship between the variables, both in panel (as common relationship – first above table of test) and in individual cross section (all the 42 counties – the second above table).

4.2. The model

Given the results of cointegration tests, we build a Vector Error Correction (VEC) model.

$$d^2(OCUP_{it}) = \beta[d(OCUP_{i,t-1}) + a_1 d\left(\frac{CHA_{t-1}}{GDP_{t-1}}\right) + a_2 \frac{CHS_{t-1}/SOM_{t-1}}{CSN_{t-1}/1000} + a_3 @PC(GDP_{t-1})] +$$

$$+ b_1 d^2(OCUP_{i,t-1}) + b_2 d^2(OCUP_{i,t-2}) + b_3 d\left(\frac{CHA_{i,t-1}}{GDP_{i,t-1}}\right) + b_4 d\left(\frac{CHA_{i,t-2}}{GDP_{i,t-2}}\right) +$$

$$+ b_5 d\left(\frac{CHS_{i,t-1}/SOM_{i,t-1}}{CSN_{i,t-1}/1000}\right) + b_6 d\left(\frac{CHS_{i,t-2}/SOM_{i,t-2}}{CSN_{i,t-2}/1000}\right) + b_7 d[@PC(GDP_{i,t-1})] +$$

$$+ b_8 d[@PC(GDP_{i,t-2})] + e_{it}.$$

where

$d^2(X) = (1 - L)^2 X_t$, and L is lag operator: $L(X_t) = X_t - X_{t-1}$;

$@PC(X_t) = [(X_t - X_{t-1})/X_t]\cdot 100$, one-period percentage change (%);

$OCUP_{it}$ = employment, in county *i*, year *t*, thousand persons;

SOM_{it} = unemployment, in county *i*, year *t*, persons;

GDP_{it} = gross domestic product, in county *i*, year *t*, millions RON;

CHS_{it} = unemployment indemnity (and Support allowance, until 2006), in county *i*, year *t*, thousand RON;

CHA_{it} = expenditure for active policies to stimulate the increase of employment in county *i*, year *t*, thousand RON;

CSN_{it} = average net nominal monthly salary earnings, in county *i*, year *t*, RON

If $\beta < 0$ is econometrically significant, then the model evolves towards a long-term equilibrium relationship:

$$d(OCUP_{i,t-1}) + a_1 d\left(\frac{CHA_{t-1}}{GDP_{t-1}}\right) + a_2 \frac{CHS_{t-1}/SOM_{t-1}}{CSN_{t-1}/1000} + a_3 @PC(GDP_{t-1}) = 0$$

In other words, the long-term equilibrium relationship is:

$$d(OCUP_{i,t-1}) = -a_1 d\left(\frac{CHA_{t-1}}{GDP_{t-1}}\right) - a_2 \frac{CHS_{t-1}/SOM_{t-1}}{CSN_{t-1}/1000} - a_3 @PC(GDP_{t-1})$$

For the above model, we selected VAR process with lag = 2 by using VAR Lag Order Selection

Criteria from EViews-8, with lag – max = 15, as follow:

Lag	LR	AIC	SC	HQ
1	NA	12.82	13.28	13.00
2	102*	11.85	12.8*	12.2*
3	23.47	11.91	13.30	12.47
4	11.24	12.12	13.98	12.87
5	15.22	12.27	14.58	13.20
6	25.14	12.23	15.01	13.35
7	25.23	12.16	15.40	13.46
8	13.53	12.28	15.98	13.77
9	18.64	12.27	16.44	13.95
10	25.12	12.08	16.71	13.94
11	9.92	12.22	17.31	14.26
12	19.77	12.05	17.60	14.28
13	24.12	11.67	17.69	14.09
14	15.31	11.51	17.99	14.11
15	13.63	11.3*	18.27	14.11

* indicates lag order selected by the criterion

LR: sequential modified LR test statistic (each test at 5% level)

AIC: Akaike information criterion

SC: Schwarz information criterion

HQ: Hannan-Quinn information criterion

In above table, excepting AIC (inconclusive, lag = 15 is not acceptable), all other criterions indicate the lag = 2.

5. Results and conclusions

The EViews-8 results of the model are as follows:

Vector Error Correction Estimates

Sample (adjusted): 1999 2012

Included observations: 588 after adjustments

Standard errors in ( ) & t-statistics in [ ]

Cointegrating Eq:	CointEq1
$d(OCUP_{t-1})$	1.000000
$\frac{CHA_{t-1}}{PIB_{t-1}}$	-5402.507
	(418.872)
	[-12.8977]
$\frac{CHS_{t-1}/SOM_{t-1}}{CSN_{t-1}/1000}$	5086.404
	(929.370)
	[5.47296]
$@PC(GDP_{t-1})$	-639.8350
	(79.3631)
	[-8.06212]
Error Correction:	d(OCUP, 2)
CointEq1	-8.77E-05
	(1.7E-05)
	[-5.28629]
$d(OCUP_{t-1}, 2)$	-0.811589
	(0.03887)
	[-20.8806]
$d(OCUP_{t-2}, 2)$	-0.242868
	(0.03767)
	[-6.44668]
$d\left(\frac{CHA_{t-1}}{GDP_{t-1}}\right)$	-0.422639
	(0.16466)
	[-2.56677]
$d\left(\frac{CHA_{t-2}}{GDP_{t-2}}\right)$	-0.066607
	(0.12012)
	[-0.55451]
$d\left(\frac{CHS_{t-1}/SOM_{t-1}}{CSN_{t-1}/1000}\right)$	-0.633559
	(0.79649)
	[-0.79544]
$d\left(\frac{CHS_{t-2}/SOM_{t-2}}{CSN_{t-2}/1000}\right)$	1.409310
	(0.78894)
	[1.78634]
$d(@PC(GDP_{t-1}))$	0.163798
	(0.03099)
	[5.28494]
$d(@PC(GDP_{t-2}))$	0.114653
	(0.02377)
	[4.82356]
R-squared	0.513782
Adj. R-squared	0.507064
Sum sq. resids	90555.31
S.E. equation	12.50598
F-statistic	76.47807
Log likelihood	-2315.211
Akaike AIC	7.905478
Schwarz SC	7.972469
Mean dependent	0.596088
S.D. dependent	17.81240

Determ.res.cov. (dof adj.)	34388
Determinant resid.cov.	32330
Log likelihood	-6390.2
AIC	21.871
Schwarz criterion	22.169

In order to reduce the publishing space, we have not presented the cointegrating equations for the other variables: $\frac{CHA}{PIB}$, $\frac{CHS/SOM}{CSN/1000}$ and $@PC(GDP_{t-1})$.

In the model, $\beta = -8.77E\text{-}05 < 0$, is negative and significantly different from zero (t-stat = -5.28629). This means there is a long-term relationship between dynamics of employment and the exogenous variables from model:

$$d(OCUP_{i,t-1}) = 5402.507\, d\left(\frac{CHA_{t-1}}{GDP_{t-1}}\right) -$$

$$- 5086.404 \frac{CHS_{t-1}/SOM_{t-1}}{CSN_{t-1}/1000} +$$

$$+ 639.835 \ @PC(GDP_{t-1})$$

and all variables are significantly different from zero. But, the connexion between employment and compensation payments converges extremely slowly for this long-term stable relationship.

In other words, the raise of the expenditure for active policies to stimulate the increase of employment (CHA) was associated, in the period under review, with a positive trend in employment as long-term trend. Also as a long-term trend, increase in payments for unemployment indemnity and support allowance, in relation to average net nominal monthly salary earnings had a negative effect on employment growth, probably by stimulating a behavior of discouraging job search. Obviously, as was anticipated, the link between gross domestic product growth, @PC(GDP) and the dynamics of employment, d(OCUP) is positive on long term and significantly not null.

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NEW CHALLENGES FOR TRADE PROMOTION ACTIVITY IN ACTUAL GLOBAL WORLD ECONOMIC FRAMEWORK

Octavian-Liviu OLARU[*]

Abstract

Export promotion strategy has to play play an important part in the development strategies of countries, especially of developing countries that seek to make exports an engine for economic growth. General category of Trade support institutions (TSI) exist in every country to help businesses developement, promote and sell their goods and services abroad.

Within TSI, we can consider that a TPO traditionally has a the leading role in "promoting" international trade, focusing on the most important activities in the field, in cooperation with the other component institutions of a national TSI. There may be more than one TPO per country, they are not homogeneous and can take many forms.

There has not been a revolution in trade promotion activity over the the past 20 years, but there has certainly been an evolution in the context of new prerequisits of the global world economic framework).

Keywords: *foreign trade promotion, services, TPO, efficency, export.*

1. Introduction

Export promotion schemes can play an important part in the development strategies of countries, especially of developing countries that seek to make exports an engine for economic growth. Membership in the World Trade Organization (WTO) is a critical tool for participation in the multilateral trading system. It requires opening domestic markets to international trade – where exceptions and flexibilities have not been not negotiated – but also provides huge market opportunities for domestic producers.

To design successful export development strategies, it is fundamental that governments and private exporters have a clear understanding of the applicable WTO rules and their implications for their specific individual characteristics.

The rules are complex. This book highlights the relevant rules contained in the WTO Agreement on Subsidies and Countervailing Measures (ASCM), covering manufactured goods, and the WTO Agreement on Agriculture (AoA).

In recent decades, global integration – together with openness to trade – has been a catalyst for strong economic growth for many countries, generating employment and reducing poverty.

Countries that have reaped the most benefi ts from international trade have focused on national trade policies and regulatory reforms that created a business-friendly environment so that fi rms could achieve export success. However, because trade policy is a complicated process that demands balancing competing and disparate interests, the process of reform is challenging for both the public and private sectors. Meeting these challenges calls for action on two fronts.

First, governments must take a holistic view of the policies, laws and regulations needed. They must be implemented in the right sequence to create a mutually reinforcing framework that fosters competitiveness and a business-friendly environment. Policies, laws and regulations should work together in synergy to achieve 'export impact for good'. Ministries, departments and government agencies must work in tandem to ensure policy coherence.

Second, for the reform process to strike the right balance among various interests, governments must secure the buy-in of all stakeholders, especially from the private sector.

2. Actual global economic trends

After growing by an estimated 2.6 percent in 2014, the global economy is projected to expand by 3 percent this year, 3.3 percent in 2016 and 3.2 percent in 2017, predict the World Bank specialists, in January 2015.

The fragile global recovery lie increasingly divergent trends with significant implications for global growth. Activity in the United States and the United Kingdom is gathering momentum as labor markets heal and monetary policy remains extremely accommodative. But the recovery has been sputtering in the Euro Area and Japan as legacies of the financial crisis linger.

Risks to the outlook remain tilted to the downside, due to four factors. First is persistently weak global trade. Second is the possibility of financial market volatility as interest rates in major economies rise on varying timelines. Third is the extent to which low oil prices strain balance sheets in oil-producing countries. Fourth is the risk of a prolonged period of stagnation or deflation in the Euro Area or Japan.

Growth in high-income countries as a group is expected to rise modestly to 2.2 percent this year (from 1.8 percent in 2014) in 2015 and by about 2.3 percent in 2016-17. Growth in the United States is expected to

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accelerate to 3.2 percent this year (from 2.4 percent last year), before moderating to 3 and 2.4 percent in 2016 and 2017, respectively. In the Euro Area, uncomfortably low inflation could prove to be protracted. The forecast for Euro Area growth is a sluggish 1.1 percent in 2015 (0.8 percent in 2014), rising to 1.6 percent in 2016-17. In Japan, growth will rise to 1.2 percent in 2015 (0.2 percent in 2014) and 1.6 percent in 2016.

Trade flows are likely to remain weak in 2015. Since the global financial crisis, global trade has slowed significantly, growing by less than 4 percent in 2013 and 2014, well below the pre-crisis average growth of 7 percent per annum.

3. A new concept of trade promotion institutions

General category of Trade support institutions (TSI) exist in every country to help businesses developement, promote and sell their goods and services abroad. This category includes institutions governmental and nongovernmental institutions with a wide range of activities (TPOs – Trade promotion organizations, ministries - with an interest in export development, chambers of commerce and industry, economic development agency - with export focus, foreign trade representatives/offices, regional economic groupings -ith export focus), as well as specific sectoral bodies (exporters' associations, trade associations, chambers - agriculture and other sector specific, sector based bodies - industry and services) and institutions with specific functions (export credit and financing bodies, standard and quality agencies, export packaging institutes, international purchasing and supply chain management bodies, training institutions, trade law and arbitration bodies).

There is no standard format for a TSI and often more than one exists in each country.

Within TSI, we can consider that a TPO traditionally has a the leading role in "promoting" international trade, focusing on the most important activities in the field, in cooperation with the other component institutions of a national TSI. There may be more than one TPO per country, they are not homogeneous and can take many forms.

In some countries TPOs are part of governmental bodies, in others they are statutory agencies created by public law, in others, private sector bodies (e.g. chambers of commerce in Austria). Sometimes they are a combination of public and private enterprise (e.g. Swedish Trade Council).

One TPO may represent smaller nations while larger nations may be represented by TPOs at regional and local/city levels. However, one is generally recognised as the national TPO in international meetings because of its public law and funding status. Nevertheless, export customers will use the most convenient TPO that can best meet their needs. A few TPOs have responsibility for promoting tourism, but more combine their exporting role with that of promoting inward investment.

TPO services can be those demanded by the exporting community, perhaps in response to a customer needs analysis, or in response to an analysis of the requests received. TPOs may also use information from around the world to identify opportunities in markets and sectors as yet unnoticed by the country's exporters. This would be seen as proactive work by the TPO, with the balance of responsive and proactive services being at the TPO's discretion. However, many TPOs offer only a fraction of large range of specific activities due of limited resources or legal powers, customer demand, or competition from other component of the national TSI.

The main groups of functions with the greatest potential for a TPO are the folowing:

Information. The main objective of a TPO is to put sellers in touch with buyers abroad and facilitate the development of that contact. TPOs can provide information about buyers and sellers, for example size, turnover, contact details, market reputation, customer attitudes, competitiveness, methods of doing business, market size, TPOs assemble and distribute information via publications, websites, selective e-mail and in person at enquiry points. They may also delegate this task to provincial offices and agencies closer to the exporter.

TPOs can make information available to exporters via the following channels:

- Websites (either open access, or access limited to registered users).
- Distribution systems which attempt to match information to users by means of a pre-established profile (often known as Selective Dissemination of Information). This is normally sent by e-mail or by text (SMS) or postal delivery where the infrastructure or culture does not support e-delivery.
- Publications.
- Information centres (with personal, telephone or e-mail contact with TPO staff, or combinations of methods)
- Announcements in newspapers, trade magazines or on radio where other more targeted methods cannot be widely used.

Advisory services. The TPO is seldom organized in such a way that it could provide advisory/consultancy services of that kind. It essentially provides intelligence on foreign markets, and then connects potential suppliers and purchasers. Where a TPO can provide such advisory or consultancy services, it would be a very useful adjunct to the NSB's conformity assessment services, as the conflict of interest would not arise. In this case the NSB and TPO should cooperate closely to ensure that the TPO advisory/consultancy service is successful in helping upgrade the product, process or service so that it meets stated requirements, and can be tested and certified.

Promotion in target markets. Once a TPO has identified details of potential buyers and markets, and the exporter has decided to develop the opportunity, it can facilitate contact between buyer and seller. This could involve providing and/or subsidising participation by the exporter, either alone or with other enterprises, at an international trade fair. It can also organise buyer/seller missions to and from the target market. All these activities are aimed at developing the contact between buyer and seller, and making the exporter more aware of the export market conditions.

Support abroad. TPOs with networks of offices or representatives overseas can provide additional help to the country's exporters – this is particularly important for SMEs without agents or distributors in a new market able to deal with local requirements in the local language.

SMEs often need to use the TPO's overseas offices, the country's embassy or other representatives to make these introductions and identify translation and interpreting services. Larger TPOs with extensive overseas networks can assist exporters with such local market knowledge. However, TPO employees are expensive to relocate in foreign markets, and are usually supplemented by local staff who can provide local language capabilities and knowledge at lower cost.

Import promotion offices have been established in some developed economies to support SMEs from developing economies gain access to their markets. Typical examples include the Netherlands Centre for the Promotion of Imports from Developing Countries (CBI), or the Swiss Import Promotion Programme (SIPPO).

Role of TPOs in trade development. The TPO focus changed with the arrival of the Internet, enabling exporters to search for market information directly rather than through a TPO, and to contact potential buyers via e-mail, business etworking sites or electronic marketplaces. In response, some TPOs began to intervene earlier in the export process ("going-up-stream") to help exporters become export-ready in developing and adapting their products. This has challenged TPOs to equip themselves with additional skills. If TPOs do not provide assistance in export-readiness then it may become the responsibility of separate small firms agencies (the United Kingdom's Business Link network is one example). Some TPOs (e.g. those of Sweden and Norway) in developed countries provide more detailed support ("going downstream") and offer full cost consultancy services in competition with the private sector.

TPOs in developed markets usually direct customers to sources of advice rather than themselves becoming involved in specializations such as packaging, transport, financing and insurance, which require knowledge and skills not usually possessed by government officials. Thus they have not traditionally provided information about technical regulations or standards required by exporters to meet market needs. In view of the globalisation of trade and greater movement of goods between countries, it is more important than ever that exporters have better information on market entry requirements.

Actualy, TPOs service has been extended to helping exporters set up overseas subsidiaries and generate profit from manufacturing abroad (outward investment). In parallel with globalisation and the transfer of manufacturing facilities to lower cost economies is a dependence on selling services (such as professional advice, construction activities, transport). TPOs have had to develop mechanisms to assist service suppliers, whether professionals – e.g. architects, lawyers, accountants, or onsultants – e.g. business or internationally tradable services. The tools developed for selling goods (e.g. trade fairs) are not necessarily relevant to selling services. Here, trade missions that concentrate on personal introductions have generally been more effective. However the provision of market information is common to selling goods and selling services.

Although the range of TPO services provided may seem quite wide, in reality it is relatively narrow. Surveys show that, even in developed markets like the UK, some 40 % of exporters are unaware of the existence of a TPO. Large companies tend not to need TPO services because they generally sell established products to established markets, and know their buyers and markets well. If they wish to enter a new market, they will probably appoint an agent or distributor, or set up a local office and not require TPO services. An exception might be a service organization, such as a large distribution or construction company, requiring diplomatic support to reach decision makers in the local ministry. Service organizations such as banks, and professionals such as architects and surveyors will rarely call on the TPO because it is unlikely to have the necessary knowledge and expertise.

TPO customers tend to be SMEs. In most sectors, micro businesses are normally considered to be too small to export, particularly if substantial amounts of working capital or effort is required to penetrate a foreign market. SMEs wishing to enter new markets or sell new products into existing markets may seek TPO help to find buyers and undertake market research. Such a service is likely to be low cost or free of charge.

4. The value chain approach

The value chain approach is used by many organizations to show how fragmented activities can be coordinated to reveal interconnections and inter-dependences between international traders and economic operators in different countries. Value chains highlight the fact that most products and services are produced by a complex and sequenced set of activities. Developments in global markets over the past few decades have greatly increased the complexity of inter-company linkages and the ways in

which the activities of different organizations are coordinated.

From a policy perspective, value chains are increasingly utilized to address two key issues in business development and trade promotion:

How to mobilize, and work with, the private sector to promote development, reduce poverty, and shift from supplyside to demand-side interventions.

How to support the productive activities of small producers and marginalized populations in the context of globalization.

Developing a value chain for a product or service in a specific country will focus attention on the coordination of fragmented production and distribution systems, and the options open to an enterprise in managing relationships along the chain. It is also an opportunity to identify the points at which TPOs could lend support. Any gaps can be easily identified, and programmes to develop appropriate capacities can be established. This may be more valuable to the SME sector than to large exporters already familiar with the sequence of processes and players, who have developed their own methods of dealing with potential gaps.

Case study – Tourism. Tourism is a multi-dimensional service industry. In most countries where the importance of tourism is recognized, the industry falls under the auspices of a specific government body or tourism board.

The principal role of the TPO would be to help promote home market image building and tourism during trade fairs and similar events. This is as important as promoting any manufacturing industry, particularly as tourism is a major foreign exchange earner in many countries. Links between TPOs and tourism boards can be of significant value where home market image building is planned. The challenge however, is that the key TPO home country customers are more likely to be exporters than hotels, restaurants and tourism service providers.

Similarly, the normal TPO target audience in foreign markets would be the retail consumer seeking to buy the product, rather than the business community.

The service sector is growing, and the international standardization community is increasingly involved in developing standards to provide guidance in the quality of service delivery.

5. Conclusions

Generally, TPOs have become more global in their outlook. Once they would have helped only those firms exporting products manufactured or originating in their own country. Today, if there is enough added value in the TPO's country as part of a global supply chain, the TPO recognizes the need to assist this customer (foreign companies, as a part of the global supply chain).

More and more, TPOs have a mandate to assist enterprises in their country to invest overseas in order to increase efficiency and reduce costs by outsourcing. This generates dividends that can be repatriated to the home country. Some TPOs have also embraced the role of encouraging foreign direct investment, which gives them the supply capability to export competitive products.

Other TPOs have joined forces with tourism promotion in Western Europe, a sizeable export earner in its own right in many countries. Yet others have pursued the development of an enterprise upstream by taking on responsibility for the development of small firms and exploitation of new technologies.

The way TPOs communicate with their customers has certainly evolved over the past 15 years. From a situation where all contact was by post, telephone or telex, TPOs now communicate by e-mail, through web sites or SMS, and have organized their enquiry response facilities in call centres, frequently offshore.

Customer care has also been streamlined. An enquiry from an enterprise was once handled by a local office, routed to headquarters and then sent to the overseas network if the headquarters deemed it necessary. This rigid way of working has been replaced by TPOs, such as those in the UK and France, making substantial reductions in the size of their headquarters. They now facilitate the transfer of enquiries directly from customers or local offices to the overseas network of trade representatives and vice versa. This trend is likely to strengthen in the years ahead, with continued reductions in head office staff.

These are clear indicators that TPOs have been moving with the times and the situation is not as it was two decades ago ago.

Not only are national TPOs continuing, but in several European countries, such as France, Spain and the UK, there exist important regional TPOs. This trend has emerged with the devolution of powers within countries, but is also driven by customer demand for a service that is more focused on their area and their individual needs.

The number of customers who continue to seek assistance also supports the need for TPOs. The way in which they expect their needs to be satisfied may be changing (such as using the TPO web site rather than the traditional trade information centre), but they still appear to be seeking support.

However, while recognizing the value of their service to the needs of small and medium-sized enterprises (SMEs), we should not overlook the fact that in virtually every Western European country, most exports and most outward investment goes on without any intervention or knowledge by the national TPO. This situation has not changed in the last 40 years.

What TPOs are doing might be described as being at the margins. The average European SME knows about marketing and selling and needs little help from government organizations to do this in the

home market. But to go abroad, they need help in accessing information, perhaps in analysing it and certainly in having an outreach.

TPOs, with a network of offices abroad, have a major advantage. The TPO can assist SMEs, which usually have no such network and need help to make contacts in an overseas market and to set up meetings. A large enterprise usually has no such need, unless it is the political influence of an ambassador to open the doors of a large public organization.

Services, once called "invisible exports", account for the majority of a country's production. Getting information on overseas markets and penetrating them when there is nothing tangible the exporter can show is quite a different challenge. Most TPOs do not yet recognize this, partly because they do not know how to respond to enquiries and partly because their staff do not have the skills and knowledge to do so.

In keeping with the experience of the EU countries in field of specific practices and techniques aiming to foster their international economic relationship, foreign trade promotion activity has to represent for Romania, one of the most important components of the national economy development strategy. This activity has to be developed in accordance with the provisions of the international agreements in which Romania is a signatory part, as well as with the international market rules and procedures. Within this framework, the promotion of the Romanian companies dealing with foreign trade activity by an adequate conceived system of governmental and non governmental TPOs is acquiring new dimensions, having to become one of the main pillars of the XXI century economic development of the country. This problem has to be taken into consideration by the Romanian governmental and non-governmental bodies, taking in view that each economic operator acting in the field of foreign trade should take big efforts in order to penetrate and maintain its position on a very competitive international market.

Being aware of both the importance of the promotion activity in attaining the strategically objective of growing efficient exports and the fact that the high costs implied by the export promotion activities could be prohibitive for many Romanian exporting companies, especially for SMEs, the governmental decisions makers together with the Romanian business community, have to take a lot of measures looking for redressing this situation.

For a national export strategy to be effective, strong linkages with other economic and developmental strategy initiatives are required. Strategy makers must look beyond existing export capacity and work towards ensuring that new export capacities are generated.

Promoting export-oriented foreign direct investment must go in tandem with promoting exports in the international market place.

Developing higher value-added export performance must be directly supported through, for example, developing strong backward linkages in industry and forward linkages in agriculture. Romanian strategy makers must look at "on-shore" domestic production issues, as well as "off-shore" market development issues when developing their future responses.

For a strategy to work, the private sector — perhaps the key player in implementing export strategy — has to be fully involved and committed to the overall process. The private sector has to "buy in" and feel responsible for the success or failure of the strategy. There must be a real and effective partnership between the public and private business sector.

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THE INSUFFICIENCY OF FINANCIAL ANALYSIS FOR THE PERFORMANCE OF NON-PROFIT ORGANIZATIONS

Delia Corina MIHĂLŢAN*

Abstract

The paper work is based on the hypothesis that the financial analysis is insufficient when it comes to reflecting the performance of nonprofit organizations. Our main argument is the social purpose of non-profit organization, which is the reason why the analyst has to find optimal solutions for analyzing their performance while taking into account their social impact.

Our research focused on the conceptualizations of the performance of non-profit organizations and the adequacy of the existing models for analyzing it.

The research results refer to the limits of financial analysis regarding the performance of non-profit organizations because it can only offer relevant information regarding its effectiveness.

Keywords: *non-profit organization, financial analysis, performance, specific ratios, social impact.*

1. Introduction

The responsibility towards the stakeholders determines any entity to present financial/accounting information regarding its activity. Many times, the information in raw form doesn't say much to the user, hence the necessity to analyze them, to measure their performances based on them so that the stakeholders' requests be fulfilled.

The responsibility of non-profit organizations towards the interested parties takes shape based on the next reasons:

- the institutional purpose determines value creation;
- the social constraint determines social responsibility;
- the economic and financial constraint determines economic sustainability.

In this context, financial analysis, amongst others, becomes important for the non-profit organizations also, and not just for the corporations. However, based on the hypothesis that financial analysis isn't sufficient for nonprofit organizations and we intend for this study to expose the needs financial analysis responds to, as well as the reasons why it doesn't satisfy the stakeholders' informational needs from a non-profit organizations.

In order to achieve these objectives, we will focus our attention on the specialized literature to especially highlight those characteristics of non-profit organizations that distinguish them from companies and that have an impact on the needs that a financial analysis would respond to. Thus, we will try to identify analysis methods that adapt to their specific.

Currently, the non-profit sector in our country is poorly developed, and Romanian literature in this domain is poor, very few authors treat the aspects of financial analysis in the frame of non-profit organization. At an international level, things are different. Among the authors' concerns, the sector of financial analysis is found, some of them building a series of models of analysis appropriate for the non-profit sector.

2. Aspects that influence performance analysis

The performance is basically shown through the information from the enteritis's result account, however non-profit organizations, through their particularity, don't achieve profit. This would be one of the first aspects which argues that the elements that generate results don't provide a sufficient basis to analyze their performance. Thus, the classical financial analysis performance can't be sufficient.

"Performance measurement tools and techniques were frequently tailored to the particular contextual features and dynamics of each nonprofit organization and on the basis of their appropriateness to organizational values, goals and working practices."[1]

2.1. The performance's points of view in the non-profit sector

A number of authors believe that the non-profit sector, performance is often judged by its three points of view:

- Economics: attempting to minimize resource consumption (inputs in the system);
- Efficiency: trying to optimize the relationship between inputs and outputs (consumption of resources/results);
- Effectiveness: the outputs are compared to the

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objectives.[2]

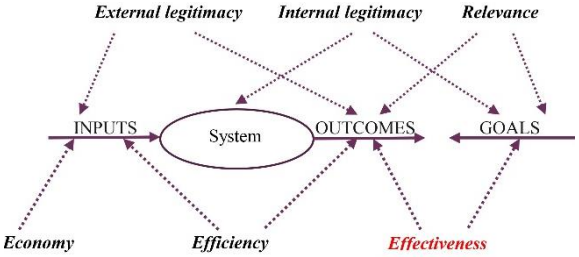
According to Cadena-Roa, Luna, Puga, associational performance has been considered as the dependent variable which can be regarded in four dimensions: efficacy, efficiency, legitimacy, and relevance. For our purposes, efficacy refers to the association's capacity to achieve its stated goals. Efficiency considers the association's ability to mobilize resources in an optimum way to achieve those goals. Legitimacy is considered both as internal and external; internal legitimacy reflects the association's capacity to have full cooperation from its members to achieve the stated goal; external legitimacy alludes to the importance that non-members confer to the association's activities and which moves them to support it. Finally, relevance refers to the social, political, economical, and cultural importance of the association's anticipated goals and unanticipated consequences. The associations may or may not be aware of their own relevance since this has been considered from a macro-perspective.[3]

Through the figure below we present the schematization of the relationship between an organization's features of performance management. Given the Figure no. 1, for performance analysis in non-profit organizations, it's necessary to identify the inputs, outputs and objectives of the system for them to be correlated. According to some authors[4], when identifying them, some problems are met that have to do with the measuring of:

- *the objectives* – non-profit organizations have diverse goals, some of them can only be identified, without being able to be measured in a relevant way for the performance analysis; certainly, the objectives that can be taken into consideration regarding the performance's analysis are the budgeted ones, respectively the expected revenues and expenses;
- *the outputs* – many of these can't be measured in value, for example, the progress of a child with disabilities who benefits from a foundation's program with activities in this field; however, an output indicator would be the actual amount of resources consumed in a program (expenses), but a big consummation of resources doesn't necessarily guarantee the results.

We note that the performance's analysis is not just the financial results and it's strongly imprinted by the non-profit organization's objectives which will materialize in outputs of which measurable values many times isn't representative for the performance analysis.

Figure nr. 1 -The relationships between the performance's points of view -



Source: inspired by Ionaşcu, Filip, Mihai, 2003:253

2.2. The non-profit organizations' working environment.

In order to evaluate and to predict the associative performance, in specialized literature there is this tendency to neglect the environment in which the association works and to show only importance only to the intra-associative characteristics.

According to some recent theories, the associations' performances depends on the relationships the associations have with the environment they work with, not just on the internal factors and the achieved goals.

"Organizations are viewed as closed-systems and attention is set on internal management efforts to improve performance—basically considered in terms of efficiency and effectiveness. Often, when those studies refer to the environment, they consider it mainly as the context, failing to analyze the reciprocity of influence between the association and the environment."[5]

"If we want to improve theoretically and empirically the way we measure associational performance, we should move beyond traditional theories and see organizations as open-systems whose performance is the result of organization–environmental interchanges. More recent theories stress that associational performance depends not only on internal factors as those reviewed in the previous sections ("Decision-Making" and "Cohesion"), nor on the merits of their goals, but also on the relations they hold with the environment."[6]

The organizations are means of collective action that are environment oriented. They are dependent on the environments in which they operate, being incomplete typical systems. In this way they are exposed to the external vulnerability and uncertainties. The figure bellow represents the main components of a non-profit organization and we can observe that all

[6]Giacomo Manetti, The Role of Blended Value Accounting in the Evaluation of Socio-Economic Impact of Social Enterprises, Voluntas (2014) 25:443–464, DOI 10.1007/s11266-012-9346-1, apud Aldrich and Marsden 1988, Scott 2003.

of the three dimensions influence and are influenced in the same time by the environment in which the non-profit organization operates as presented in Figure no 2. We can see that starting with the social aspects (purchase of input elements, human resources management, projection of internally generated elements), continuing with the economic ones (output production, association's legitimacy provision and relevance for the interested parties, cost management, registered growth) up to the environment protection management, the environment is important for all the processes.

"What we mean by environmental relations includes the structural characteristics of the system where they are rooted and those of the system or systems they want to exert influence on. It also includes the reactions to associational activities from institutions, stakeholders and other publics. Thus, we call environmental relations to:

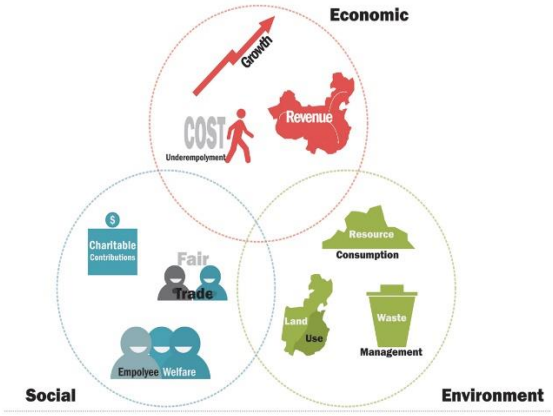
- the characteristics of the system where associations are rooted,
- the characteristics of the target system and,
- the responses from it.

In a nutshell, considering internal factors as given, what associations may achieve depends not only on their actions, but also on the way the environment enables or constrains associational strategic actions."[7]

"There are certain accounting practices that measured not only economic performance but also social results achieved using various indicators of outcome and impact. Many of these attempts relied heavily upon voluntary information regarding quality to the detriment of quantitative and monetary assessment. In recent years, however, accountancy has made several attempts to create and implement quantitative-monetary measuring tools which can measure in monetary terms the social and economic output of, not to mention the impact generated by, all kinds of organizations (Blended Value Accounting, or BVA for short). The logic of a blended value analysis suggests that, first all organizations, create both financial and social value, and that, secondly, the two types of value creation are intrinsically connected rather than being in opposition in a zero sum equation (i.e. to generate more social value, an organization must sacrifice its financial performance)."[8]

Some authors (e.g. Manetti) have been promoted social return on investment ratio (SROI) as a way to enable the social enterprise sector to better understand the wider impacts of their services and activities and quantify the total value generated in monetary terms. The end result of the process of implementation of SROI analysis is an indicator that represents the return in socio-economic terms for every monetary unit spent on the project and/or in the organization as a whole.

Figure nr. 2 - The structure of the non-profit organizations -



Source: Triplebotlin, CC BY-SA 3.0 (http://creativecommons.org/licenses/by-sa/3.0)

3. Measuring performance through financial analysis.

Performance measurement represents one of the management's and the financial-accountant department's concerns. From the management's perspective, over time, all sort of strategies have been created, two of them being:

- the strategic model developed by Moore which is based on three pillars: social and financial value creation, sustainable support of donors and sponsors, and the organizational survival.
- the "Matacena"model which was tested by Bagnoli and Megali and is based on: social efficiency dimension, institutional dimension and economic, and financial dimension.

From the financial accounting's perspective, the performance analysis can be done considering those elements that have values that can be measured in a manner that is relevant to calculate performance indicators. In most cases, performance is analyzed on types of activities done by the non-profit organization, namely: fund-raising activity and the activities related to the undertaken programs. The indicators we present can be analyzed for a single undertaken activity, but also in relation to the activities undertaken in the past, in order to analyze the evolution in time of the performances achieved by those activities.

3.1. Performance of fund-raising activities

Within the fund-raising companies the consumed resources and the results are easy to be quantified because they have goals referring to obtaining financial or even materials resources. In order to analyze the companies' fund-raising performances, we can calculate the following indicators:

[8] Giacomo Manetti, The Role of Blended Value Accounting in the Evaluation of Socio-Economic Impact of Social Enterprises, Voluntas (2014) 25:443–464, DOI 10.1007/s11266-012-9346-1, apud Aldrich and Marsden 1988, Scott 2003.

- The campaign's efficiency – by comparing the total revenues generated by that campaign to the total expenditure undertaken to implement the campaign. This indicator will show how profitable the undertaken campaign is and whether the expenses are too high compared to the generated revenues
- The campaign's effectiveness – by comparing the generated revenues to the ones hoped
- The campaign's economy – by comparing the campaign's expenses to the total expenses undertaken by the non-profit organization;

The performance can be analyzed in a more specific way applying a series of indicators to the donations, whether financial or material. Thus, for the received donations, Acumen Integrat developed the following indicators:

Table nr. 1 - Indicators concerning the donations -

The Indicator's name	Explanation
The cost per monetary unit collected	It measures the amount of costs determined by collecting monetary unit from sponsors or partners.
The average value of a donation.	It measures the average value of a received donation, by comparing the total of the donations received during a certain time period.
The efficiency of a donations' transport costs	It measures the percentage represented by the transports costs of a donation out of its total value.
The delivery time of the donation	It measures the necessary time for a donation to arrive at its destination after someone has made a commitment to offer a donation.
Received donations	It measures the percentage of donated products that were actually received, out of the number of products solicited from donors

Source: projected based on www.indicatorideperformanta.ro

Taking into consideration that the fund-raising activities operates with financial resources, we can observe that it's quite easy to build analysis models for the performances achieved. The problem comes up when we talk about according a support that is one of material resources. Most of the times, these can be measured in value, but there are cases when a monetary value cannot be attributed to them due to some circumstances or characteristics of the donated materials. This would be a limit concerning the analysis of the performances achieved in the fund-raising zone.

3.2. Programs' performance

In order to identify the indicators that can be used in analyzing program performance, the model of how every program work has to be known, as well as all its elements: goals and objectives, resources (inputs), activities, outputs and outcomes. Outputs represent what a program actually does (e.g. informs a certain number of people regarding harmful effects of drugs consumptions), whereas outcomes are the results it produces (e.g. fewer drugs consumers). Depending on how these elements can be measured, the indicators can be projected in order to reveal the programs' performance.

In Poister's opinion, "non-profit programs should be planned and managed with an eye toward specifying and achieving desirable results. They should be viewed as interventions involving service delivery or enforcement activity that is designed to address some problem, meet some need, or impact favorably on some unsatisfactory condition in a way that has been defined as serving the public interest. The positive impacts so generated constitute the program's intended results, which would justify support for the program in the first place. A program's intended results, or its outcomes, occur "out there" in the community, within a targeted area or target population."[9]

In order to analyze the performance, a model such as the one presented in the Figure no. 3 can be used as "an organizing tool for identifying the critical variables involved in program design, the role played by each in the underlying logic, and the presumed relationships among them. Briefly, resources are used to carry on program activities and provide services that produce immediate products, or outputs. These outputs are intended to lead to outcomes, which are the substantive changes, improvements, or benefits that are supposed to result from the program. Frequently, these outcomes themselves occur in sequence, running from initial outcomes to intermediate and longer-term outcomes."[10]

Of all the elements involved in the programs model, the only resources that can be measured in value are the consumed resources and the number of beneficiaries. Generally, the relevant types of performance measurement include measurements of output, efficiency, productivity, service quality, effectiveness, cost-effectiveness, and customer

satisfaction. Thus, in order to be able to analyze the conducted programs' performance, the involved resources for running the programs, the programs' beneficiaries and the staff involved are taken into consideration

If we want to analyze the performance from a financial perspective, we focus on the resource consummation, output measure, the number of beneficiaries, employees and volunteers. When calculating the costs of involved resources, the total resources consumed in the program, as well as how much fixed assets wears out for the period in which they were used to carry out the program will be taken into consideration. Resource consumption also includes the share of the expenditure on the utilities and maintenance related to the means used in the program. Likewise, the expenditure with the employees and the volunteers involved in the program under analysis has to be taken into consideration.

The relevant indicators concerning the financial performance can be calculated by reporting the following costs to the number of beneficiaries:

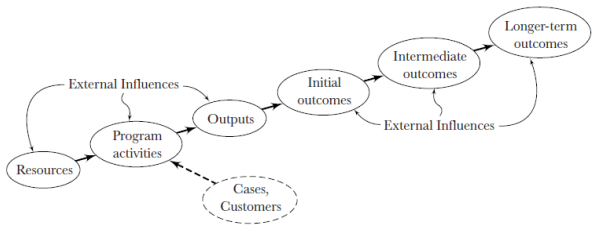
- costs of resources used in the program;
- costs of employees' wages;
- costs involving volunteers.

Output measures are important because they represent the direct products of nonprofit programs. They often measure:

- volumes of programmed activity;
- amount of work that is performed;
- the number of cases that are dealt with by a program.

In the financial performance analysis, the outputs are important as relevant information concerning the financial efficiency by comparing the costs with the achieved outputs can be obtained. Thus, efficiency indicators look at the ratio of outputs to the monetary cost of the collective resources consumed in producing them

Figure no. 3 - Generic logic program model -



Source: Poister, 2003:37

Concerning the financial performance analysis of the conducted programs in the non-profit organizations, the existing limits are connected to:

- Efficiency, in the sense that the maximum outcomes can't be quantified in value, due to the social goal of the organization, so the social impact of the changes brought in the program beneficiaries can't be quantified;
- Effectiveness, because the goals and the outcomes of a non-profit organization aren't of a financial nature, but a social one, these being able to be measured through non-financial indicators which are the tools of performance management;
- Economy, meaning that there are no parameters that provide indications of economic management of resources required for a particular program.

4. Conclusions

By exposing the characteristics of performance at the level of non-profit organizations, our study has confirmed the hypothesis that a financial analysis of the performance at the level of these types of entities would be sufficient to convey its global performance. Where the classical financial analysis can't answer the stakeholders' needs, the performance's management activities has to intervene by using specific tools in order to analyze the performance in non-profit organizations.

The performance in the non-profit organizations is seen as having social, economic and environmental facets. All of these are influenced by the environment in which the organization operates. The performance is defined in relation with the organization's goals, the consumed resources, the outputs and the achieved results from the activities, taking into account the outcomes (social impact).

At the level of non-profit organizations, we addressed the performance of fund-raising activities and of programs. In the first case, we concluded that a performance financial analysis would offer enough information concerning the conducted activities, with the very rare exceptions where material resource are donated which can't be quantified in value. In the second case, things are different. The main problem is connected to the fact that, most of the time, the outcomes of the conducted programs can't be quantified in money, which represents a limit when we talk about their efficiency and effectiveness analysis.

Beyond these limits, the performance can be analyzed with the specific tools of the performance management in the frame of non-profit organizations, a domain that can represent a new field of research that would bring benefits to the Romania's civil society.

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THE ASSESSMENT METHODOLOGY PDCA/PDSA – A METHODOLOGY FOR COORDINATING THE EFFORTS TO IMPROVE THE ORGANIZATIONAL PROCESSES TO ACHIEVE EXCELLENCE

Cristina Raluca POPESCU[*]
Veronica Adriana POPESCU[**]

Abstract

In the paper "The Assessment Methodology PDCA/PDSA – A Methodology for Coordinating the Efforts to Improve the Organizational Processes to Achieve Excellence" the authors present the basic features of the assessment methodology PDCA/PDSA that is designed to coordinate the efforts to improve the organizational processes in order to achieve excellence.

In the first part of the paper (the introduction of the paper), the authors present the general background concerning the performance of management business processes and the importance of achieving excellence and furthermore correctly assessing/evaluating it.

In the second part of the paper (the assessment methodology PDCA/PDSA – as a methodology for coordinating the efforts to improve the organizational processes to achieve excellence), the authors describe the characteristics of the assessment methodology PDCA/PDSA from a theoretical point of view.

We can say that in the current state of global economy, the global performance includes the economic, social and environmental issues, while, effectiveness and efficiency acquire new dimensions, both quantitative and qualitative. Performance needs to adopt a more holistic view of the interdependence of internal and external parameters, quantitative and qualitative, technical and human, physical and financial management of, thus leading to what we call today overall performance.

Keywords: *Assessment Methodology PDCA/PDSA, Coordinating Efforts, Improve the Organizational Processes, Achieve Excellence, Business Process Management.*

1. Introduction

Given that currently in Romania there are not many studies dedicated to performance management business processes and the use its tools in Romanian institutions, we believe that an article in this field may represent a step forward in our contemporary society which is evolving and transforming.

A feature of recent years specific to the business world and not only is the concept of performance (Venkatraman, N., Ramanujam, V., 1986). Organizations increasingly face unexpected challenges, which require a very competent management situation (Verboncu, I., Zalman, M., 2005). This places an emphasis on achieving performance strongly in all areas. Organizations are continually concerned either to achieve performance or maintain their performance or to improve performance or to measure the performance obtained.

The new global economy, characterized by economic liberalization, globalization, increased competition close, the transition from the industrial economy to an economy based on knowledge, information and knowledge, the social, environmental restrictions to the needs of sustainable development, many financial crisis felt globally have determined the changing requirements directed to various economic entities and diversify their responsibilities towards all categories of owners of interest to society as a whole. In this new economic system, companies can also be seen as "cells" on which the health of all its "body" depends (Zairi, Mohamed, 1997). Therefore, we cannot talk about the viability of a company in a competitive environment, unstable and turbulent, without taking into account the importance of performance.

Improving the business processes or business process excellence means in real life a continuous confrontation with a multitude of complex situations or very complex, which creates difficulties, not infrequently caused by unprofessional approach to business. Such situations can be explained by complex: multiple interdependencies between processes, which can cause major conflict situations in processes, the high number of activities and processes, the variety of their high involvement human factor insufficiently prepared to cope with unforeseen situations, internal constraints and external dynamics in business-related events, and so on.

We believe that one of the most important assessment methodologies that are able to coordinate the efforts to improve the organizational processes to achieve excellence is the assessment methodology entitled PDCA/PDSA. This particular type of assessment methodology is analysed below.

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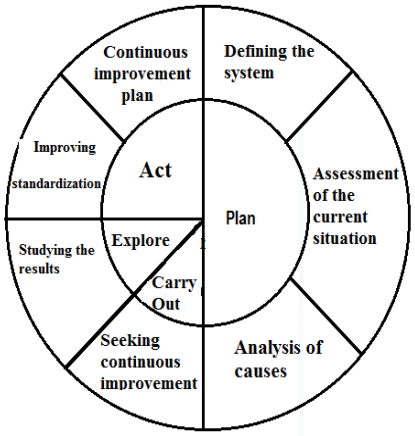
2. The assessment methodology PDCA/PDSA – as a methodology for coordinating the efforts to improve the organizational processes to achieve excellence

The PDSA methodology for improving organizational processes originally developed in the 1930s Walter A. Shewhart, has its roots in the scientific method (Francis Bacon in 1620) (see Figure no. 1: PDSA Cycle – Walter A. Shewhart).

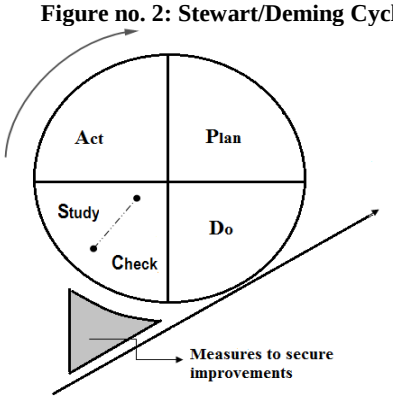
Figure no. 1: PDSA Cycle – Walter A. Shewhart



Source: Authors' adaptation after Walter A. Shewhart cycle in the process of continuous improvement

After the modification of W. E. Deming in 1950, this process can be found under the name PDCA, or "Deming Cycle". PDCA, designed to be used as a dynamic model, allows a continuous improvement process, every improvement meaning initiating a new cycle. Being a dynamic model, it implements the ideas and concepts that allow reconsideration process at any time. After applying the improvements deemed necessary, there may be a new cycle, which includes the latest enhancements. This process of continuous improvement processes contribute to the maturation subject to change (see Figure no. 2: Stewart/Deming Cycle).

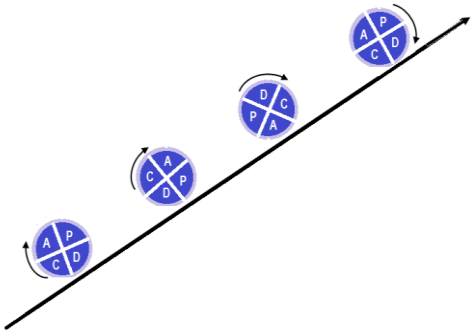
Figure no. 2: Stewart/Deming Cycle



Source: Authors' adaptation after Stewart and Deming cycle in the process of continuous improvement

Continuous improvement cycle can be graphically represented by the so-called "ramp of continuous improvement" (see Figure no. 3: Continuous improvement cycle).

Figure no. 3: Continuous improvement cycle



Source: The authors

Each concept that brings change can be represented by a spiral PDSA/PDCA. The ramp of continuous improvement can be sketched at an individual level, one cycle being followed by another, suggesting a spiral or a ladder.

Some of the ISO Standards (SR EN ISO 9000:2006, 2006; SR EN ISO 9001:2008, 2008; SR EN ISO 9004:2010, 2010) that are using PDCA methodology are able to improve organizational processes, such as the ISO 9001 defined for quality management (SR EN ISO 9001, 2009), ISO 14001 defined for environmental management (SR EN ISO 14001, 2000) and OHSAS 18001 defined for occupational safety and health management (OHSAS 18001, 1999).

The generic name comes from the initials PDCA methodology steps taken in a cycle: Plan - Do - Check - Act (Plan - Do - Check - Act), while PDSA cycle comes from the initials Plan - Do - Study - Act (plan - Do - Study - Act).

Prior to considering what needs improvement, identifying elements that provide opportunities in this regard. The aim is to select those elements of intervention that bring the greatest benefits in relation to the effort. Therefore, the planning phase is performed in two main steps.

I. The planning phase (Plan - Planning) aims to develop a plan of action to achieve change with the objective of continuous improvement; step is performed in two steps:

a) The first step, the identification of the problem involves: (a1) selection problem analysed; (a2) correct definition of the problem and determine precisely the elements on which it will intervene; (a3) setting measurable objectives and associated metrics in an effort to solve the problem for subsequent evaluation of progress; (a4) determining the coordination and implementation plan to improve.

b) The second step, the analysis of the problem involves: (b1) identifying processes that affect the question; (b2) choosing a pilot process; (b3) determining the actions taking place in the pilot

process, depending on how they take place in time; (b4) A graphical representation of the pilot process; (b5) pilot validation graphical representation of the process; (b6) identify potential cases they may face in the pilot process; (b7) data collection and analysis on the issue raised in the pilot process perspective; (b8) checking or reconsideration of the elements of the problem; (b9) identify the causes that generate the problem; (b10) collecting additional data, if deemed necessary; (b11) further actions of the other processes that impact on the problem, following the same steps as for the pilot process.

II. The implementation phase (Do - Execute) either to implement the proposed improvements or experimental testing of the proposed improvements, which will be implemented in a real system; this phase is performed also in two steps:

a) The first step in developing the solutions involves: (a1) to define the set of criteria on which the proposed solutions will be evaluated; (a2) determining the possible solutions to be applied to the root causes associated with the subject matter of discussion; (a3) choosing the best solutions in the set originally proposed; (a4) promoting this solution and promote it so that there is support for its implementation; (a5) planning solution selected.

b) The second step, the implementation of the solution selected, includes: (b1) implementation at experimental (pilot); (b2) identifying shortcomings and developing new improved solutions; (b3) applying the solution selected system-wide; (b4) to document improvement by developing procedures; (b5) additional data collection if using specialized mechanisms are necessary.

At the end, it is checked to what extent opted for solutions are interrelated to prevent possible conflicts between processes.

III. The verification phase (Check - Check/Study) involves checking the ability to meet the objectives set, closely following the conduct of key activities, to ensure that what was to be implemented properly understood, trying to identify and intervene in a timely manner, avoiding other problems that may arise in the process.

Therefore, this step involves gathering relevant data solution implemented by analyzing data in relation to the planned objectives. The verification stage is an important and also a mandatory step, allowing verifying the manner in which the system works according to the changes applied.

IV. The action phase (Action - Act) requires final verification of the effects of change, to determine whether it can be adopted. The proposed solution can be finally adopted, resumed or abandoned by its results.

If the change results in improving the solution adopted, but not before being subjected to partial or full standardization procedure, enabling exploitation.

Accepting the solution involves the deployment of a new series of actions that take into account: training staff to implement the solution; monitoring the effects of the implemented solution; identify opportunities for refining the solution and those that could contribute to its improvement. Conversely, if the solution has been ineffective assuming consumption of time and resources being accepted hardly holds or members, or if improvements are significant, it must be abandoned.

It will resume PDCA cycle, seeking to improve elements that do not meet expectations, extending to the new segments that can be considered. The resumption of the cycle involves time and increasing complexity of how the problem will be addressed. In his approach to continuously improve organizational processes, W. E. Deming defines a more evolved version of PDCA methodology, called FOCUS - PDCA. The FOCUS acronym comes from the initials of the main steps which define the methodology: Clarify – Find – Organize – Understand – Select (Identify – Organize – Clarify – Understand – Select).

3. Conclusions

The manner to carry out the management process in order to ensure the company's success depends on its position against competitors. Performance management processes and related terms include: strategic planning, financial planning and budgeting, performance measurement and monitoring, human resources management, project management and software, business process management, knowledge management, risk management, quality management, and so on. All these processes are carried out based on scientific management, integrating all management and many others may be necessary, depending on the specific. It is a modern approach achieved with methods and methodologies, tools and techniques that can be integrated in various forms of design, development and improvement of processes specific organizations.

Companies began to feel a pressing need for new and better methodologies for measuring organizational performance. In response to requirements arising from both the external environment and the internal organizations, practitioners, specialists, scientists, consultants, efforts to develop new methods for assessing organizational performance. The first steps have been registered in an attempt to improve financial performance measurement methods: the development and implementation of concepts such as activity-based management, economic profit, cash flow analysis and stakeholder analysis.

Reassessment concept implies defining performance indicators that reflect as close to reality operation. The identification and use of appropriate indicators for assessing the performance of an organization should consider putting them in correlation with long-term goals that they have in mind. Performance indicators should be properly identified, mainly due to the general vision that can

provide the performance of the organization. On their basis will be able to assess whether the strategy chosen by the organization after implementation and execution has helped increase its value.

The conclusions of this paper are:

PDSA methodology: PDSA methodology for improving organizational processes originally developed in the 1930s Walter A. Shewhart, has its roots in the scientific method. After the modification of W. E. Deming in 1950, this process can be found under the name PDCA, or "Deming Cycle". PDCA, designed to be used as a dynamic model, allows a continuous improvement process, every improvement meaning initiating a new cycle. Being a dynamic model, it implements the ideas and concepts that allow reconsideration process at any time. After applying the improvements deemed necessary, there may be a new cycle, which includes the latest enhancements. This process of continuous improvement processes contribute to the maturation subject to change.

PDCA methodology: The generic name comes from the initials PDCA methodology steps taken in a cycle: Plan - Do - Check - Act (Plan - Do - Check - Act), while PDSA cycle comes from the initials Plan - Do - Study - Act (plan - Do - Study - Act).

This dynamic environment subject to such constraints affecting the efficiency of type PDCA methodology developed to support continuous improvement effort, not to allow systematic completion of the four steps necessary steps. It is believed that PDCA assessment methodology, although provides a very systematic approach, is time and resource consuming. The time is compressed so much that PDCA is no longer able to ensure accuracy. Due to this fact, it is believed that by using this method there is a conflict between accuracy and time in which to reach a conclusion.

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THE ASSESSMENT METHODOLOGIES PTELR, ADRI AND CAE – THREE METHODOLOGIES FOR COORDINATING THE EFFORTS TO IMPROVE THE ORGANIZATIONAL PROCESSES TO ACHIEVE EXCELLENCE

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Gheorghe N. POPESCU[**]

Abstract

In the paper "The Assessment Methodologies PTELR, ADRI and CAE – Three Methodologies for Coordinating the Efforts to Improve the Organizational Processes to Achieve Excellence" the authors present the basic features of the assessment methodologies PTELR, ADRI and CAE that are designed to coordinate the efforts to improve the organizational processes in order to achieve excellence.

In the first part of the paper (the introduction of the paper), the authors present the general background concerning the performance of management business processes and the importance of achieving excellence and furthermore correctly assessing/evaluating it. Aspects such as quality, quality control, quality assurance, performance and excellence are brought into discussion in the context generated by globalization, new technologies and new business models. Moreover, aspects regarding the methods employed to ensure the quality, maintaining it and continuous improvements, as well as total quality management, are also main pillars of this current research.

In the content of the paper (the assessment methodologies PTELR, ADRI and CAE – as methodologies for coordinating the efforts to improve the organizational processes to achieve excellence), the authors describe the characteristics of the assessment methodologies PTELR, ADRI and CAE from a theoretical point of view.

Keywords: *business process management, assessment methodologies, PTELR, ADRI, CAE, organizational processes, quality, quality control, performance, excellence, globalization.*

1. Introduction

The paper entitled "The Assessment Methodologies PTELR, ADRI and CAE – Three Methodologies for Coordinating the Efforts to Improve the Organizational Processes to Achieve Excellence" is dedicated to theoretical contributions to knowledge development in modeling business performance in the XXI century in the context of the approach to excellence. The paper presents in a concise manner some theoretical contributions to the knowledge development in modelling business performance in the XXI century in the context of the approach to excellence and describes, from a theoretical point of view, the assessment methodologies PTELR, ADRI and CAE, which are three methodologies for coordinating the efforts to improve the organizational processes to achieve excellence.

The quality of products or services or their management, is a decisive factor in the activity of any society whose dynamic is changing and developing, under any market economy. The concept of "quality", first found in Aristotle's philosophical system, is of great importance in our lives of all, quality is a powerful strategic management for global organizations that determines the highest degree measure competitiveness of products or service organizations, companies or firms both domestically and internationally.

In terms of the approach and quality management systems, identify over time, evolving carried out in several stages, each with specific characteristics: quality inspection stage, stage quality control by statistical methods, step to ensure quality, quality management stage, the stage of total quality excellence.

The new approach takes into account the quality control by focusing specifically on preventing and eliminating defects being applied in all areas by all parties:

- Quality control of the product design begins and ends with the delivery of its client;
- Control is performed both specialized inspection staff and by each person involved in the manufacturing or service provision;
- To achieve the goals of "quality assurance" is necessary to involve all departments of the company.

In this new context it is necessary to conduct periodic audits to analyse the observance of the quality system adopted his efficiency, the need for change, able to increase the quality and competitiveness. Since this is a system of relations between the coordinating and his subordinates, so between people, quality achievements in this field and effects achieved will create new end features including managers and work climate created between team members.

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In the current economic context, marked by the growing importance of quality as a determinant of the competitiveness of organizations, there is a concern for both febrile production units and those providing services, the use of new techniques and tools applicable to quality management, the main purpose to continuously improve performance in order to achieve a higher degree of satisfaction and complex customer requirements, with maximum efficiency and effectiveness.

Quality and excellence are relative and subjective values to which it tends, though not always successfully. Quality, defined in relation to the cultural, economic and social needs, expectations and requirements of customers in science and technology in continuous progress, is developing permanently.

The methods employed to ensure the quality, maintaining it and continuous improvement, total quality management meet.

Total quality management, managerial concept that takes shape, centres its activities on quality and full involvement, awareness and responsibility of all employees. TQM concept consisting of a set of complex processes, aims to continuously improve product and service quality, customer satisfaction purposes. Quality assurance system has been the subject of international standards ISO 9000 which were taken in Romanian standardization. In the years 2000 - 2001 appeared in the new version of ISO 9000 which covers quality management system, also taken in Romanian standardization.

The elements with major impact on the modern approach to quality strategy found in three elements that have brought significant changes in the modern era, internationally:

- Globalization of markets in which we approach most of the true meaning of the phrase: "Our customer, our master", while the customer requirements may seem exaggerated sometimes unexpectedly;
- New technology, which is in a boom, driven by a variety of factors, including a role they have e-commerce and e-Business to Business market;
- New business models characterized by excellence and transparency strongly supported the crucial role they have resources "intangible" (man-pawn mainly found in relationships with customers, partners and suppliers, intellectual capital, technology, know-how built the products, technologies, manufacturing or other economic links in the chain, top management).

The fourth stage of quality, total quality management defines the framework for introducing new concepts such as "zero defects", "quality circles", including the Japanese principle of "CWQC - Company Wide Quality Control" Kaoru Ishikawa defined meaning to "control the quality of enterprise-wide".

The road to total quality excellence organizations must continuously watch:

a) Ensuring full customer satisfaction (requirements, needs, expectations), depending on the type of products and / or services they perform and / or provides each department, department or functional structure of the organization;

b) Regular analysis within each department, department or functional structures, to:

- results and the state in which the plans for achieving performance indicators established;
- flexible and rapid feedback to requests and events, regardless of when they are asked by customers;
- risks related products and / or services performed and / or supplied;
- costs due to effective and efficient use of resources;

c) Emphasis on improving processes that can lead to the best results;

d) Obtain advantages to maintain the competitiveness by improving organizational capabilities;

e) Motivating employees to ensure their active participation and involvement to achieve organizational goals and objectives proposed;

f) Ensuring and maintaining the trust of all stakeholders in enhancing organizational effectiveness and efficiency.

The key concepts of TQM are "excellent", "exceeding customer expectations", "zero defects" total involvement provided by the organization and management primarily of its elite and collaborating organizations.

International Organization for Standardization (ISO - International Organization for Standardization) 9000 series of standards adopted on quality management in response to increased market globalization challenges, the result of a long process of evolution, which began in the US Being generally accepted in 1950, the results of ISO take the form of international standards, guidelines and other similar documents whose objective involves the development of standardization and facilitating the international exchange of goods and services. Initial regulations aimed at improving the performance quality of organizations, then complemented by a series of quality assurance standards, including those corresponding industries, thus extending gradually their range of applicability, culminating in the adoption in 1987 of a series of ISO 9000 standard is applicable to this form especially by organizations in the field of production. Subsequently, to make it applicable not only in production organizations, the standard was revised and officially adopted in 1994 by the International Organization for Standardization.

These standards and regulations are widely used in the international market, in accordance with the technical requirements that meet standards of quality, safety, hygiene and environmental protection, deadlines, costs and requirements on the content of social elements.

The standards have come to be regarded as frequently as practical tools that allow addressing those urgent challenges which the international community must face.

The public or private sector managers have come to refer spot on the application of international standards ISO in organizations they represent, and this is a major asset for attracting, maintaining and winning new customers, while focusing on improving their work.

To excel in business means being better than the other competitors, particularly through performance management, financial, quality, thus highlighting both the situation of an organization performing the superlative way and all the factors due to which it has come to excel. "Business excellence" highlights a complex system of performance appraisal which gives the organization a maximum level of credibility in the market. Evaluated and compared with well-defined benchmarks, the performance achieved by an organization can determine a "business excellence", its specific. Moreover, to achieve public recognition of the excellence award is made by the quality attributed to the fulfillment of a complex set of criteria and performance evaluations conducted in the most discerning and transparent way possible.

All of criteria and sub-criteria global reference that can quantify overall performance of an organization, consisting of both the drivers and the practical results thereof, may obtain coveted ensure quality, which is the attribute model of business excellence.

There are many countries that have developed over time through sustained efforts, their own models of excellence, then using them as structures in a process of assessing and recognizing performance in organizations through special programs providing awards in recognition of the value and performance.

2. The Assessment Methodology PTELR – a theoretical approach

J. Naisbitt (Naisbitt, John, 1982) predicted, more than three decades ago, the development of a new paradigm of thinking imposed by globalization. The management science, in front of many challenges such as the globalization of business in a galloping pace, constantly raises issues of adaptation of organizations in terms of the external environment, the global market is found most often in the form of a system of interdependent markets characterized by competition closer every day.

In the current situation, organizations cannot take decisions independently, as they did in the last few decades, which puts organizations in a position to reconsider priorities if successful management intend, characterized by excellence, is expressly preoccupied respond swiftly to customer requirements vis-à-vis: delivering quality products and services in a timely manner, ensuring their high performance, coming up with tempting offers at prices or rates, providing a wide range of types of buyers.

Given the information revolution that allowed the transition from classical to integrate production output by computer (CIM - Computer Integrated Manufacturing), management companies had to develop competitive strategies increasingly complex by: tracking multiple aspects regarding the quality of products/services delivery their timely adaptation to consumer needs, low cost; simultaneous tracking of multiple market segments; following the development of new products.

It should be noted that between globalization and enterprise activity tightly reflected including management activities need to adapt the current situation that arises more often focus on driving business networks, the dissolution of the company functions on loyalty management and competition, which takes extremely varied forms.

In the current economy, we note the decisive role of the globalization process, supported by three significant factors influence resizing markets, deregulation, and power organizations to integrate activities worldwide. Specifically:

a) The area of international trade was essentially scaled by integrating new states in Latin America, Central and Eastern Europe and in Southeast Asia;

b) There have been taken action on de-regulation, which provides trade facilitation, with positive consequences, particularly visible in services;

c) By globalization many organizations have proven competence to integrate their activities, particularly research and development, supply, production and marketing worldwide.

As a result of globalization of markets and businesses, the globalization of competition has made its presence felt acutely. Therefore, the consequences of success or failure in competitive national market will not long be limited to that country, but have an important impact on the overall competitiveness of the company, being felt worldwide.

Rush globalization results in an inevitable interpenetration of national economies recovered in the growing importance of the role of trade, investment and foreign capital in gross domestic product (GDP).

Companies that do not meet the criteria imposed by the accelerating pace of globalization, it is conceivable to resist. Conditions in this context are closely related: who is stronger stand, who is faster, more creative, who face in the best manner competition. Challenges and responsibilities are so high, more so in this context that any defect, however small, in a country allows a link in the chain weakening economic interdependence, which in turn may cause a blockage of the entire gear.

As a conclusion to briefly review past issues, businesses today operate in an environment of competition at its best; the "speed" leads posted at all levels, distinguishing between those who adapt and those who fail. We are dealing with borderline

situations where the speed with which firms fail to develop, promote and capitalize on their new products and services is a critical element of competitiveness (Chen, J.M., Tsou, J.C., 2003).

In addition, the life cycle of the supply of products and services is becoming less (Gunasekaran, 2002), which translates into shortening product life cycle, which can seriously affect the company that has provided a relatively reduced to recoup the investment (Seghezzi, 2001).

In conditions of fierce competition in the market, the company is continuously subject to the need for innovation. There are situations where the company is located in the state in which you have to resort to radical changes in the supply of products and services to succeed in achieving superior financial performance (indicators are taken into consideration such as the rate of profit, return on investment, and net updated financial internal rate of return). Moreover, competitive advantage is provided and the ability of the company to be the first to bring to market the product or service requested, subject to the qualification and quality expected (Cole, 2002).

The result of these challenges can have unpleasant consequences if an effort to achieve maximum performance is maintained and correlated.

The effects imposed by the "speed" with which we have achieved "any", "however" significantly reduce: the time that would be spent on new product development, production and delivery times, the possibility that all generated by new circumstances to cause fewer errors or non-compliance, for the supply of goods or services "anyway" is excluded in achieving performance.

This dynamic environment subject to such constraints affecting the efficiency of type PDCA methodology developed to support continuous improvement effort, not to allow systematic completion of the four steps necessary steps. The PDCA assessment methodology, although a very systematic approach, is time and resources consuming. The time is compressed so much that PDCA is no longer able to ensure accuracy. We are faced with a conflict between accuracy even tackling and time in which to reach a conclusion.

Therefore, from a methodological point of view, should be identified new solutions able to solve the conflict without complications or major shortcomings.

Altshuller (Altshuller, 2000) propose to solve this conflict the method TRIZ (www.triz.org) that would allow innovative use of three principles: 1) conducting preliminary actions; 2) replacement of components deemed rigid with others characterized by flexibility; 3) more efficient use of the possible "downtime".

Based on these three new principles, Cole (2002) proposes a new methodology to improve adapted to the new environment defined by dynamism and uncertainty: PTELR, from the phrase: "Probe and learn as alternative approach" – "Probe/Probe and learn as alternative approach". PTELR methodology acronym comes from the initials of the four main phases that compose it: Tests - Test - Evaluate - Learn - Refine.

We recognize the crucial steps in the methodology of PDCA methodology, but carried out in an accelerated pace, with modifications adapted to the "speed" facing humanity globally.

"Probe/Probe and learn" is essentially an accelerated plan PDCA cycle. Unlike the conventional PDCA, probe/prove and learning is a process in which we are confronted with many difficulties on planning, plus those from the stages of implementation and verification. "Probe and learn" is a process of renewal being totally consistent with the ultimate goal of continuous improvement. Rapid learning and accelerate product development is a first requirement in this era in which firms operate increasingly more Internet. Briefly, learning and the process are two of the continuous improvement principles (Cole, 2002).

If planning phase (P) is allocated a minimum of time, execution stage (Do) is allocated a time almost exaggerated somewhat justified by the fact that at this stage develop a "prototype" of the system, tested and evaluated later. Based on lessons learned from the errors identified in the prototype, the process is improved. We notice that PTELR methodology is based on rapid learning, first of errors identified during the evaluation process which takes place in late stages of execution and, secondly, the results obtained by applying iterative methodology.

PTELR methodology assumes that generating error is part of the learning process. Errors are sometimes beneficial, should not always be avoided or suppressed, but rather minimized by careful management of probing and learning processes. Companies should learn to manage errors in the future this step is an important indicator of their success. Contributing to identify errors "useful" without error "enemy", companies enrich their experience and allow progress.

PDCA is a methodology of continuous improvement, innovation PTELR is continuous methodology (Cole, 2002), which is recommended to be used in companies that have already implemented the EFQM model.

PTELR methodology being developed exclusively for accelerated dynamic processes that involve a high level of innovation is not yet sufficiently complete and tidy and is therefore less represented. In conclusion for a highly dynamic process is recommended PTELR methodology.

When it is considered that the process proves mature enough, it is preferable that the methodology to be replaced PTELR FOCUS-PDCA methodology.

3. The Assessment Methodology ADRI – a theoretical approach

Organizational performance can be evaluated using size: approach, implementation, results and

improvement, based on which defined methodology known under the acronym ADRI being used so MBNQA (2006, Criteria for Performance Excellence, Baldrige National Quality Program) American model of organizational excellence and the Australian model of organizational excellence ABEF (2012, Australian Business Excellence Awards 2005, Standards Australia International Ltd.). Acronym ADRI methodology for continuous improvement of organizational performance is named after the initials that define the process: Addresses - Conducting (Implements) - measure results – Improves (2012, Australian Business Excellence Awards 2005, Standards Australia International Ltd.).

ADRI assessment methodology is practical dimensions to browse the steps of: approach, implementation approach (deployment), assessment of effectiveness (measurement results) and improving the approach in all aspects of the organization, through careful examination of each element, trying to find answer appropriate questions each stage:

A. Approach – "thinking and planning":

- What wants to achieve for that element - that is the intention had?
- What goals have been set?
- What strategies, structures and processes have been developed to achieve the intended intention and why would they be chosen?
- What performance indicators, quantitative and qualitative, were designed to track progress?
- How to approach aligns with the principles of Business Excellence model promoted by ABEF or MBNQA?

B. Conducting (Implementation) – "implement and make":

- How were these strategies, structures and processes put into practice?
- How is their implementation throughout the organization?
- To what extent were accepted and incorporated as part of normal operations?
- How to approach aligns with the principles of Business Excellence model promoted by ABEF or MBNQA?

C. Results (measurement results) – "monitoring and evaluation":

- What are the trends of performance indicators for this "product / service"?
- How to compare these results with the best known performance?
- What is how to measure and monitor the results of the principles of Business Excellence model promoted by ABEF or MBNQA?
- To what extent these results can be an indicator of performance for the entire organization?
- How do we know that these results lead to a correct approach and conduct?
- What can be communicated or interpreted and who can use these results?

D. Improvement – "Learning and Adaptation"

- What is the process of analyzing opportunities and that is the effectiveness of the approach and its implementation for "product/service" respectively?
- How to use the results for "product/service" respectively?
- What were the elements learned and to what extent the approach used to improve learning and deployment of business processes?
- How to approach aligns with the principles of Business Excellence model promoted by ABEF or MBNQA?

4. The Assessment Methodology CAE – a theoretical approach

The Canadian model of organizational excellence CAE proposes its own methodology to improve processes associated (Vokurka, R.J., Stading, G.L., Brazeal, J., 2000), which can be regarded like a route to be traveled step by step, the target being represented by achieving excellence in each process or activities addressed.

The CAE methodology as described by Vokurka, comprising in the cycle to improve the process, ten stages:

- The first step is to establish principles of quality. Once established, quality principles will be made known to all parties directly or indirectly concerned, proceedings having their promotion.
- The second stage begins with a review of criteria for measuring the quality of ongoing and applied the necessary changes, if any.
- In the third stage are tests that measure the quality performance in practice of the process at that time considered a "milestone". Based on the findings will be made useful conclusions for the improvement plan.
- The fourth step is important in turn, by the fact that now the improvement plan is developed.
- The fifth step involves spreading the message about the quality that emerges from the improvement plan outlined. Important in this stage is that everyone involved in the process to be put in issue the objectives set, you must accept.
- The sixth stage involves the implementation of the improvement plan.
- The seventh step is to carefully monitor how responsible is implemented the improvement plan.
- Eighth stage is one in which the retesting quality, verify the progress.
- A new phase is to identify successes, including the conclusions made in the previous step, the main purpose being to determine a performance reference standard that is found which subsequently will need to be maintained.
- Any vulnerability surprised, is a weak point in the process chain link, so that necessary corrective plan defines the following as the last step, tenth, if necessary improvements to resume the cycle, but based on another level, maintaining permanent

attention to progress through the continued close monitoring quality at each stage.

The real concern is not confined solely to maintain performance achieved, but the continuous improvement process that repeats the cycle.

3. Conclusions

In order to resume the main ideas discussed from a theoretical point of view in our current research, we can state the following elements:

A. The assessment methodology PTELR:

- PTELR methodology assumes that generating error is part of the learning process.
- Errors are sometimes beneficial, should not always be avoided or suppressed, but rather minimized by careful management of probing and learning processes.
- Companies should learn to manage errors in the future this step is an important indicator of their success. Contributing to identify errors "useful" without error "enemy", companies enrich their experience and allow progress.
- PTELR is continuous methodology, which is recommended to be used in companies that have already implemented the EFQM model.
- PTELR methodology, being developed exclusively for accelerated dynamic processes that involve, a high level of innovation is not yet sufficiently complete and tidy and is therefore less represented. In conclusion for a highly dynamic process is recommended PTELR methodology.

B. The assessment methodology ADRI:

- The organizational performance can be evaluated using size: approach, implementation, results and improvement, based on which defined methodology known under the acronym ADRI being used so MBNQA American model of organizational excellence and the Australian model of organizational excellence ABEF. Acronym ADRI methodology for continuous improvement of organizational performance is named after the initials that define the process: Addresses - Conducting (Implements) - measure results - Improves.
- ADRI assessment methodology is practical dimensions to browse the steps of: approach, implementation approach (deployment), assessment of effectiveness (measurement results) and improving the approach in all aspects of the organization, through careful examination of each element, trying to find answer appropriate questions each stage.

C. The assessment methodology CAE:

- The Canadian organizational excellence proposes its own methodology associated CAE process improvement that can be seen like a route to be travelled step by step, the target being represented by achieving excellence in each process or activities addressed.
- Any vulnerability surprised, is a weak point in the process chain link, so that necessary corrective plan defines the following as the last step, tenth, if necessary improvements to resume the cycle, but based on another level, keeping the attention and careful progress through continuous quality monitoring at each stage. The real concern is not confined solely to maintain performance achieved, but the continuous improvement process that repeats the cycle.

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A PRESENTATION OF THE ROLE PLAYED BY ACCOUNTING IN ECONOMIC DEVELOPMENT

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Abstract

The aim of this paper is to describe and analyze the importance and the role played by accounting in economic development. The accounting system must respond to the needs and expectations of the nations, but, underlining the fact that we are in the era of globalization, it must respect simultaneously the international standards. Considering that the accounting has an essential impact in economy, we intend to present the contributions of the accounting system in the economic development. Accounting does not only provide modalities of control for economic entities, but it can also be useful for the national economic planning.

Keywords: *economic development, accounting, accounting information, international standards, accounting system.*

1. Introduction

The purpose of this article, framed in the area of the economic studies, is to analyse, to underline and to make remarks in what regards the role of accounting in the economic development.

It is considered that in the economic development of countries an important role is played by accounting and that the success of the progress in an economy is influenced by the performance of the accounting systems used at micro and macro-economic level. Starting with the second half of the 20th century a striking feature of the macro-economic theory is "the use of accounting methodology for planning and control at the level of the state – a method of obtaining an over-all picture of economic activity in essential".[1]

The research question of this article is: "Which is the importance of accounting in the economic development?". In order to respond to this question we conducted a qualitative research of the specific literature, research based on several inductive processes of collecting and analyzing data. For centralise the gathered information we used as techniques: documentary research, reviewing the documents, analyze and systematic comparison. We consider it appropriate to start this study with the defining of the concepts analyzed: economic development and accounting.

2. Content

Geneviève Causse affirmed that "the economic and social development of one country is defined in relation to the basic needs of humans and in relation to the characteristics of socio-economic structures of the regarded country"[2].

The economic development must lead to a growth of the people welfare, as a result of the combined and planned actions of government, the private sector and the communitys. "The development of a country is measured with statistical indexes such as income per capita (per person) (GDP), life expectancy, the rate of literacy, et cetera."[3]

In the last century the economic development represented one of the political issues between countries, especially between the socialist and occidental ones.

On the academic research area were conducted many studies regarding the economic development. Rostow and Lewis, were among the first authors that presented models of economic growth, models focusing on the role of investments.

Some authors, like Perroux, make differences between economic growth and economic development. The accent is put on the economic duality of countries - exists simultaneously a traditional sector and a modern sector.

Because were many development models with very different results, the World Bank and the International Monetary Fund - IMF made pressures for the implement "The structural adjustment Program",

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[1] Kenneth Samuel Most, "*The role of accounting in the economic development of the modern state",* (PhD diss., University of Florida, 1970), p. 31.

[2] Bernard Colasse, "*Encycolpédie de Comptabilité, Controle de Gestion et Audit",* (Paris: Ed. Economica, 2009), p: 689.

[3] Chokri Zehri, Asma Abdelbaki, *"Does adoption of international accounting standards promote economic growth in developing countries?"* International Open Journal of Economics, Vol. 1, No. 1, July 2013, p.01; Available online at http://acascipub.com/Journals.php

and new privatization policies and trade liberalization. "These outreach programs for the world market have determined the appearance of a minimum harmonization regarding regulations, including accounting regulations"[4].

The accounting arised from human's need, as an economic being, to represent the own socio-economic reality. "Over time, this form of representation has evolved and individualized in a distinct body of knowledge that was meant to explain the practices used to represent an economic and social reality (an exchange of products, a business)."[5]

The process of defining the accounting as scientific field was a complex one, and was made in close relation with the socio-economic development.

In the economic theory accounting it is defined "as a knowledge tool of economic realities in the form values (utilities) and their sources of origin (resources)"[6]. But, from the perspective of economic development, the accounting must be seen as a large system with multiple dimensions: legal, economic, social and political.

In the current literature many authors have focused on studying the role of accounting in economic development. Researchers like Enthoven (1973), Perera (1989) and Mirghani (1982) suggested that the accounting has a major role in achieving a higher level of the socio-economic development. Wallace (1990) and Susela (1999) considered that it is impossible to describe the exact role of accounting in economic development, this relation being influenced by various factors. M.S. Haque treated in his paper "Restructuring Development theories and Policy" (1999) the role of accounting under conservative, reformist and radical traditions. He concluded that "the exact role of accounting within each national socio-economic development will depend, to a large extend, on the development paradigm that is under consideration"[7].

The conservative tradition of development sustains the idea that the accounting is a technical instrument which can contribute to the effort of achieving some better socio-economic living conditions. Accounting collects, analyzes, interprets data and reports them to the final users, being a help in the economic decision making.

Another role played by accounting is that of attestation. This means that, the Accountant, as a key figure of managerial staff, is an honest person who conducts his own activity in compliance with the laws and with the accepted policies and principles. This role has gained significance after the recent financial scandal Such as Enron (2001), WorldCom (2002), Tyco (2002) and so on. The accounting information provided from the individual economic entities are partially used in the national income accounting, and are "important for assessing the effectiveness of particular national development policies and the performance of the economy as a whole"[8].

A.J.H. Enthoven (1973) considers that the accounting sustains the advancement of the economic development, assuring through its efficient systems the necessary support for extant institutional structures.

From the perspective of the reformist tradition, the accounting has the role of uncovering the illegalities, the unfair economic practices, providing thus the necessary and correct data for making adjustments in structural issues. The published information must satisfy the needs of all users not only for the dominant stakeholders (e.g. shareholding).

Reformists sustain that accounting information must be useful in the process of evaluation of the effects obtained through the particular national policies. The accounting helps in this way in determining whether the promoted policies have the expected results or should be abandoned. In the developing countries the accounting also contributes in establishing relations with international financial institutions, by providing the necessary information for making agreements.

Under the radical tradition, the accounting techniques are represented as unsuitable and perhaps even obstructive in obtaining the national development, government having the most important role.

Accounting has the role to support the government, which is the main actor of economic development, to make decisions at both macro and micro economic levels.

As a preliminary conclusion we can affirm that the accounting meets various roles in economic development depending on the paradigm taked in consideration.

In what regards the role and implication of the accounting at micro and macro-economic levels were made numerous studies.

At macroeconomic level, we assist to an increased interest from the academic society in what regards the usefulness of the accounting methodology in control and planning. But, the use of the accounting for planning purposes is not a recent practice, a rudimentary form being used even in ancient times, in the Nile area and in Ancient Greece.

K. S. Most concluded in 1970 that the "interest in accounting, as evidence for a positive theory of public finance has grown with the availability of

[4] Bernard Colasse, "*Encycolpédie de Comptabilité, Controle de Gestion et Audit",* (Paris: Ed. Economica, 2009), p: 691.

[5] Ion Ionascu, *"Epistemologia contabilitatii",* (Bucuresti, Ed. Economica, 1997), p. 13.

[6] M.L. Frumusanu, A.Breuer, D. Jurchescu, *"The role of accounting information writing and project implementation",* (Annals of the University of Petroşani, Economics, 11(1), 2011), p. 121

[7] Abu Shiraz Rahaman, *"Revisiting the role of accounting in Third World socio-economic development: A critical reflection", (*University of Calagary, Alberta, Canada), p. 2.

[8] Abu Shiraz Rahaman, *"Revisiting the role of accounting in Third World socio-economic development: A critical reflection", (*University of Calagary, Alberta, Canada), p. 4.

national income accounting models"[9]. He also remarked that the researchers became concerned in problems like planning and control, because "as the economic functions of government expand, the technical aspects of finance, of public accounting and of the control of expenditure, assume a new importance".[10]

In the specific literature we founded various and very different opinions referring to the role of accounting at microeconomic level.

Although early theorists from economic field showed a concern in the business and accounting practice, classical and neoclassical economists have not shown a particular interest to accounting methodology.

Contrary to their opinion, G. Causse believes that the accounting plays an important role in economic development of states and that the achievement of development depends on the performances of the accouting systems used.

Accounting, at economic entities level, has the role of:

- providing the necessary data for internal and external users;
- satisfying the informational needs of the management;
- meeting the control needs of the owners;
- supplying the necessary databases for economists and planners.

By publishing superior quality data (relevant, pertinent, reliable, for example) the accounting contributes to the development of financial markets, leading indirectly to a channeling of the funds for investment and development.

The public accounting has an essential function in economy, because by its own principles and procedures, sustains the control activity of public funds, funds which have considerable importance in the economic and social life of developing countries.

The national accounting "aligns the economic terminology, in characteristic quantities (national income, for example) or indicators (investment rate, for example) and presents periodically comprehensive and consistent information on the economic activity of a country"[11], data which represent a basis for economic planning.

In his paper "Développement et comptabilité", G. Causse has submitted as indirect effects of the accounting in economic development, the following:

- improves the functioning of the tax system;

Accounting, by establishing the procedures and by respecting the legal, fiscal reglementations contributes indirectly to the tax collections. This process is often slowed by a poor performance of bookkeeping or even a fraudulent one.

- the rational evaluation of projects;

When one state must evaluate the developing plans proposed by the specialized organisms, it uses techniques that are specific to accounting (cost- benefit analysis, for example). "A faulty accounting can lead to the acceptance of unviable projects or unattractive, which is very damaging in a context of scarce resources".

- support for regional integration;

The actual context of accounting harmonisation facilitates the commercial and financial transactions within a transnational framework.

- the attraction of investors thanks to the transparency of accounts;

The investors need the assurance that their business will bring profit. For estimating the potential earnings, they ask for correct and objective documents, in accordance with the international legal framework. Only a quality accounting system can sustain their exigences.

- increases accountability in the management of funds.

Recently, was raised the question of the growth of the social and economic responsibility of accountants. They need to properly manage the funds which have been assigned to them; because they have a moral responsability for the whole society, in the extent that they administrate public funds.

At the end of the last century we assisted, amid globalisation of the financial markets and trade, to a repositioning of the entire economic environment.

More than 100 countries have adopted the International Accounting Standards and many others expressed the intention to adopt them. "Although in its first version, the IAS/IFRS have mainly targeted and focused on the developed countries, above all, large corporations, a strong diffusion of these standards has been interested among the developing countries"[12].

By adapting accounting regulations with the international standards, countries become more attractive to foreign investors, because they can use similar information in fundamenting the investment decisions. It is also more easily to audit and control the economic entities at the level of the state. In the academic environment, most of the economic studies were conducted in the direction of analyzing the impact of the adoption of IFRS in already developed countries. Only few studies were focused on analyzing the data from developing contries. The conclusions of these studies were very different so it couldn't be established a precise relation between adopting the IFRS and economic growth. In the article called "An

[9] Kenneth Samuel Most, "*The role of accounting in the economic development of the modern state", (*PhD diss., University of Florida, 1970), 34

[10] Ursula K. Hicks, "*Public Finance"* (Cambridge, England, 1955), Preface, p. ix.

[11],[12] Bernard Colasse, "*Encycolpédie de Comptabilité, Controle de Gestion et Audit",* (Paris: Ed. Economica, 2009), p: 695

[12] C. Zehri, A. Abdelbaki, *"Does adoption of international accounting standards promote economic growth in developing countries?"* International Open Journal of Economics, Vol. 1, No. 1, July 2013, p.01; Available online at http://acascipub.com/Journals.php

analysis of the factors affecting the adoption of international accounting standards by developing countries" Zeghal and Mhedhbi showed that in the developing countries with high economic growth the IFRS adoption is well accepted. Contrary to them "Woolley (1998) has observed that, in an Asian context, no significant differences could be noticed in terms of economic growth among IFRS adopting and those applying their local standards."[13] G. Causse sustaind that the "developing countries are not considered stakeholders in standardization institutions, and standards are not established in consideration of the context of these countries."[14]

3. Conclusions

After reviewing of the academic literature, we can conclude that the accounting not only participates directly at the economic development of countries, but also sustains the national economic planning, by providing the data and the specific instruments. As Hoarau and Teller sustained in 2001, that the accounting must be oriented towards ""substantial value", that is to say integrating resources that ensure long term development potential of economic entities and their environment, not only towards "shareholder value""[15].

Another conclusion drawn from this research is that accountants are important persons in the managerial team, because they ensure the credibility of accounting by being honest and by respecting the legislation and the economic and financial reglementations.

The broad role of accounting is also highlighted by the importance of accounting information in the economic environment. The information satisfy the needs of internal and external users and are also useful in the process of evaluation of the results obtained through the particular national policies. The accounting, by publishing good-quality data, can promote financial stability, facilitate the absorption of domestic and international funds, create a safe investment environment and foster investor confidence.

"A strong and internationally comparable reporting system facilitates international flows of financial resources while at the same time helping to reduce corruption and mismanagement of resources"[16].

For all that, it is impossible to sustain that accounting has only certain roles in economic development. Its involvement in economy is very various, being influenced by the characteristics of the considered countries, and it may differ according to the dominant paradigm.

The accounting is also used at microeconomic level as an aid in the management of economic entities.

So, we can affirm with conviction that the accounting has an essential role in the economic development.

As a future direction for research we find it appropriate to investigate which are the characteristics that accounting must meet to be a support for economic development. We also find it appropriate to study how and if the economic development of the states influences the evolution of accounting.

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[13] C. Zehri, A. Abdelbaki, *"Does adoption of international accounting standards promote economic growth in developing countries?"* International Open Journal of Economics, Vol. 1, No. 1, July 2013, p.04; Available online at http://acascipub.com/Journals.php

[14] Bernard Colasse, "*Encycolpédie de Comptabilité, Controle de Gestion et Audit",* (Paris: Ed. Economica, 2009), p: 702

[16] Bernard Colasse, "*Encycolpédie de Comptabilité, Controle de Gestion et Audit",* (Paris: Ed. Economica, 2009), p: 702

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THE IMPACT OF BASEL III AGREEMENT ON THE ROMANIAN BANKING SYSTEM

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Abstract

Basel III Agreement is a set of regulations on the banking system, which aims to ensure the system stability, by applying new standards on the capital level and on the liquidity level adequacy and also, on the reduction of banking risk, implied by the financial crisis. Romanian commercial banks will be forced, by the Basel III Agreement implementation, to reduce the risk of capital, using the balance sheet restructuring and by improving the capital quality. The aim of this paper is to analyze the impact of implementing new capital requirements, stipulated by Basel III Agreement, on the Romanian commercial banks, how they will react to the new standards and the decisions they will be able to adopt to respect the standards.

Keywords: *Basel III Agreement, liquidity level, commercial banks, capital standards, leverage ratio.*

1. Introduction

The stability and solvency of the banking system are a precondition for proper functioning of the financial system. In order to adapt and increase the flexibility of the current monitoring system, the authorities responsible for international banking regulation have initiated a reform process of calculating necessary capital for risk coverage, through the Basel Committee.

There are many different kinds of risk against which bank's managements need to guard. The major risk is credit risk, which means the risk of counterparty failure, but there are many other kinds of risk which could affect the bank's results, such as investment risk, interest rate risk, exchange risk or concentration risk.

Global economic and financial crises have demostrated numerous weaknesses in banks' risk management practices. Many banks and financial institutions did not have enough capital and the capital which they had, it was not good enough to cover looses suffered. In response, Basel Committee on Banking Supervision (BCBS) has collectively reached an agreement on reforms to „strengthen global capital and liquidity rules with the goal of promoting a more resilient banking sector", which is being referred to as „Basel III".

Basel III focuses on three main areas – capital, liquidity and systemic risk, with their influences on the bank's activities.

The Basel Committee reforms refer both to micro prudential and macro prudential measures[1] and improves a new framework for risk management at the level of banking system.

Thus, at the micro level, Basel III regulates capital adequacy, introducing a higher quality of capital, improves the coverage of the risks, especially related to capital market activities, requires much higher levels of capital to absorb the types of losses associated with crises and a global liquidity standard to supplement the capital regulations.

In addition, the macro prudential elements are: a leverage ratio (like a new element for limiting the volume of debt in the banking system in boom periods), new measures to raise capital levels or drown it down in stress periods to reduce procyclicality and, for global systemic banks, a higher capacity of loss absorbency.

2. Basel III Agreement Requirements

Basel III objectives are broken down in three parts:

- Capital reform
- Liquidity standards
- Systemic risk and interconnectedness

1. Capital reform refers to quality, consistency and transparency of capital base, the risk coverage and leverage ratio. Basel III Agreement requires banks to hold 4,5% of common equity and 6% of Tier I capital. Also, in this part, Basel III introduced "additional capital buffers":

- A "mandatory capital conservation buffer" of 2,5%
- A "discretionary counter - cyclical buffer", which would allow national regulators to require up to another 2,5% of capital during periods of high credit growth.

Capital conservation buffer – is intended to ensure that institutions are able to absorb losses in stress periods lasting for a number of years. This kind of capital buffer solves the regulatory paradox after which higher minimum capital should not be used to absorb losses falling below the minimum requirements, leading to a withdrawal of the banking

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[1] Walter, S. (2010),Basel III and Financial Stability, Speech at the 5th Biennial Conference on Risk Management and Supervision, Financial Stability Institute, Bank for International Settlements, Basel, 2010, http://www.bis.org/speeches/sp101109a.htm

license. With the introduced capital buffers and the associated distribution constraints falling below the requirements, a "softer" regulatory tool is introduced.[2]

The Basel III rules have been implemented in the EU from the beginning of 2014.

Capital requirements fall under the provisions of CRD IV/CRR regulatory package, starting with 2014. These requirements are applicable to all EU member states and establish standardized and uniform rules for covering the risk involved in banking activities. Thus, credit institutions have to respect the own funds requirements:

Total capital of at least 8% of RWA (Risk – weighted assets);

Tier 1 capital of at least 6% of RWA;

CET 1 (Common Equity Tier 1) capital of at least 4,5% of RWA.

The European Union capital adequacy rules recognize two layers of capital – Tier 1 and Tier 2. Criteria for these instruments are contained in CRR, which will have direct application in each UE member state.

Tier 1 includes only permanent shareholders' equity (common stocks) and disclosed reserves (created or increased by appropriations of retained earnings or other surplus, e.g. share premiums, retained profit, general reserves and legal reserves, and also include general funds – such as a fund for general banking risk in certain EC countries)[3]

Tier 2 under Basel III includes: undisclosed reserves, revaluation reserves, general provisions/general loan-loss reserves and hybrid (debt/equity) capital instruments with a maturity of not less than five years.

Tier 1 can be subdivided into CET 1 (Common Equity Tier 1) and AT 1 (Additional Tier 1).

The capital adequacy indicators in the Romanian banking system remained at high levels, which followed an upward course (Table no.1)

Table no. 1 - Own Funds and Capital Adequacy Indicators *(Percent)*

	2013-Jun.	2013-Dec	2014-Jun
Percent in total own funds	**100**	**100**	**100**
Tier 1 capital	**92,5**	**91,1**	**87,7**
Tier 2 capital	**7,5**	**8,9**	**12,3**
Total capital ratio (a) (› 8%)	**14,7**	**15,5**	**17,0**
Tier 1 capital ratio (›6%)	**13,6**	**14,1**	**14,9**

Source: NBR

(a) – Total capital ratio refers to own funds of the institution, calculated as a percentage of total risk exposure amount. This indicator stood at 17 percent in June 2014, above the requiremqnt level of 8 percent.

(b)–Tier 1 capital ratio is calculated as a percent of total risk exposure value of an institution, and for Romanian banks recorded a high level of 14,9 percent in June 2014.

In the Romanian banking system, the quality of own funds it was always maintained at a high level, complying the requirements set by the CRD IV/CRR regulatory package. The own fund of banks, Romanian legal entities rose by about 13 percent in June 2014 – June 2014 period, as a result of the 20 percent decline of the total volume of prudential filters regulated at national level, in 2014, according to CRD IV regulatory framework, as a result of the capital increases made by shareholders in 2013 and 2014, and of course as an answer of the improvement in the financial performance of banks, during 2014.

Counter - cyclical buffer allows national authorities, like national banks, to require up to an additional 2,5% of capital during periods of high credit growth. National authorities will pre-announce the decision to raise the level of the buffer by up to 12 months, but the decision to decrease the level of the buffer will take effect immediately.

Banks may be able to use in downturns the flexibility provided by the capital conservation buffer, but in the same time, they may prefer to reduce credit extension rather than being subject to restrictions on capital distributions (dividends, share repurchases and especially discretionary bonus payments to staff) if they do not meet the additional capital requirements.[4]

The new CRD IV/CRR regulatory package supplements the set of capital adequacy indicators calculated based on the total risk exposure amount via the introduction of the leverage ratio.This ratio measures the risk associated with funding sources, other than equity. This is a simple and transparent indicator of the assessment risk which is not the subject to modeling errors and quantifying measures of asset risk associated.

Leverage ratio is defined as:

$$Leverage\ ratio = \frac{Total\ assets}{Total\ equity + Subordinated\ debt}$$

The leverage ratio is expressed as a percentage, being calculated as an institution's capital measure (Tier 1capital) divided by that institution's total exposure measure (the sum of the exposure values of all assets and off-balance sheet items not deducted when determining the capital measure indicator). The exposure value of an asset is its accounting value, remaining after specific credit risk adjustments;

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additional regulated value adjustments and other own funds reductions related to the assets item have been applied.

A higher value of this ratio means a higher vunerability to negative shocks which lower the value of assets or financing liquidity. An excessive leverage could increase the dependency of a bank regardind the potentially volatile short-term funding sources and to expose it to the risk of increasing funding liquidity.[5]

The leverage ratio was initially introduced as an additional feature, the implementation of which is flexibly decided by supervisory authorities and is expected to become a mandatory measure starting with 2018.

For the Romanian banking system, the leverage ratio level stood at 8% (at the end of 2013) and 7,9% (in June 2014), being calculated based on a methodology established by the NBR, as a ratio of Tier 1 capital to average bank assets at accounting value. These values registered by the leverage ratio reflecting the high capitalization of bank assets at the accounting value, which is a common feature of the countries in the region. (For the banks from France, Italy and Nederlands, which have subsidiaries in Romania, the level of this indicator stood at roughly 5 percent.

2. Basel III introduced new **liquidity standards**, actually 2 required liquidity ratios[6], which promote the resilience of a banking sector:

LCR – Liquidity Coverage Ratio

NSFR – Net Stable Funding Ratio

LCR was published in December 2010 and refers of banks liquidity risk profile. In this way, Basel Committee requires a bank to hold sufficient high-quality liquid assets to cover its total net cash outflows over 30 days. The LCR will be introduced as planned on 1st January 2015, but the minimum requirement will start at 60%, rising in equal annual stages of 10 pp. to reach 100% to 1st January 2019. This plan of introducing LCR (shown below, Table no.2), is made to ensure the ongoing financing of economic activity.

Table no.2 – The plan of introducing LCR

	2015	2016	2017	2018	2019
Minimum LCR requirements	**60 %**	**70 %**	**80 %**	**90 %**	**100 %**

Source: NBR

The Liquidity Coverage Ratio (LCR) requires banks to have sufficient high-quality liquid assets to withstand a 30 days stressed funding scenario that is specified by supervisors.

$$LCR = \frac{Stock\ of\ HQLA}{Total\ net\ outflows\ over\ the\ next\ 30\ calendar\ days} \geq 100\ \%$$

"HQLA" – assets should be liquid in markets during a time of stress and, ideally, be central bank eligible.

Assets are considered to be HQLA if they can be easily and immediately converted into cash at little or no loss of value.

The LCR standard and monitoring tools should be applied to all internationally active banks on a consolidated basis, but may be used for other banks and on any subset of entities of internationally active banks as well to ensure greater consistency and a level playing field between domestic and cross-border banks. The LCR standard and monitoring tools should be applied consistently wherever they are applied.

Net Stable Funding Ratio (NSFR) is a longer – term structural ratio, designed to address liquidity mismatches. It covers the entire balance sheet and provides incentives for banks to use stable sources of funding.

$$NSFR = \frac{Available\ funding}{Required\ funding} \geq 100\% \quad [3]$$

The NSFR has a time horizon of one year and has been developed to provide a sustainable maturity structure of assets and liabilities.

Stable funding means all those types of equity and liabilities expected to be reliable sources of the funds under an extended stress scenario of one year.

This measure implies taking into account certain criteria:

- Notation different profiles of assets and association with their recommended levels of stable resources (depending on their risk)
- New weighting of assets requiring a certain level of funding (according to their risk):
- Between 0% and 5% for cash accounts and government securities
- Between 65% and 85% for personal loans and mortgages
- 100% for all other assets

This weighting can be interpreted as a level at which an asset should be financed with stable resources.

New weighting in the quality of financing (according to their stability):

- 100% for Common Equity
- 80% to 90% for customer deposits
- 50% for loans with low collateral or unsecured

[5] Bordeleau, E., Crowford, A. and Graham, C. – Regulatory Constraints of Bank Leverage: Issues and Lessons from the Canadian Experience, No. 15, 2009, Bank of Canada

[6] http://www.bis.org/publ/bcbs189.pdf

This weighting can be interpreted as maximum levels at which these resources can finance an asset. This should result in getting more diversified funding by the banks so as not to be dependent on a certain type of resource.

Banks will have to assess the stability of their balance sheet resources as a percentage and the need for funding for individual assets.

Accordingly to the agency theory, the optimal financial structure of the capital results from the compromise between various funding options (equity, debts and hybrid securities) that allow the reconciliation of conflicts of interests between the capital suppliers an managers.[7]

The requirements of Basel III Agreement related on liquidity risk are expected to have impact both upon the internal process in the banks as well as upon the business model.

Organizational impact means[8]: external reporting supplemented by the new liquidity ratios; preparation of a cash flow-based liquidity gap profile; monitoring tools – regular reporting to the supervisory authorities.

On the other hand, the impact of liquidity risk requirements on the business model will be reflected by longer maturities and higher stability of liabilities, as well as reduced term transformation and higher costs for refinancing.

3. Systemic risk and interconnectedness. Systemic risk was a major contributor to the financial crisis in 2008. It can be defined as financial system instability and might be very dangerous, because "a failure of one financial business may infect other, otherwise healthy businesses"[9]. For this reason, the National Bank of Romania is currently considering the possibility of introducing a measure of quantify financial market stress, because isolated vulnerabilities in certain sectors may negatively affect, via contagion effects, the performance of the entire system.

3. Conclusions

If Basel I and Basel II agreements, by their requirements, contributed to a better capitalization of banks, after that it was felt the need to introduce more complex prudential policies, which have led to the decision to develop the new Basel III Agreement.

The new rules introduced by implementing Basel III, will put huge pressure on small banks, in particular in terms of the calculation of the risk. Thus, they will no longer be allowed to grant loans as easily, and one of the categories of customers at risk to lose the SMEs. Under the conditions in which small banks will become inaccessible to the SMEs in search of financing, they will move toward strong institutions. But, as they have not looked very pleased in the last period in to take risks, they will try to do it, most likely, to make a natural selection to customers by increasing the cost of loans.

Thus, the implementation of Basel III will have dramatic effects in a market already plagued by limitations on crediting. Basel III is a framing device on the international financial institutions for a set of minimum regulatory requirements, in particular regarding capital, liquidity and leverage. This framework, Basel III, is designed to strengthen the resilience of banks and for the entire banking system, due to the hard lessons learned from the recent financial crisis, having revealed that many banks in the advanced economies were undercapitalized, illiquid and over leveraged. In the same time, "measurement of bank performance involve analysis of both quantitative and especially qualitative indicators, primarily aimed to determinate the soundness of the bank, the extent of its exposure to the various risk categories and especially its level of efficiency."[10]

Basel III Agreement is seen both as an opportunity and as a challenge for banks. This regulatory framework can provide a solid foundation for the next developments undertaken in the banking sector and ensure that excesses made in the past can be avoided. Basel III Agreement will change the way banks manage their risks, but in the same time, the equity management, too.

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THE ACCOUNTANT PROFESSIONAL AS A CURRENT USER OF PROFESSIONAL JUDGMENT

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Abstract

Professional judgment governs the evolution of a process in the absence of any relevant procedural regulations. In this paper we will describe both the building components of the professional judgment and the accounting professional as a practitioner whom use most often the expression of the above mentioned type of judgment.

Keywords: *professional judgment, practitioners, economics, decision making, financial statement.*

1. Introduction

Within a company, professionals are required to get involved in activities that do not always provide predictable trajectories. Their job's specifics impose the professionals to assume responsibilities stated in their job description as also responsibilities that are forming along the situations get more particular. At this point, the professionals assume the exercitation of decisions starting from the idea that a package of information, of hypothesis and demonstrations can be preferred to a certain situation, not generalized instead of an absolute ideological package. In order to differentiate these two categories, the action of a rigorous formulated professional judgment is required.

Professionalism (professional consciousness) is complex, discretionary, requires practical and theoretical knowledge, qualification and also the acknowledgment that people without experience cannot understand, fully read and evaluate at a high level the results of the practiced labor.[1]

Professional practice, without a strong judgment to stand as foundation cannot be labeled more than a technical labor.[2]

Professionals use the professional judgment as a fundamental logical form comprising of a correlated stream of arguments[3]. According to prof. David Tripp, the professional judgment suits into 4 shapes:

- Practical (that type of judgment almost instantly formulated)
- Diagnostic (generalized judgment within the professional practice)
- Reflective (judgment of evaluation and justifying nature that emerges when the practitioner reflects in detail over its own actions and effects, weighting all alternative strategies)
- Critical (judgment that cumulates both a critical and reflexive attitude and also the diagnostic profess of the professional practices)

Prof. Della Fish and Prof. Colin Coles are proposing the following classification of professional judgment[4]:

- intuitive

– emerges in the situations that require an immediate reaction and supposes the quick establishment of the working instruments and the required skills needed to resolve the issue that emerged. It does not involve a preexisting judgment, this type of understanding being labeled usually as technical of "instrumental"[5].

- strategic

– has an urgent character that supposes a wide spectrum of possibilities.6 It is based on practices that are highlighted in well established procedures.

- reflective

– seeks situations that emerge in practice along with a high level of uncertainty. This category implies a profound thinking in the solving process, a cumulus of personal thinking process, of own skills.

- deliberative

– it is described by the moral character of decisions and focuses both the entity's interests and also the individual's.

Professionals see these practices in these circumstances as being moral concurrent ideas that can generate conflicts and dilemmas hard to solve[7].

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[1] Freidson, Elliot. "*Professionalism reborn: Theory, prophecy, and policy"*. University of Chicago Press, 1994.

[2] Coles, Colin, *"Developing professional judgment."* Journal of Continuing Education in the Health Professions 22.1 (2002): 3-10., p 5.

[3] Tripp, David, "*Critical Incidents in Teaching"* (Classic Edition): Developing Professional Judgement., p. 137, Routledge, 2011.

[4] Coles, Colin. *"Developing professional judgment."* Journal of Continuing Education in the Health Professions 22.1 (2002): 3-10., p 5.

[5] Carr, Wilfred, *"For education: towards critical educational inquiry*". p 59, Buckingham, UK: The Open University, 1995.

[6] Grundy, Shirley, *"Curriculum: product or praxis?"*, p 280, Brighton, UK: Falmer, 1987.

[7] Fish, Della, Coles, Colin. *"Developing professional judgment in health care: learning through the critical appreciation of practice*", p. 280, Oxford, UK: Butterworth-Heinemann, 1998.

2. Accounting professionals.

Forming the accounting type of professional judgment at a global level is based, accordingly to the guide issued by the Institute of Authorized Accountant of Scotland (ICAS), on several principles[8]:

- Principle 1: Knowledge gathering and analysis

An accounting professional judgment can be issued only after the collection and analysis of data. In order to better understand the purposes, legal framework and economic substance of the transactions, the accounting practitioner must go through several stages:

- Reading the relevant documentation
- Taking into consideration the cash-flows expected from the transaction and the impact on the entity's cash.
- Establishing the purpose to be pursued on each part involved in the transaction in order to understand the economical reality
- The identification of affiliated transactions that must be performed in order to establish the economical substance
- Taking into consideration the uncertainties and the possible range of result from the transaction
- Identifying the effect of the concluded transaction on the assets and liabilities of the entity and also over the operational capacities.

- Principle 2: Assessment of accounting guidance

An accounting professional judgment can be issued only within an accounting applicable framework with extended applicability

In the absence of relevant standards or in the case of a conflict generated by the notions found in more than one standard the following actions are in place:

- Consultation of the conceptual framework for the general principles regarding the definition, recognition and measurement of assets, liabilities, revenues and expenses;
- Consultation of law regulated accounting documents for additional guidance;
- Establishing the existence of general valid accounting practice.

- Principle 3: Process for making a judgement

An accounting professional judgment can be issued only after certain demarches with an equitable character, high accurate and concrete have been carried out taking into consideration the following aspects:

- Taking into consideration and evaluate the pallet of alternative accounting methods;
- Allocation of sufficient time for consulting the experts;
- Elimination of own conflicts of interest, of bias and misconceptions in order to ensure an objective judgment;
- Organization of meetings designed to support the decision taking with professional advisors, auditors and other personnel that have the ability to support the decision making.
- Initiation of approval procedures for the judgments made by superior forums.
- Identifying the time intervals at the end of which a reevaluation of the professional judgment is required. For example: at the end of the financial period or before concluding new agreements.

- Principle 4: Documentation of judgment

An accounting professional judgment implies proper documentation.

The entity must provide the following documentation regarding the accounting professional judgment:

- Presentation of the transaction;
- The accounting laws to be taken into consideration;
- Professional judgment used – final decision;
- Time given for taking the decision;
- Presentation of all alternative options and justification of the final option taken;
- Expressing, if applicable, the uncertainty of the decisional process;
- The sensitivity of the accounting professional judgment to changes that can occur in hypothesis or circumstances related to the transaction;
- The demarche carried on prior to a decision take: highlighting the sources used, discussions carried forwards (when, where and with whom), noting the person/entity that takes the decision and the date at which this process ended;
- Approval of demarches regarding the decisions: who approved and when;
- When it is necessary the reevaluation of the professional judgment and in what period.
- Presentation of the closeout regarding accounting significant judgment.

Objectivity – as a fundamental principle of ethics in the accounting profession states that an accounting professional must carry its activity impartially by elimination of all intrusions regarding misjudgments, bias, conflicts of interest or compatibility, confusions of unwanted influences that could intervene in the professional or business judgments. [9]

The International Accounting Standard (IAS) 1 presentation of financial statements mentions the use of professional judgment in the following situations:

- For the determination of the best presentation method of the information regarding the name of the reporting entity, the way the financial statements are referring to a group of entities of an individual entity,

[8] "*A Professional Judgement Framework for Financial Reporting - An international guide for preparers, auditors, regulators and standard setters"* published by the Technical Policy & Services Board of The Institute of Chartered Accountants of Scotland (ICAS), p. 8, August 2012.

[9] *"Codul Etic Naţional al Profesioniştilor Contabili*", Ediţia a V-a, revizuită şi adăugită în conformitate cu Codul Etic Internaţional al Profesioniştilor Contabili elaborat de IFAC, revizuit în iulie 2009, Colecţia Doctrină – Deontologie, Editura CECCAR, Bucureşti, 2011.

date of the balance sheet or the period regarding the issue of the financial statements, the presentation currency and de decimals used for the amounts stated in the financial statements. „For example, when an entity presents the financial statements electronically, separate pages are not always used; an entity then presents the above items to ensure that the information included in the financial statements can be understood. An entity often makes financial statements more understandable by presenting information in thousands or millions of units of the presentation currency. This is acceptable as long as the entity discloses the level of rounding and does not omit material information." [10]

- In the eventuality of separate presentation of additional elements, the professional judgments is based on "the nature and liquidity of assets; the function of assets within the entity; and the amounts, nature and timing of liabilities. [11]
- In the classification by destination of expenses when an entity presents separately cost of sales from the other expenses. [12]
- An entity has the obligation the present the summary of its significant accounting policies or in the other notes the professional judgment made by the management in applying the accounting policies and the effects it has over the amounts stated in the financial statements. [13]
- In the application of an entity's accounting policies, the management uses professional judgment in order to determine: „(a) whether financial assets are held-to-maturity investments; (b) when substantially all the significant risks and rewards of ownership of financial assets and lease assets are transferred to other entities; (c) whether, in substance, particular sales of goods are financing arrangements and therefore do not give rise to revenue; and (d) whether the substance of the relationship between the entity and a special purpose entity indicates that the entity controls the special purpose entity." [14]
- The information regarding the main hypothesis regarding the following periods and regarding other sources of uncertainty over the estimates at the balance sheet's date require subjective professional judgment made by the management of the entity.[15]

IAS 8 Accounting Policies, Changes in Accounting Estimates and Errors mentions the use of professional judgment in the following situations:

- In the absence of a standard or applicable interpretation in a specific manner over a transaction or another event, the management must use professional judgment in order to issue and apply an accounting policy that contains viable and relevant information that comply with the provisions and guidance of the standards, with definitions, criteria of recognition etc. from the general framework.[16]
- For the estimation of elements from the financial statement that cannot be evaluated with accuracy due to inherent commercial activity's uncertainty. The estimation are based on information available at the latest. [17]
- IAS 16 Property, Plant and Equipment mentions the used of professional judgment in the following situation:
- In the recognition of fixed assets in accordance with the specific circumstances of an entity (in some cases it will be appropriate to aggregate insignificant individual elements, such as molds, measure and control equipment, tools and other similar elements and to apply recognition criteria of the aggregated value of the above mentioned[18])
- In estimation of useful lives of assets, the professional judgment is applied in accordance with the experience of the entity with a similar asset. „The useful life of an asset is defined in terms of the asset's expected utility to the entity. The asset management policy of the entity may involve the disposal of assets after a specified time or after consumption of a specified proportion of the future economic benefits embodied in the asset. Therefore, the useful life of an asset may be shorter than its economic life. The estimation of the useful life of the asset is a matter of judgement based on the experience of the entity with similar assets." [19]
- When choosing the depreciation methods and in the useful life assessment of assets. „Therefore, disclosure of the methods adopted and the estimated useful lives or depreciation rates provides users of financial statements with information that allows them to review the policies selected by management and enables comparisons to be made with other entities." [20]

IAS 21 The Effects of Changes in Foreign Exchange Rates mentions the use of professional judgment in determining the functional currency that presents the most accurate the economic effects of events, transactions and common conditions when this currency is not obvious. [21]

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[10] International Accounting Standard 1- Presentation of Financial Statements, art. 47 and art. 48, p. 7.
[11] International Accounting Standard 1- Presentation of Financial Statements, art. 72, p. 11.
[12] International Accounting Standard 1- Presentation of Financial Statements, art. 92, p. 14.
[13] International Accounting Standard 1- Presentation of Financial Statements, art. 113, p 17.
[14] International Accounting Standard 1- Presentation of Financial Statements, art. 114, p. 17.
[15] International Accounting Standard 1- Presentation of Financial Statements, art. 118, p. 18.
[16] International Accounting Standard 8 - Accounting Policies, Changes in Accounting Estimates and Errors, art. 10 si 11, p. 37.
[17] International Accounting Standard 8 - Accounting Policies, Changes in Accounting Estimates and Errors, art. 32, p. 41.
[18] Delia Mircea, coordonator editorial al Contzilla.ro cu certificare ACCA**, "***Utilizarea rationamentului profesional in contabilitate- 3 situatii",* http://www.contzilla.ro/utilizarea-rationamentului-professional-in-contabilitate-3-situatii/, accesed on February 12, 2015.
[19] International Accounting Standard 16 - Property, Plant and Equipment, art. 57, p. 86.
[20] International Accounting Standard 16 - Property, Plant and Equipment, art. 75, p. 89.
[21] International Accounting Standard 21 - The Effects of Changes in Foreign Exchange Rates, art. 12, p. 152.

IAS 23 Borrowing Costs mentions the use of professional judgment in determining the borrowing costs that can be directly attributable to an asset with a long production cycle asset[22].

IAS 29 Financial Reporting in Hyperinflationary Economies refers to the use of professional judgment at the time it is needed to restate the financial statements. Professional judgment is applied also in restating the financial statements along the involvement of other procedures. [23]

IAS 34 Interim Financial Reporting mentions the use of professional judgment in the evaluation of the materiality threshold "to ensure that an interim financial report includes all information that is relevant to understanding an entity's financial position and performance during the interim period." [24]

According to IAS 36 Impairment of Assets the identification of an asset's cash-generating unit involves use of the professional judgement." [25]

According to IAS 37 Provisions, Contingent Liabilities and Contingent Assets the professional judgment of the entity's management determines the estimates of results and financial effects along with the support of independent experts and with the experience of similar transactions. [26]

IAS 38 Intangible Assets refers to the use of professional judgment in establishing whether an asset that comprises both tangible and intangible elements is a tangible or intangible asset. „For example, computer software for a computer-controlled machine tool that cannot operate without that specific software is an integral part of the related hardware and it is treated as property, plant and equipment. The same applies to the operating system of a computer. When the software is not an integral part of the related hardware, computer software is treated as an intangible asset." [27]

IAS 39 Financial Instruments: Recognition and Measurement states that „in some cases the observable data required to estimate the amount of an impairment loss on a financial asset may be limited or no longer fully relevant to current circumstances. For example, this may be the case when a borrower is in financial difficulties and there are few available historical data relating to similar borrowers. In such cases, an entity uses its experienced judgement to estimate the amount of any impairment loss. Similarly an entity uses its experienced judgement to adjust observable data for a group of financial assets to reflect current circumstances"[28]

IAS 40 Investment Property mentions that professional judgment is used in assessing whether a real-estate property is a real-estate investment or not (the entities establish the criteria) and in order to assess which of the real-estate properties meet the conditions to be restated as real-estate investment. [29]

3. Conclusions

"In a market economy in which competition is the main selection criterion for companies, decision taking concerning the financing sources is an extremely difficult process."[30]

The professional judgments will always influence the decisional mechanism both by the conjunctions created and by returns "that means that there is a difference in size and hence a difference in importance"[31] when the future evolution of companies is taken into consideration.

Accounting professionals represent one of the most important categories of practitioners due to the fact that their professional judgments serve as material support for the activities carried forward by financial analyst, auditors and other categories of general practitioners.

Professional judgment is a concept that completes the activity of all practitioners.

This type of judgment appears at helping element of high importance in the decision-making process.

The intervention of this type of judgment represents and extension of decision taking power of the practitioner, the practitioner having the possibility to highlight his main native skills or practice accumulated skills.

The professional accountant used all categories of material elements transposed in laws, specific Codes, job descriptions, internal regulations, procedures; in the absence of such express regulations the professional judgment is used as a principal or auxiliary instrument.

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[23] International Accounting Standard 29, art. 10, p. 189.
[24] International Accounting Standard 34 - Interim Financial Reporting, art. 25, p. 241.
[25] International Accounting Standard 36 - Impairment of Assets, art. 68, p. 256.
[26] International Accounting Standard 37 - Provisions, Contingent Liabilities and Contingent Assets, art. 38, p. 279.
[27] International Accounting Standard 38 - Intangible Assets, art. 4.
[28] International Accounting Standard 39 - Financial Instruments: Recognition and Measurement, art. 62.
[29] International Accounting Standard 40 - Investment Property, art. 14.
[30] Sudacevschi, Mihaela, *"Financing Sources for Companies and the Implications on Their Image."*, Lex ET Scientia International Journal (LESIJ) XVI-1 (2009): 324-331.
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EXPLAINING POWER OVER THE INVESTEE - THE RIGHTS THAT GIVE THE POSSIBILITY TO DIRECTS THE INVESTEE`S RELEVANT ACTIVITIES

Adrian ŞTEFAN-DUICU[*]

Abstract

The links created on all levels between the parent company and its subsidiaries have generated along time debates regarding the subterfugii to the regulations applicable in the audit activity in order to protect the above mentioned entities. Throughout this paper we will progressively describe the pylons that represent the foundation of the regulations subject to the audit activity in this organizational environment.

Keywords: *financial statements, subsidiaries, audit activity, regulations, interests.*

1. Introduction

Power arises from rights. Sometimes assessing power is straightforward, such as when power over an investee is obtained directly and solely from the voting rights granted by equity instruments such as shares, and can be assessed by considering the voting rights from those shareholdings. In other cases, the assessment will be more complex and require more than one factor to be considered, for example when power results from one or more contractual arrangements

In the consolidation process, one of the most significant steps is the determination of the power the investor has over the investee.

A thorough analysis must be performed on all aspects of the control and weather the investor has or doesn't the power to direct the investee's relevant activities. An investor with the current ability to direct the relevant activities has power even if its rights to direct have yet to be exercised.

Evidence that the investor has been directing relevant activities can help determine whether the investor has power, but such evidence is not, in itself, conclusive in determining whether the investor has power over an investee.

2. Attention over „the possibility to direct" and not to effectively apply the power

The power rezides in rights. To have power over the investee, an investor needs, to have rights that provide the posibility to direct the relevant activties of the investee.

Therefore, establishment of the power is made on the investor's posibility to direct the relevant activities of the investee. The International Financial Standard Consolidated Financial Statements - IFRS 10 does not require the investor to use its power. An investor that has the posibility to direct the relevant activities of another company has power over it even though this power is not exercised.

Moreover, the evidence that states an investor has directed the relevant of an investee can aid in determining the investor has or hasnt' power, but this proof alone is not the determining factor in assesing that the investor has the power.

An investor can have the power over an investee even if other entities have rights that provide them the ability to direct the relevant activities (eg. Another entity has a significant influence).

3. Rights that give an investor power over an investee

The rights that can give an investor power can differ between investees.[1] Different types of rights that, either individually or in combination, can give an investor power over an investee include, but are not limited to:

- Rights in the form of voting rights (or pontential voting rights);
- Right to appoint, reappoint or remove key members of the investee's management personnel who have the rights to direct the relevant activities;
- Right to appoint, reappoint or remove another entity that directs the relevant activities;
- Rights to constrain the investee to intro or veto in matters that can benefit the investor;
- Other rights (such as rights written in management agreements) that give the owner the posibility to direct relevant activites.

4. Evidence to be taken into consideration when the assessing is difficult in matters of deteming wether the rights of an investor are enough or not in order to provide power

When there is difficult to asses whether an investor's rights are sufficient to provide power, the

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[1] The International Financial Standard Consolidated Financial Statements - IFRS 10:B14.

investor should consider evidence regarding whether it has the practical ability to unilaterally direct the relevant activities. Also, considerations must be given to whether:

- the investor can, without having the contractual right to do so, appoint or approve the investee's key management personnel who have the ability to direct the relevant activities;
- the investor can, without having the contractual right to do so, direct the investee to enter into, or can veto any changes to, significant transactions for the benefit of the investor;
- the investee's key management personnel are related parties of the investor (e.g. the chief executive officer of the investee and the chief executive officer of the investor are the same person); and/or
- the majority of the members of the investee's governing body are related parties of the investor.

In some cases there can be indications that the investor has a special relationship with the investee, suggesting that the investor has more than a passive interest in the investee.

The existence of any individual indicator or a particular combination of indicators does not necessarily mean that the power criteria are met. However, having more than a passive interest in the investee indicates that the investor has other related rights enough to give it power or provide evidence of existing power over the investee. In combinations with other rights, the following may indicate that the investor has power over the investee[2]:

- the investee's key management personnel who have the ability to direct the relevant activities are current or previous employees of the investor;
- the investee's operations are dependent on the investor, such as in the following situations:
  - the investee depends on the investor to fund a significant portion of its operations;
  - the investor guarantees a significant portion of the investee's obligations;
  - the investee depends on the investor for critical services, technology, supplies or raw materials;
  - the investor controls assets such as licenses or trademarks that are critical to the investee's operations; and/or;
  - the investee depends on the investor for key management personnel, such as when the investor's personnel have specialized knowledge of the investee's operations;
- a significant portion of the investee's activities either involve or are conducted on behalf of the investor; and/or;
- the investor's exposure or rights in terms of returns from its involvement with the investee is disproportionately greater than its voting or other similar rights. For example, there may be a situation in which an investor is entitled or exposed to more than half of the returns of the investee but holds less than half of the voting rights of the investee.

The higher the exposure, or right, to the variation of profits by involving within an investee, the higher the stimulant for the investor in obtaining enough rights that provide power. Therefore, having a high exposure to profits uncertainty represents an indicator of power for the investor.

However, taking into consideration the investor's exposure is not enough for assessing whether the investor has od doesn't have power over the investee.

5. Substantive rights

In assessing whether an investor has it has the power or not, an investor is taking into consideration only the substantive rights in relationship with the investee. Substantive rights that are to be taken into consideration are the one held by the investor and other third parties. For an right to be substantive, its owner must have the practical ability to use that right.

Determining whether the rights are substantive on not, judgment must be applied by taking into account all factors and circumstances. The international standard IFRS 10 states a non-exhaustive list of factors to be taken in consideration:

- Whether there are barriers (economical or other) or not that can prevent the owner/owners or not in using their rights.
- When the use of rights implies an agreement between more individuals or when the rights are owned by more than one individual, whether there is or not a mechanism that supplies for the parties the practical possibility to collectively use the rights if they choose to;
- Whether one or more parties that owns rights would benefit or not from using the rights.

Moreover, for the rights to be substantive it must be used in the moment in which the decisions regarding the relevant activities must be taken.

Examples for the identification of substantive rights:

1. The investee holds the annual shareholders meeting in order to take decisions that will direct the relevant activities of the company. The next shareholders meeting will be in 8 months from now.

However, the shareholders that individually or collectively hold at least 5% of the voting rights can request an extraordinary meeting that can modify the actual policies regarding the relevant activities, but also have the obligation to inform the rest of the shareholders with the extraordinary meeting with at least 30 days in advance. The policies that alter the relevant activities can be modified only within an extraordinary or normal shareholders meeting. Those policies may include the approval for the sale of the company's significant assets and also purchase or disposal of significant investments.

[2] The International Financial Standard Consolidated Financial Statements - IFRS 10:B19.

2. An investor holds the majority of the voting rights over an investee. The investor's rights are substantive due to the fact that the investor can take decision that can direct the relevant activities of the company at the time it is needed. The fact that these actions must be announced within 30 days ahead does not prevent the investor in using the voting rights that he holds in order to direct the relevant activities from the moment he obtained the shares.

3. An investor that holds an option for purchasing the majority of shares from an investee due in 25 days. This option grants the investor substantive rights and the possibility to direct the relevant activities of the company even though he hasn't used its option.

4. An investor holds a forward contract for the purchase of majority of investees' shares with no other rights. The maturity term of the option is 6 moths. Opposing to other examples presented above, the investor does not hold the possibility to direct the investee's relevant activities. Present owners have the possibility to direct the relevant activities due to the fact that they can alter the policies regarding the relevant activities before the forward agreement reaches maturity.

Substantive rights that can be used by other parties can prevent an investor to control the investee. These rights do not require that the owner has the possibility to take decisions. As long as the rights are not protective, substantive rights held by a third party can prevent an investor to control the investee even though the rights provide to their owner only the possibility to approve or deny decisions in relationship with the relevant activities.

6. Protective rights

In determining whether certain rights provide the investor with power over the investee or not, an investor must determine if its rights or the rights of other are protective or not.

Protective rights are determined as rights designed to protect the interests of a party which owns these rights without giving the respective party power over the investee.

Taking into consideration the nature of the protective rights, an investor that only holds protective rights cannot own the power and cannot prevent another party to hold the power over an investee.

Examples of protective rights include:

- The right of a party that has granted a loan to prevent the loaned parties to run certain actions that ca significantly alter the credit risk from the loaned to the loaner.
- The right of a party that holds non-controlling interests over an investee to approve significant capital expenditures than normally needed or to approve the investee to issue capital or expenditure instruments and
- The right of a party that has granted a loan to execute the asset of the loaned entity in the situation in which the loaned party does not fulfill its contractual provisions in respect of reimbursing the loan.

In certain situations, structured entities are incorporated for holding one asset. The procurement of this asset is financed through a loan for which the assets represent also the role of collateral guarantee. In the situation of non-compliance with the contractual provisions, the loaner holds the right to own the asset but does not own the recourse right over other assets the loaned structured entity or over another's entity assets. At the moment the entity is incorporated, it shal own only the above mentioned assest and the loan used for procurement.

The fact that a structured entity holds only one asset does not modify the evaluation that the entity that has granted the loan holds or doesn't the protective rights to seize the asset. If the rights are protective by nature, it should be treated as such no matter if these rights refer to one or more assets held by the entity of if it refers to only one asset. The purpose of the rights needs to be settled for the party that has beneficiated from the loan if it is intended to provide the loaner the power over the loaned party or only protection of the interests' for the loaner by the loan agreement.

Example: Potential rights that prevent the shareholders of the majority of voting rights to have control:

Entities A, B, and C hold 60%, 20% and respectively 20% of shares in Entity D. There is an exception at the time the potential rights are used for decisions made over the relevant activities of Entity D that are being made only by the majority of votes at the general shareholders assembly.

Despite the fact that shareholders of Entity D have signed an agreement in which Entities B and C have potential rights at the shareholders assemblies regarding the acceptance or decline of actions taken by Entity A regarding the relevant activities. If Entities B and C use their potential rights, the proposed actions will be approved only of the shareholders on minimum 75% of voting rights agree.

In the above described circumstances, the rights owned by Entities B and C are not only protective rights. Potential rights do not only protect the interests of Entities B and C but also provide the possibility to prevent another party (Entity A) from taking unilateral decisions regarding the relevant activities of Entity D. Taking into consideration potential rights held by Entities B and C, Entity A does not hold control of Entity D.

7. Relevant activities are directed by voting rights

Frequently, voting or other similar rights provide power for the investor, individually or in combination with other agreements. For example, the general case in which an investee has a pallet of financing and operational activities that significantly affects its

profits that require significant decisions to be taken constantly.

I. Power by a majority of voting rights

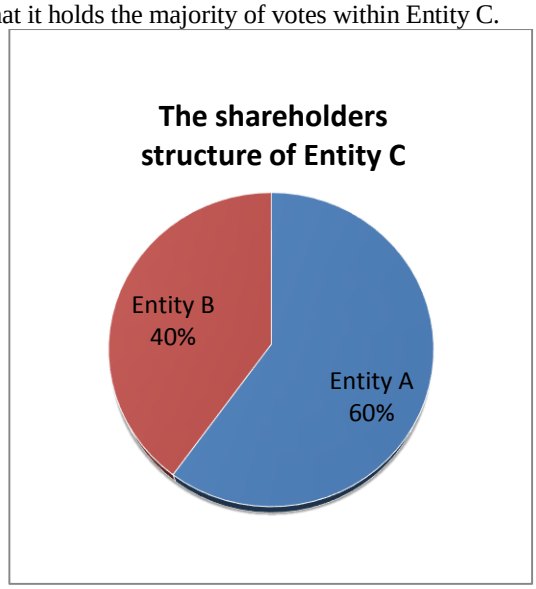
An investor that holds the majority of voting rights within an investee holds the power in the following situations (except the above mentioned ones):

- Relevant activities of the investee are directed by a single vote of the majority voting holder or
- A majority of members from the governance body that directs the relevant activities of the investee is named by a vote of the majority voting rights owner.

Example: Relevant activities of an investee are directed by a shareholder with a majority of voting rights within the investee:

Entities A and B hold 60 % and respectively 40% of the ordinary shares of Entity C. Relevant activities of Entity C are directed by the majority of voting rights within the shareholders assemblies. Each ordinary share carries by itself a vote in the shareholders assembly. If no other factors are taken into consideration (eg. Agreements between the shareholders of Entities A and B that have other provisions) the relevant activities of Entity C are directed by the entity that holds the majority of votes.

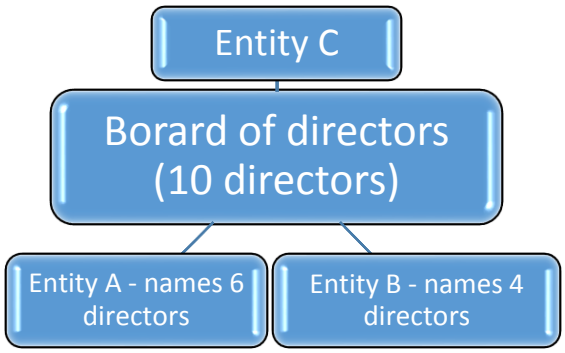
As a result, in absence of other significant factors, Entity A holds the power over Entity C due to the fact that it holds the majority of votes within Entity C.



Source: elaborated by author

Example: Relevant activities of an investee are directed by a governing body and the majority of the members are named by the shareholder that holds the majority of the voting rights in the investee

Entities A and Entity B hold 60%, respectively 40% of the Entity C ordinary shares'. The investee is governed by the Board of directors. Entities A and B are entitled to name 6, respectively 4 directors, proportionally with the shares they own. As a result, in the absence of other relevant factors, Entity A holds the power over Entity C due to the fact that it has the right to name the majority of directors in the Board, therefore to direct the relevant activities of Entity C.



Source: elaborated by author

II. Majority of voting rights but no power

An investor that holds more than half of the voting rights of an investee will have power over the investee through these rights only if the rights are significant and provide the investor the ability to direct the relevant activities, ability that is mainly made by determining the operational and financing policies.

Sometimes even though the investor holds the majority of voting rights of an investee, it doesn't necessarily hold the power. This situation is found at the time the investor holds the majority of voting right, put these votes are not substantive. Accordingly to IFRS 10, there are two situations:

- The situation in which another entity holds rights that provide the possibility to direct the relevant activities of an investee and that entity does not represent an agent of the investor, the investor does not possess the control over the investee.
- The situation in which the relevant activities of the investee are directed by a Government, Court House, Administrator or another regulatory factor. In these circumstances, the owner of the majority of voting rights cannot have the power.

It is not to be assumed that naming and administrator or liquidator will prevent the entity that holds the majority of voting rights will have the power. Rather than otherwise, it is necessary to be taken into consideration if the power held by the administrator or liquidator is enough to prevent the investor in directing the relevant activities of the investee. Although most often is the case of liquidation, these situations do not lead to the loss of control held by the entity that holds the majority of voting rights.

III. Power obtained with less than the majority of voting rights

The international standard IFRS 10 provides the information that an investor that holds less than the majority of voting rights of an investee can have the power over the investee. An investor can have the power in the following circumstances by:

- An agreement between the investor and the other parties that hold voting rights;

- Rights that are provided by certain contractual provisions;
- Voting right of the investor, if there are sufficient to provide the practical ability to direct the relevant activity;
- Potential voting rights;
- A combination of the above mentioned.

8. Power in the situation in which voting rights have no significant influence over the profit of the investee

In contradiction with the above mentioned situations, in certain circumstances voting rights can have no impact on the investee's profits (ex. The situation in which an contractual agreement determines the direction of the relevant activities and the voting rights have impact only in the administrative responsibilities).

In the situation the investee is structured in such a manner that voting rights do not represent a dominant factor in determining the controlling part, an investor must, also, give increase attention for these aspects when it takes into consideration the purpose and the structure of the investment:

- Risks at which the investee has been incorporated to be exposed;
- Risks at which the investee's has been incorporated to transfer towards involved parties and
- If the investor is exposed at any of the mentioned risks.

In such circumstances, considerations regarding the risks include not adverse risks but also the favorable risks.

All the risks attributable to an investee do not necessarily associate with the relevant activities. Even though a certain risk can be present and affect the involved parties, the entity does or doesn't have in its structure means to diminish the risk. As a result, a relevant activity may not be found in relationship with that risk (for example the documents of financing the entity may include activities to diminish the exposure risk).

In the situation in which a risk is associated to a relevant activity, an investor won't be able to influence the variability of returns that can occur from that risk. As a result, the estimation of the first and third element of control (the power of an investor over and investee and the ability to use its power to influence the amount of profit of an investee) would be concentrated on other present risks to which the relevant activities are associated.

Nevertheless, if a relevant activity cannot be associated to any risks, the variability that emerges from that risk must be analyzed from the point of view of the decisional factor that can be the principal or the agent.

Example: Risks that is not associated to any relevant activities

An entity is incorporated for the procurements from a financial institution mortgages over some residential investments with a value of 100 Million UM at a fixed rate on 30 years. The entity is financed by 100 Million UM on a period of 3 years and guaranteed with subordinated debt titles.

Every month, the owner of the subordinated debt titles receives interest payments along with the interest reimbursement from the mortgages and any encashment of principal is used to cover the installment subordinated to the loan. The documentation regarding the incorporation of the entity forbids it to cease its mortgages, procurement of investment ar hiring derivative transactions.

Therefore, the entity exposes its investors to the following risks:

- Credit risk – the risk that mortgages will not be paid;
- Prepayments risk – the risk that the mortgages will be reimbursed in advance and the amount of interest will be reduces;
- Interest risk – the risk that the net book value of fixed installments of mortgages will fluctuate along with the modification of the interest rated on the market.

Due to restrictions in place, the possible actions to be taken in order to manage the prepayments risk or the interest risk do not exist, therefore no relevant activity can be associated to these risks.

Analyzing the fact that an investor has or not the power over an investee in influencing the amounts of profits will, in this case scenario, focus on the credit risk. In this respect, the investor must identify the activities associated to the credit risk and who holds the ability of taking decisions in this matter.

9. Conclusions

In appling the consolidation standard's provision a thorough analysis must be performed due to the fact that there are lots of aspects to be taken into consideration. As we presented in the above analysis, there are several steps and details to be taken into consideration in order to properly asses wether an investor has the relevant rights that provide control over the relevant activites of the investee.

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EVOLUTION OF ECONOMY AND ITS IMPACT ON INSURANCE MARKET – A STATISTICAL ANALYSIS

Sandra TEODORESCU[*]

Abstract.

The economic context has a strong impact on the insurance sector. On the one hand, the decisions related to sector regulation could influence the life of the insurance companies. On the other hand, taxes and other measures that may affect purchasing power, economic instability represent a threat. It is a fact that insurances are products that customers and companies access them when economic conditions are predictable and budgets could be accurately predicted.

The paper mainly analyzes in terms of indicators, the impact of the economy on the insurance sector. We are talking about the interrelationships between Gross Written Premiums (the insurance "Budget") and some macroeconomic indicators characterizing the Romanian economy, such as Gross Domestic Product, net average earnings, the average number of employees etc. Statistical analysis is performed for a 12-year period during 2002-2013. This analysis is based on official statistics published by the National Institute of Statistics, the National Forecasting Commission and the National Bank of Romania. The methodology consists of correlation and regression analysis. Of the variables used in the study we mention: Gross Domestic Product, the number of employees, employment, net average earnings, the activity rate of the working age population (15-64 years), non-governmental domestic credit. The analysis of correlation between the studied variables reveals that is a strong correlation between Gross Written Premiums and GDP, the number of employees, average earnings and non-government domestic credit.. Thus, economic growth, rising incomes, the increasing number of employees and facilitating credit conditions could be some elements that would lead to sustainable growth of the insurance market.

Keywords: Gross Written Premiums*;* Gross Domestic Product; insurance market*;* correlation *and* regression analysis.

JEL Classification: *C15 – Statistical Simulation Methods; E44 – Financial Markets and the Macroeconomy; G17 – Financial Forecasting and Simulation;*

1. INTRODUCTION

The economic history of the last 25 years has induced, as in the past, the conclusion of a permanent correlation between the growth indices in this field with the progress of the insurance sector. The general rule is that a prosperous society tends to defend, and thus, welfare, while as a society under the poverty has little interest in the protection of poverty.

Thus, in its simplest expression, the quarter of the century separates us from communism, alternated the long period of turbulence and decline, during the transition from centralism and dirigisme, to market dominance, as later, during the crisis of 2009-2012, with well experienced growth period during 2006-2009 and a slow recovery, still fragile, in the coming years by 2012. However, we must admit, that even in the difficult years and even in the relatively more comfortable years, Romanian society has not benefited of a comprehensive vision and, therefore, could not be managed neither dramatic effects nor the relatively favorable ones.

Increasing and decreasing curves of the economy have been harmonized with insurance penetration rate, but at least in the auspicious periods, their development was not generally as expected. Finally, the loan policy has increased more in the years 2005-2008 and then record a constantly decline, much aggravated by the fluctuations of currencies, such as recently, the Swiss franc and the US dollar.

All these, the fragile and inconsistent economic growth, catastrophic decrease of the number of jobs, the loan policy at the discretion of banks, should not suffer any damage, even if their borrowers have exhausted all the resources, outlined a framework unfavorable to the insurance market, led modest rates of growth or alternated stagnation with decline periods. Adding and historical factors (lack of a culture of saving and protecting property, possible to complete in time) and some psychological factors (Romanian fatalism and distrust that has been lost through mismanagement or in consequence of a cataclysm, however unpredictable, not can be recovered anymore) we have almost complete picture of the situation in this field, in early XXI century.

In Romania, insurance penetration rate is still very low, ranking us among the last places among the countries of the European Union. Insurance penetration in Romania has been on a downward trend in the period 2011-2014, as a result of internal macroeconomic context and the international financial situation. Thus, reporting total Gross Written Premiumss (GWP) by insurance companies in the first half of 2014 to the Gross Domestic Product (GDP), insurance penetration in GDP amounted to 1.42%, down compared to the same period of past, when it was

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1.61%, according to data from the Financial Supervisory Authority.

For 2015, the National Forecasting Commission estimates, similar to 2014, an economic growth of 2.5%, according to data contained in the autumn forecast. However, most analysts expect a growth between 2.2% and 2.5%.

Unemployment in Romania is anticipated by the International Monetary Fund to decrease slightly, from 7.3% in 2013 to 7,2% in 2014 and 7.1% in 2015. The Romanian employers report that will continue to increase its number of employees and in the first quarter of 2015, but growth will again be modest, says the latest edition of the Manpower Employment Outlook Labor. Most active labor market are forecast in the manufacturing and finance, insurance, real estate and business services.

The loan policy is expected to recover slightly in 2015, after two years of decline, due to the increasing number of loans in local currency, to facilitate credit conditions and slowing bank deleveraging. The National Bank of Romania aims sustainable revival of lending, such as to contribute to a balanced and sustainable economic growth.

As before, the insurance industry will be influenced by developments in the local economy, which depends on global economic developments, especially European ones. 2015 could be the year a slight increase in the insurance market. The positive elements in the economy or in industrial growth, export growth, increased individual consumption and markets developments, closely related to the insurance market will favorably influence the insurance market.

Among existing threats are: the relatively low purchasing power of the population, lack of trust of potential customers, economic instability. Economic growth, which might reflect the incomes of Romanians, investment and development projects from European funds, goods or services in continuous development, decrease unemployment by increasing the number of employees, an facilitating credit conditions could be, for insurance market, the opportunities of 2015.

2. DATA DESCRIPTION

The statistical data used in the study are the official statistics data, published by the National Institute of Statistics, National Forecasting Commission and the National Bank of Romania. The variables used in the analysis of the correlation are:

- Insurance Gross Written Premiums – GWP (RON);
- Gross Domestic Product –GDP (million RON);
- Net Average Earnings –NAE (RON);
- Non-Governmental Domestic Credits – NGDC (million RON);
- Average Number of Employees – ANE (thousands of people);
- Employed population – EP (thousands of people);
- The activity Rate of the Working Age Population (15-64 years old) – RWAP (%)

The period covered by analysis is 2002-2013.

3. STATISTICAL ANALYSIS

The methodology consists of correlation and regression analysis, to assess the impact of some macroeconomic indicators on the volume of insurance Gross Written Premiums.

3.1. CORRELATIONS BETWEEN GWP AND SEVERAL MACROECONOMIC INDICATORS

The correlation between Gross Written Premiums (GWP) ratio and each macroeconomic indicator is listed below:

Table no.1.

Correlations. Marked correlations are significant at p < .05000 N=12

	GDP	**ANE**	**EP**	**NAE**	**RWAP**	**NGDC**
GWP	0.95	0.89	0.38	0.96	0.37	0.97

One can notice that the correlation matrix shows that the best correlation between the GWP and the macroeconomic indicators are $r_{GWP;GDP} = 0.95$, $r_{GWP;NAE} = 0.96$, $r_{GWP;ANE} = 0.89$, and, respectively, $r_{GWP;NGDC} = 0.97$, where $r_{X,Y}$ represent the correlation coefficient between the variables X and Y. All these correlation coefficients indicate the strongest relationship between variables.

3.2. EMPIRICAL ANALYSIS

In the first part of the analysis and study the dependence of the amount of insurance and some indicators with significant correlation coefficients.

1) From regression results[1] the linear regression equation for the GWP dependent variable and independent variables are following:

$$GWP = 0.0185 * GDP - 779.5683 \quad (1)$$
$$GWP = 4.5 * ANE - 23949.9 \quad (2)$$
$$GWP = 6.753 * NAE - 476.167 \quad (3)$$
$$GWP = 0.0244 * NGDC + 1833.216 \quad (4)$$

or, after normalization:

$$GWP = 0.918258 * GDP, \quad R^2 = 0.843 \quad (5)$$
$$GWP = 0{,}872167 * ANE, \quad R^2 = 0.7606 \quad (6)$$
$$GWP = 0.925004 * NAE, \quad R^2 = 0.84119 \quad (7)$$
$$GWP = 0.907017 * NGDC, \quad R^2 = 0.82268 \quad (8)$$

[1] *See Tables 5-8, Appendix*

The coefficients of the independent variables: Gross Domestic Product (GDP), Average Number of Employees (ANE), Net Average Earning (NAE) and Non-Governmental Domestic Credits (NGDP) are significant for a probability of 95%.

- According to the model (1), if GDP would increase by EUR 1 million, the GWP would increase by an average of 0.0185 million RON.
- According to equation (2), the regression coefficient indicates a change in the volume of GWP, an average of 4.5 million USD, an amendment to the ANE with 1000 employees.
- According to the equation (3) if the net average earnings would increase by 1 RON, then GWP volume would increase on average by 6.753 million RON.
- A change of 1 million USD of NGDC volume will be accompanied by a change in the volume of Gross Written Premiums, an average of 0.0244 million RON, according to (4).

Figure 1. Graph of the regression line (1) (obtained with Statistica)

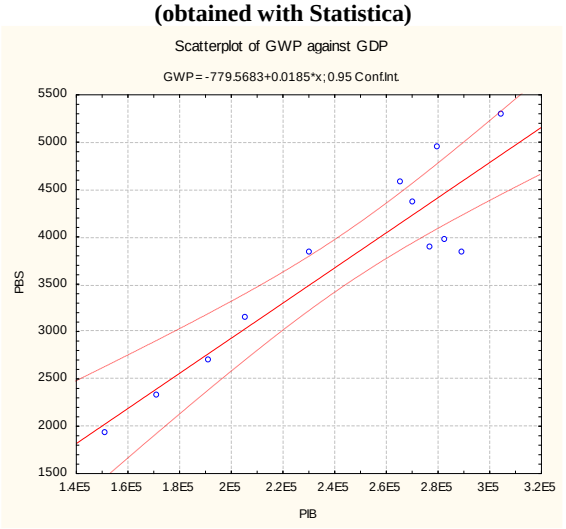


Figure 2. Graph of the regression line (2) (obtained with Statistica)

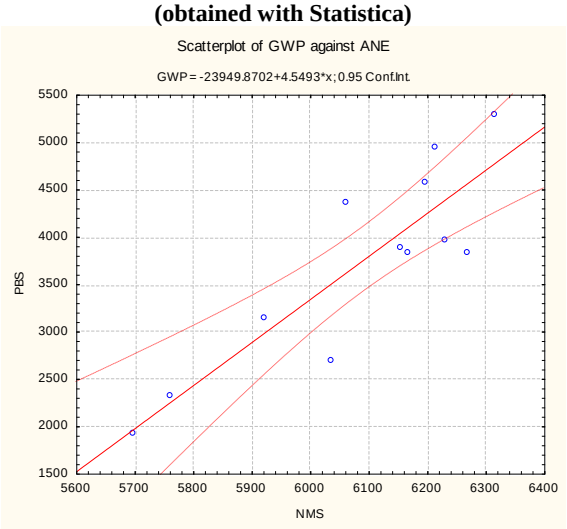


Figure 3. Graph of the regression line (3) (obtained with Statistica)

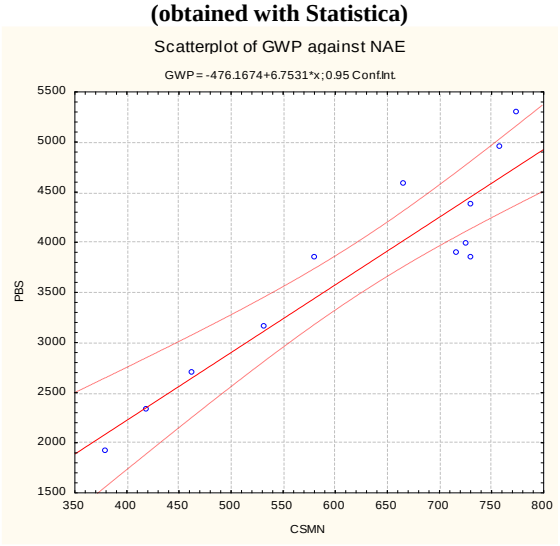
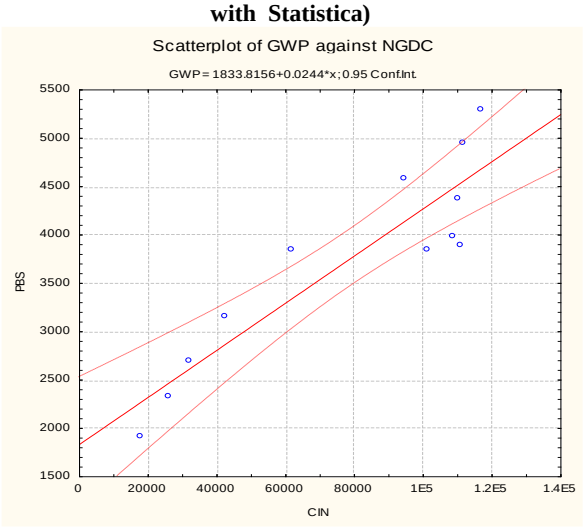


Figure 4. Graph of the regression line (4) (obtained with Statistica)



In the second part of the analysis, we study the dependence of the amount of insurance, on the one hand, and Gross Domestic Product (GDP), Average Number of Employees (ANE), Net Average Earnings (NAE) and Non-Governmental Domestic Credit (NGDC) volume on the other.

Multifactorial regression equation[2] is:

$$GWP = 0.00425 * NGDC + 10.924 * NAE + 2.73 * ANE - 14114.4$$

or, after normalization:

$$GWP = 0.15817 * NGDC + 1.49638 * NAE + 0.52368 * ANE$$

The coefficients of the independent variables are significant for a probability of 95%.

Thus:

- if non-governmental domestic credits volume would increase by EUR 1 million, the Gross Written Premiums would increase on average by 4250 RON,

[2] *See Table 9, Appendix*

while other factors remain stable.

- if the net average earnings would rise by 1 RON and other factors of influence would remain constant, the amount of insurance would increase on average by RON 10.9 million.
- if the average number of employees would increase by 1,000 persons, the Gross Written Premiums of insurance would increase by EUR 2.7 million, if other factors remain stable.

4. EVOLUTIONAL SCENARIOS

4.1. HYPOTHETICAL SCENARIO

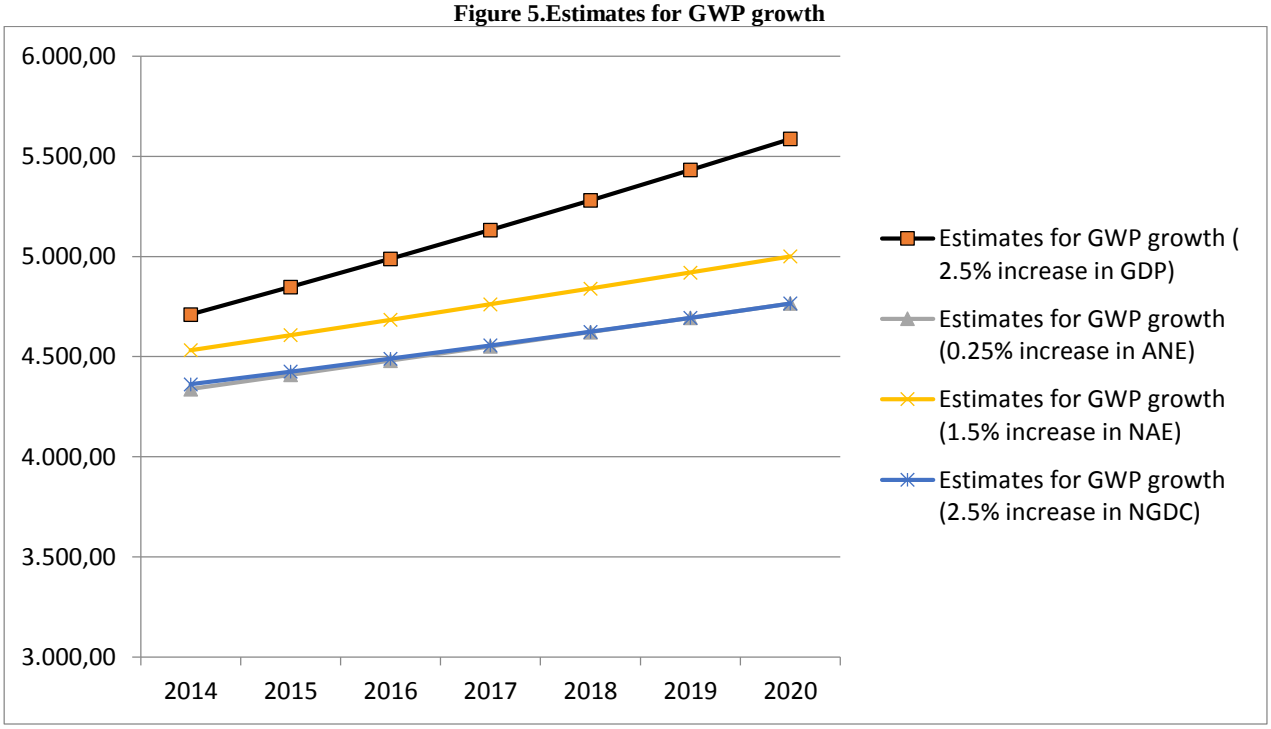
To calculate the economic impact of macroeconomic indicators on Gross Written Premiums from insurance, we assume that the indicators will increase as follows: GDP increases by 2.5% per year, NAE increases by 1.5% per year, NGDC increases by 2.5% per year and, respectively, ANE increases by 0.25% per year during 2014-2020. *If the indicators increase with mentioned percentages, what will be the impact on Gross Written Premiums, during 2014-2020?*

The estimates for Gross Written Premiums growth rate for 2014-2020 are noted in the table below, using the regression equations (1)-(4) and an evolution analysis of the indicators during 2002-2013.

Table no.2. **(million RON)**

Year	Estimates for GWP growth (2.5% increase in GDP)	Estimates for GWP growth (0.25% increase in ANE)	Estimates for GWP growth (1.5% increase in NAE)	Estimates for GWP growth (2.5% increase in NGDC)
2014	4,710.24	4,338.34	4,532.35	4,361.67
2015	4,847.48	4,409.06	4,607.48	4,424.88
2016	4,988.16	4,479.96	4,683.74	4,489.67
2017	5,132.35	4,551.04	4,761.14	4,556.08
2018	5,280.15	4,622.29	4,839.70	4,624.15
2019	5,431.64	4,693.72	4,919.43	4,693.93
2020	5,586.92	4,765.33	5,000.37	4,765.45

Figure 5.Estimates for GWP growth



4.2. HYSTORICAL SCENARIOS

- *If the financial crisis that emerged in 2009 reoccurs in 2014, what will be the impact on Gross Written Premiums growth?*

The estimated value of Gross Written Premiums for 2014 (assuming that the crisis reoccurs) used in the above mentioned multifactorial linear regression equations are shown in the following bold font value:

Table no.3

Predicting Values for variable: GWP (mil.RON)			
	B-Weight	**Value**	**B-Weight - * Value**
GDP	-0.02431	279652.1	-6799.3
NGDC	0.00425	111543.6	474.1
NAE	10.92441	759.5	8296.9
ANE	2.73154	6213.0	16971.1
Intercept			-14114.4
Predicted			**4828.4**
-95.0%CL			4003.1
+95.0%CL			5653.8

$GWP_{2014/2002}$ =4828.4 million RON, represents GWP (2014/2002 - current period/period of reference) which transformed again using the consumer price index, is $GWP_{2014} = 10.525{,}43$ million RON

- *If evolution during 2000-2008 (the economic boom period of Romania), reoccurs in 2014, what will be the impact on Gross Written Premiums?*

The estimated value of Gross Written Premiums for 2014 (assuming that the economic boom reoccurs) used in the above mentioned multifactorial linear regression equations are shown in the following bold font value:

Table no.4

Predicting Values for variable: GWP (mil.RON)			
	B-Weight	**Value**	**B-Weight - * Value**
GDP	-0.02431	325291.8	-7909.0
NGDC	0.00425	138807.1	590.0
NAE	10.92441	823.4	8994.8
ANE	2.73154	6381.0	17429.8
Intercept			-14114.4
Predicted			**4991.4**
-95.0%CL			4152.7
+95.0%CL			5830.1

In this case, $GWP_{2014/2002} = 499.4$ million RON, respectively $GWP_{2014} = 10{,}880.75$ million RON (transformed using the consumer price index).

5. CONCLUSIONS

Analysis of the relationship between economic growth and the insurance market, which took into account the current year (2015), for which it was investigated the correlation between Gross Written Premiums of insurance (GWP) and some macroeconomic indicators Gross Domestic Product (GDP), the Average Number of Employees (ANE), Employed Population (EP), Net Average Earnings (NAE), the activity Rate of the Working Age Population (RWAP), Non-Governmental Domestic Credit–(NGDC), filed, in context, two scenarios: one hypothetical, the other historical. Forecast is prudently positive, estimating the expected economic growth (in industry, exports, services, European funds) with consequences for consumption growth, enabled the new tax code and regulations (which will be at the debate in the near future), in a European context and favorable due to a possible increase in investments.

Hostile factors are those which could cause instability and lack of confidence that could maintain insurance penetration rate in the future in the same downward trend.

6. APPENDIX

Table no.5

Regression Summary for Dependent Variable: GWP R= .91825773 R²= .84319726 Adjusted R²= .82751699 F(1,10)=53.774 p						
	Beta	**Std.Err. - of Beta**	**B**	**Std.Err. - of B**	**t(10)**	**p-level**
Intercept			-779.568	627.8845	-1.24158	0.242724
GDP	0.918258	0.125221	0.019	0.0025	7.33310	0.000025

Table no.6

Regression Summary for Dependent Variable: GWP R= .87216686 R²= .76067503 Adjusted R²= .73674253 F(1,10)=31.784 p						
	Beta	**Std.Err. - of Beta**	**B**	**Std.Err. - of B**	**t(10)**	**p-level**

Intercept			-23949.9	4912.760	-4.87503	0.000647
ANE	0.872167	0.154701	4.5	0.807	5.63775	0.000216

Table no. 7

Regression Summary for Dependent Variable: GWP
R= .92500407 R²= .85563254 Adjusted R²= .84119579 F(1,10)=59.268 p

	Beta	**Std.Err. - of Beta**	**B**	**Std.Err. - of B**	**t(10)**	**p-level**
Intercept			-476.167	559.6900	-0.850770	0.414804
NAE	0.925004	0.120153	6.753	0.8772	7.698551	0.000016

Table no.8

Regression Summary for Dependent Variable: GWP
R= .90701736 R²= .82268050 Adjusted R²= .80494855 F(1,10)=46.395 p

	Beta	**Std.Err. - of Beta**	**B**	**Std.Err. - of B**	**t(10)**	**p-level**
Intercept			1833.816	308.6868	5.940700	0.000143
NGDC	0.907017	0.133161	0.024	0.0036	6.811415	0.000047

Table no.9

Regression Summary for Dependent Variable: GWP
R= .93762522 R²= .87914106 Adjusted R²= .81007881 F(4,7)=12.730 p

	Beta	**Std.Err. - of Beta**	**B**	**Std.Err. - of B**	**t(7)**	**p-level**
Intercept			-14114.4	12003.75	-1.17583	0.278100
NGDC	0.15817	1.067404	0.0	0.03	0.14818	0.886378
NAE	1.49638	1.340791	10.9	9.79	1.11604	0.301245
ANE	0.52368	0.489967	2.7	2.56	1.06881	0.320623

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AN ANALYTIC HIERARCHY PROCESS APPLICATION FOR THE BEST DRIVER SELECTION IN UNIVERSITIES

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Abstract

Drivers are responsible for the safety and timely delivery of passengers and materials. Universities employ a certain number of drivers and this responsibility is true for them as well. University drivers are usually sent to different duties. Not only road, weather and traffic conditions but also size and type of vehicles change in different duties. Some drivers are more appropriate for some duties while some others are not. Evaluation of alternatives and assigning the best driver to a specific duty is very important for designating authority in universities. The aim of this study is to search whether the Analytic Hierarchy Process (AHP) is applicable to such an environment. In order to do this, the criteria that are necessary for driver selection have been specified. Two examples, which can be encountered in a university environment and contain two different duties, have been given. Based on those criteria, four alternative drivers have been evaluated for both examples. Priority orders of those four alternative drivers are different for both examples when looking at AHP results.

Keywords: *multicriteria decision making, analytic hierarchy process, managerial decision, services, assignment.*

1. Introduction

Since knowledge society grows faster and expands beyond the borders, individuals in knowledge society need to travel frequently, faster, and safely. Universities play a major role in the movements of intellectual people to contribute this expansion. There are many kinds of equipments and materials need to be moved or transported without any damage in the universities of today's knowledge society as well.

Developing knowledge society needs to make decisions with many criteria more than ever before so that multicriteria decision making becomes very important. Making a decision becomes more complicated and it may take a longer time. In order to get rid of those problems, decision makers need to increase their multicriteria decision making abilities. Additionally, developing standard schemes and templates for the similar decision making situations will contribute to increase the speed of any decision.

One of the multicriteria decision making methods is Analytic Hierarchy Process (AHP). There are many application areas of AHP because it is appropriate for many situations. Some multicriteria decision areas about selection among alternatives include supplier or firm (Roman *et al.*, 2014; Koç and Burhan, 2014; Bruno *et al*. 2012), production process (Sharma and Agrawal, 2009), strategy (Lin and Wu, 2008; Wu *et al.*, 2012), planning (Sayyadi and Awasthi, 2013), etc. There are also some researches in literature related to selection of person or employees by using AHP or fuzzy AHP (Ünal, 2011; Doğan and Önder, 2014; Jabri, 1990; Zolfani and Antucheviciene, 2012; İbicioğlu and Ünal, 2014; Eraslan and Algün, 2005; Özdağoğlu, 2008; Swiercz and Ezzedeen, 2001; Torfi and Rashidi, 2011; Güngör *et al*. 2009). On the other hand, there could not be found any research about driver selection by using AHP in literature. Because of this reason, the aim of this study is to search weather AHP is applicable to prioritization of drivers in terms of different duties in universities and develop a useful multicriteria scheme in order to make similar decisions faster.

This paper is organized as follows: to be able to evaluate appropriateness of drivers to duties, necessary criteria are described in second section. Third section explains basic AHP multicriteria decision-making approach. Fourth section gives two real examples about the best driver selection in a university and fifth section is the conclusion section that summarizes findings with recommendations and gives some possible future directions.

2. Criteria for the Best Driver Selection

2.1. Vehicle to be Driven (V)

Vehicles should be well equipped and serviced prior to departure. Bad conditions of vehicles affect drivers badly while good conditions of vehicles decrease the risk of doing an accident and loosing life or property. Size and age of vehicles are among the contributing factors to young driver crashes (Scott-Parker *et al*., 2015). Type of duty, readiness of vehicle, and even sometimes cost of travel can change the type of vehicle that the driver have to use during travel. For example, some duties need a car while some others require a truck or a bus. Some drivers perform well on some kind of vehicles while some others do not. Therefore, decision makers need to consider type (V_1),

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comfort (V_2) and driving safety (V_3) of the vehicle before assigning a driver to any duty.

2.2. Road to be Used (R)

Duties can take place in the city that the university is already located on or in other cities or destinations away from the university. Because of this reason, long or short distance travels is a major concern for any driver. Sometimes drivers can not be in a good condition to go a long distance since they can be tired, do not have much time or enough experience. Traffic is heavy and complicated on some roads and high ways especially in big cities. Slower speeds, longer trip times and increased queuing occurs in urban traffic network with traffic congestion. Driving is very difficult in traffic congestion because drivers have no freedom of choice with respect to driving decisions, they are forced to follow the leading vehicles, and they can hardly maintain desired speed and adjust lane choice (Wang *et al.*, 2011). Finding an address can be difficult for some drivers if they are not familiar with the city or location that the duty will take place. Roads can be dangerous because of not only their construction materials but also geographical conditions. They can have many curves, holes, and bumps. Road infrastructure is among actors influencing young driver road safety in the study of Scott-Parker *et al*. (2015). On the other hand, climate changes from region to region. Rainy, snowy and icy roads are possible challenges that the drivers must deal with. It has been proven that the choice of speed, reaction time and driving behavior of drivers are negatively affected during adverse weather conditions (Chakrabartya and Guptab, 2013). Some drivers may be much careful in bad weather conditions and dangerous roads. Therefore, decision makers need to consider distance (R_1), traffic density (R_2), weather condition (R_3), and surface quality (R_4) of the road before choosing a driver for any duty.

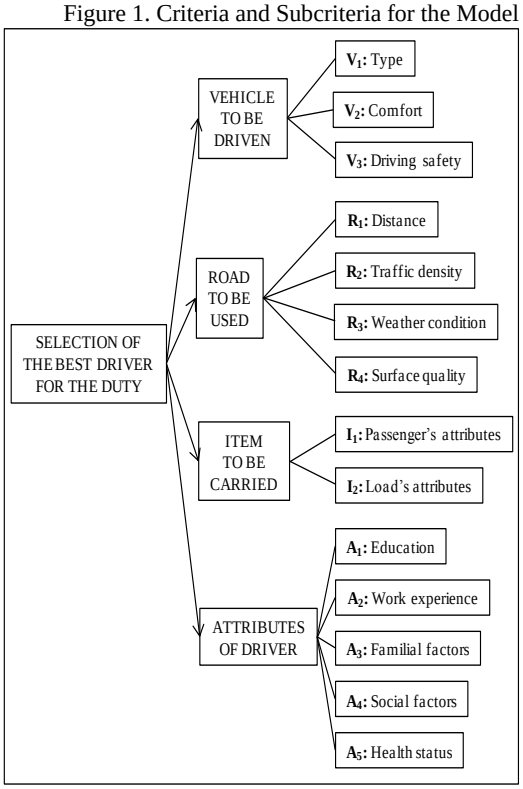
2.3. Item to be Carried (I)

The most important responsibility of drivers is to carry items to destinations without causing any damage, harm, or dissatisfaction. Items include humans, animals, products, devices, materials, and equipments. Passengers can have different kind of attitudes, attributes, and careers. They can be academicians, bureaucrats, students, athletes, managers, workers etc. They can expect different behaviors from drives. For example, bureaucrats or managers may expect dialogue that is more formal while students or workers may be comfortable with informal communications. Some passengers like travel with some music while some others like it within a quiet atmosphere. Some drivers' personalities are more appropriate for traveling with some kind of passengers. Items like devices, equipments or materials have to be carried without any physical damage. Sometimes they need to be handled by the driver and moved to or from the vehicle. They can be heavy, light or fragile. Some drivers are not strong enough to carry them. Therefore, decision makers need to consider passenger's attributes (I_1) and load's attributes (I_2) when choosing the best driver for any duty.

2.4. Attributes of Driver (A)

Personnel attributes of any driver are very important criteria in order to make a good selection for decision makers. Without concerning those attributes, the link that connects drivers with above-mentioned criteria is not established properly and any decision becomes ambiguous. Drivers may come from different backgrounds and living conditions. Their education levels may be different. Higher education helps drivers when communicating with passengers in a formal way. It has been shown that the higher education facilitates to overcome stress as well (Özmutaf, 2006). The drivers with higher education can easily deal with stress. Additionally, work experience is as important as education for being a good driver. In the research of Güngör *et al*. (2009), İbicioğlu and Ünal (2014), Özdağoğlu (2008), Doğan and Önder (2014), and Torfi and Rashidi (2011), work experience and education are included personnel selection criteria. Experienced drivers are familiar with the conditions of vehicles, roads and loads. They can rarely make mistakes. Familial and social factors can affect drivers as well. Married drivers have to thing about their families. Driving after hours can be stressful and wistful for them. Drivers with some social problems like bad living conditions and credit debts can be more pensive and careless. Some criteria such as bringing familial problems to work, being in a healthy condition, having abilities in the social relations with other people are included in ideal performance evaluation forms in the study of Eraslan and Algün (2005). Some kind of illnesses may affect the driving safety as well. For example healthy eyes, ears, and nerve system are very important for driving safely. Therefore, decision makers need to consider education (A_1), work experience (A_2), familial factors (A_3), social factors (A_4), and health status (A_5) of drivers when deciding which driver is more appropriate for the duty. All of the above mentioned criteria and subcriteria are shown with their abbreviations in Figure 1.

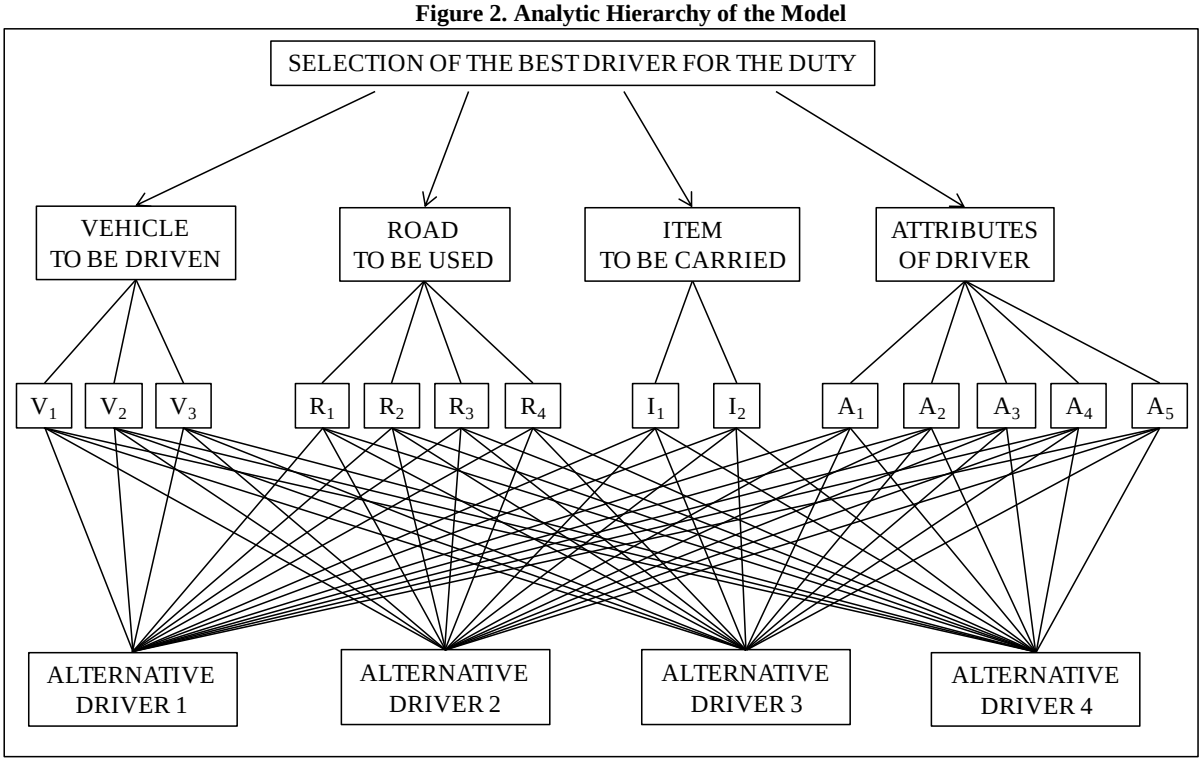
Figure 1. Criteria and Subcriteria for the Model



3. Analytic Hierarchy Process

AHP is one of multicriteria decision-making method that was originally developed by Saaty (1980). The approach allows the decision maker to structure complex problems in the form of a hierarchy or a set of integrated levels. Generally, the hierarchy has at least three levels, namely, the goal, the criteria, and the alternatives (Liberatore et al., 1992). The goal of this study's problem is to select the best driver of a university in terms of a certain duty. The goal is placed on the first level of the hierarchy as shown in Figure 2. The second level of the hierarchy occupies the criteria and subcriteria that are defined in previous section. The alternatives are four drivers in the third level in Figure 2.

Figure 2. Analytic Hierarchy of the Model



AHP is a measurement theory, which is performed by pairwise comparisons, and depends on the opinions of experts for defining priority measures (Ahmed *et al.*, 2006). First, each criterion is compared with others in terms of importance level in AHP. For example, when comparing criteria A_i and A_j, linguistic preference judgments and numerical ratings of them are used as shown in Table 1.

Table 1. The Fundamental Scale (Saaty, 2006)

Intensity of Importance	Definition	Explanation
1	Equal importance	Two activities contribute equally to the objective
3	Moderate importance	Experience and judgement slightly favor one activity over another
5	Strong importance	Experience or judgement strongly favor one activity over another
7	Very strong or demonstrated importance	An activity is favored very strongly over another; its dominance demonstrated in practice
9	Extreme importance	The evidence favoring one activity over another is of the highest possible order of affirmation
2, 4, 6, 8	Intermediate values when compromise is needed	

The number of comparison for n criteria is $m = n(n-1)/2$. Obtained pairwise comparisons are shown in a single matrix. Priority weights of criteria are calculated by using this matrix. The maximum eigenvalue is found and normalized eigenvector is calculated corresponding to this eigenvalue. The elements of this normalized eigenvector give the weights of criteria.

Having made all the pairwise comparisons, the consistency is determined by using the eigenvalue, λ_{max}, to calculate the consistency index, CI as follows: $CI = (\lambda_{max} - n)/(n-1)$, where n is the matrix size. Judgment consistency can be checked by taking the consistency ratio (CR) of CI with the appropriate value in Table 2. The CR is acceptable if it does not exceed 0.10. If it is more, the judgment matrix is inconsistent. In order to obtain a consistent matrix, judgments should be reviewed and improved (Al-Harbi, 2001).

Table 2. Average random consistency index (RI) (Saaty, 2006).

n	1	2	3	4	5	6	7	8	9	10
RI	0	0	0.52	0.89	1.11	1.25	1.35	1.40	1.45	1.49

4. An Application on University Drivers

The application took place a public university in Turkey. There is a driver crew consisting of nine drivers in the university. The drivers can be assigned to some different duties within a day. Sometimes the time of a duty can exceed working hours. Although there are nine drivers to choose for a duty, about four of them are usually available and appropriate because of some reasons when selection is a matter of concern.

In order to show that the priority order of drivers can change from duty to duty, AHP is applied on the same four drivers in two different duties. These duties are given as two examples below.

4.1. Example One

The university arranges talk meetings about topics in history and culture once a week. Usually one speaker is brought from another university or institution. The speakers may be academicians, authors, journalists and experts in their fields. The first example is about this kind of event. That week's speaker is a dean of a faculty of science and letters of a university in İstanbul. That speaker will be taken from İstanbul and brought to the university in the other city. That will be the duty of selected driver and the vehicle to be used for that duty will be an automobile. The designating authority, which is usually a senior staff member related to drivers, will decide which one of the four drivers is the most appropriate for this duty. Therefore, this senior staff member has made pairwise

comparisons and below matrices have been filled accordingly. CRs are in parentheses at the top of matrices.

Main Criteria (CR = 0.07).

	V	R	I	A		
V	1	5	3	5	=	0.064
R	1/5	1	1/3	3		0.271
I	1/3	3	1	5		0.172
A	1/5	1/3	1/5	1		0.544

Vehicle to be driven (CR = 0.04).

	V_1	V_2	V_3		
V_1	1	3	5	=	0.105
V_2	1/3	1	3		0.258
V_3	1/5	1/3	1		0.637

Road to be used (CR = 0.06).

	R_1	R_2	R_3	R_4		
R_1	1	3	3	1	=	0.127
R_2	1/3	1	3	1		0.223
R_3	1/3	1/3	1	1/3		0.487
R_4	1	1	3	1		0.162

Item to be carried (CR = 0.00).

	I_1	I_2		
I_1	1	1/3	=	0.750
I_2	3	1		0.250

Attributes of driver (CR = 0.03).

	A_1	A_2	A_3	A_4	A_5		
A_1	1	7	1	3	3	=	0.061
A_2	1/7	1	1/7	1/3	1/3		0.483
A_3	1	7	1	1/5	1/7		0.048
A_4	1/3	3	5	1	1		0.194
A_5	1/3	3	7	1	1		0.213

Subcriteria Type (CR = 0.04).

	A	B	C	D		
A	1	1/3	1/3	1/5	=	0.526
B	3	1	1	1		0.158
C	3	1	1	1/3		0.210
D	5	1	3	1		0.107

Comfort (CR = 0.06).

	A	B	C	D		
A	1	1/3	1	1/3	=	0.368
B	3	1	3	3		0.096
C	1	1/3	1	1/3		0.368
D	3	1/3	3	1		0.169

Driving safety (CR = 0.06).

	A	B	C	D		
A	1	1/3	1	1/3	=	0.389
B	3	1	3	1		0.130
C	1	1/3	1	1		0.303
D	3	1	1	1		0.178

Distance (CR = 0.07).

	A	B	C	D		
A	1	5	5	1	=	0.085
B	1/5	1	3	1/3		0.292
C	1/5	1/3	1	1/3		0.512
D	1	3	3	1		0.111

Traffic dencity (CR = 0.06).

	A	B	C	D		
A	1	3	1	3	=	0.394
B	1/3	1	1/3	1/3		0.096
C	1	3	1	1		0.287
D	1/3	3	1	1		0.223

Weather condition (CR = 0.06).

	A	B	C	D		
A	1	1/5	3	1/5	=	0.305
B	5	1	5	1		0.078
C	1/3	1/5	1	5		0.538
D	5	1	1/5	1		0.078

Surface quality (CR = 0.07).

	A	B	C	D		
A	1	1/3	1/3	1/5	=	0.508
B	3	1	3	1/3		0.151
C	3	1/3	1	1/3		0.265
D	5	3	3	1		0.075

Passenger's attributes (CR = 0.06).

	A	B	C	D		
A	1	1/3	1	1/3	=	0.368
B	3	1	3	1/3		0.169
C	1	1/3	1	1/3		0.368
D	3	3	3	1		0.096

Load's attributes (CR = 0.00).

	A	B	C	D		
A	1	1/3	1	1/3	=	0.375
B	3	1	3	1		0.125
C	1	1/3	1	1/3		0.375
D	3	1	3	1		0.125

Education (CR = 0.06)

	A	B	C	D		
A	1	1	3	3	=	0.130
B	1	1	1	3		0.178
C	1/3	1	1	1		0.303
D	1/3	1/3	1	1		0.389

Work experience (CR = 0.00).

	A	B	C	D		
A	1	3	3	3	=	0.225
B	1/3	1	3	3		0.125
C	1/3	1/3	1	1		0.375
D	1/3	1/3	1	1		0.375

Familial factors (CR = 0.06).

	A	B	C	D		
A	1	3	1	1	=	0.162
B	1/3	1	1/3	1/3		0.487
C	1	3	1	1/3		0.223
D	1	3	3	1		0.127

Social factors (CR = 0.00).

	A	B	C	D		
A	1	3	1	3	=	0.125
B	1/3	1	1/3	1		0.375
C	1	3	1	3		0.125
D	1/3	1	1/3	1		0.375

Health status (CR = 0.02).

	A	B	C	D		
A	1	3	5	1	=	0.095
B	1/3	1	3	1/3		0.249
C	1/5	1/3	1	1/5		0.560
D	1	3	5	1		0.095

4.2. Example Two

There will be a national folk dances competition in Antalya. Antalya is a city located on south coasts of Turkey. This event will continue six days. The university plans to send its folk dances club, which consists of 40 students, for that event. A bus will be dedicated and two drivers be assigned to this bus for that duty. The same senior staff member in example one has made pairwise comparisons here again and below matrices have been filled accordingly. CRs are in parentheses at the top of matrices.

Main criteria (CR = 0.07).

	V	R	I	A		
V	1	3	5	5	=	0.064
R	1/3	1	3	5		0.172
I	1/5	1/3	1	3		0.271
A	1/5	1/5	1/3	1		0.544

Vehicle to be driven (CR = 0.00).

	V_1	V_2	V_3		
V_1	1	1	7	=	0.111
V_2	1	1	7		0.111
V_3	1/7	1/7	1		0.778

Road to be used (CR = 0.09).

	R_1	R_2	R_3	R_4		
R_1	1	3	5	5	=	0.102
R_2	1/3	1	7	5		0.053
R_3	1/5	1/7	1	3		0.549
R_4	1/5	1/5	1/3	1		0.297

Item to be carried (CR = 0.00).

	I_1	I_2		
I_1	1	1/7	=	0.875
I_2	7	1		0.125

Attributes of driver (CR = 0.09).

	A_1	A_2	A_3	A_4	A_5		
A_1	1	7	3	3	3	=	0.053
A_2	1/7	1	1/5	1/5	1		0.431
A_3	1/3	5	1	1/3	1		0.171
A_4	1/3	5	3	1	5		0.081
A_5	1/3	1	1	1/5	1		0.265

Subcriteria Type (CR = 0.06).

	A	B	C	D		
A	1	1/5	1/5	1/5	=	0.613
B	5	1	1	3		0.089
C	5	1	1	3		0.089
D	5	1/3	1/3	1		0.208

Comfort (CR = 0.07).

	A	B	C	D		
A	1	1/5	1/3	1/5	=	0.549
B	5	1	3	3		0.074
C	3	1/3	1	1/3		0.248
D	5	1/3	3	1		0.129

Driving safety (CR = 0.06).

	A	B	C	D		
A	1	1	1	1/3	=	0.303
B	1	1	3	1		0.178
C	1	1/3	1	1/3		0.389
D	3	1	3	1		0.130

Distance (CR = 0.05).

	A	B	C	D		
A	1	7	5	1	=	0.069
B	1/7	1	1/3	1/5		0.560
C	1/5	3	1	1/5		0.294
D	1	5	5	1		0.077

Traffic density (CR = 0.06).

	A	B	C	D		
A	1	1/3	1	3	=	0.223
B	3	1	3	3		0.096
C	1	1/3	1	3		0.287
D	1/3	1/3	1/3	1		0.394

Weather condition (CR = 0.06).

	A	B	C	D		
A	1	1/5	3	1/5	=	0.305
B	5	1	5	1		0.078
C	1/3	1/5	1	5		0.538
D	5	1	1/5	1		0.078

Surface quality (CR = 0.07).

	A	B	C	D		
A	1	1/5	1/3	1/5	=	0.544
B	5	1	5	3		0.064
C	3	1/5	1	1/3		0.271
D	5	1/3	3	1		0.122

Passenger's attributes (CR = 0.03).

	A	B	C	D		
A	1	1/5	1/5	1/7	=	0.635
B	5	1	1	1/3		0.151
C	5	1	1	1/3		0.151
D	7	3	3	1		0.062

Load's attributes (CR = 0.08).

	A	B	C	D		
A	1	1	1/3	1/5	=	0.377
B	1	1	1/5	1/3		0.405
C	3	5	1	1/3		0.138
D	5	3	3	1		0.080

Education (CR = 0.06).

	A	B	C	D		
A	1	1	3	3	=	0.130
B	1	1	1	3		0.178
C	1/3	1	1	1		0.303
D	1/3	1/3	1	1		0.389

Work experience (CR = 0.05).

	A	B	C	D		
A	1	7	5	5	=	0.053
B	1/7	1	1/3	1		0.402
C	1/5	3	1	3		0.169
D	1/5	1	1/3	1		0.376

Familial factors (CR = 0.06).

	A	B	C	D		
A	1	3	3	1	=	0.127
B	1/3	1	1/3	1/3		0.487
C	1/3	3	1	1		0.223
D	1	3	1	1		0.162

Social factors (CR = 0.04).

	A	B	C	D		
A	1	5	3	5	=	0.066
B	1/5	1	1/5	1		0.434
C	1/3	5	1	3		0.131
D	1/5	1	1/3	1		0.370

Health status (CR = 0.04).

	A	B	C	D		
A	1	1	5	1	=	0.133
B	1	1	1/3	1/3		0.200
C	1/5	3	1	1/5		0.567
D	1	3	5	1		0.100

4.3. Analysis of the Results

As can be seen in pairwise comparison matrices in the sections 4.1 and 4.2, all CRs are below 0.10. These mean that the results are consistent. Table 3 shows AHP results of both examples. Overall CRs are also below 0.10 for two examples as shown at the bottom of Table 3. Therefore, inconsistency is not a matter of concern for both examples. Although the drivers are same for both examples, their priority orders are not equal. Driver C is the most demanded one for the duty in example one while driver B is the most appropriate one for the duty in example two when looking at the alternative section of Table 3. Driver B is the least appropriate one in example one however. Because of two drivers are needed, driver B and C should be chosen for the duty in example two. On the other hand, only driver C should be chosen for the duty in example one.

Since the priority orders are different for different duties, the results show that AHP is applicable for such a driver selection process in universities. The most important problem here is that the frequency of this kind of selection process is quite a few in universities although AHP usage takes time. It is known that making pairwise comparisons and having consistent comparison matrices take time for any decision maker. However, AHP methodology is still beneficial because the same or similar duties repeat in certain periods even though they can be seen different at the beginning. After doing AHP and assigning the most suitable driver to a certain duty, it is also possible to find another duty similar to this one and assign the same driver without any calculation or deeply thinking in the future.

Table 3. AHP results of both examples

	Example 1	Example 2
Main Criteria		
Vehicle to be driven	0.064	0.064
Road to be used	0.271	0.122
Item to be carried	0.122	0.271
Attributes of driver	0.544	0.544
Subcriteria for vehicle to be driven		
Type	0.105	0.111
Comfort	0.258	0.111
Driving safety	0.637	0.778
Subcriteria for road to be used		
Distance	0.127	0.102
Traffic density	0.223	0.053
Weather condition	0.487	0.549
Surface quality	0.162	0.297
Subcriteria for item to be carried		
Passenger's attributes	0.750	0.875
Load's attributes	0.250	0.125
Subcriteria for attributes of driver		
Education	0.061	0.053
Work experience	0.483	0.431
Familial factors	0.048	0.171
Social factors	0.194	0.081
Health status	0.213	0.265
Alternatives		
Driver A	0.225	0.248
Driver B	0.179	0.283
Driver C	0.361	0.264
Driver D	0.235	0.205
Overal consistency ratio	0.05	0.07

5. Conclusions

A driver's license shows only a permit that a driver can use a certain kind of vehicle. It does not explain a driver's abilities or attributes. Some drivers can be appropriate for weather, road and vehicle conditions as a whole while some others can be advantageous for several of those conditions. Recognizing the attributes of any driver is very important for the authority that in charge of assigning the driver for a duty since taking account of those attributes in the assignment process increases the safety of travel. Thus, the risk of doing accident decreases and any conflict or friction between the driver and passengers does not appear.

The most important contribution of this study to literature is the specification of criteria for evaluation of any driver. Those criteria are divided into four main categories such as vehicle to be driven, road to be used, item to be carried, and attributes of driver and those categories are divided into fourteen subcriteria. Illustrating the applicability of AHP in the selection of best university drivers by using those criteria is another contribution of this study to literature. The criteria have been tested by using ordinary AHP method within two examples. It is possible to say that the results are promising. Some possible extensions of this study may be searching the applicability of fuzzy AHP, TOPSIS, and fuzzy TOPSIS methods in future researches.

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OLD AND NEW ECONOMIC GLOBALIZATION

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Abstract

The retrospective of the theoretical approaches of the phenomenon of economic globalization in the last three decades emphasizes the movement of attention from the globalization of markets, from the'80s, to the globalization of production and services in the current decade. This trend is essentially the result of implementing new strategies by multinational and transnational companies. We try in this context to draw a line between the "globalization of markets" and the "globalization of production and services". A feature of the globalization of production and services is the implementation of the arbitrage strategy in respect of one or more production factors. But the "globalization of production and services' gains a new content due to the new possibilities offered by the "modularization" of production. Following, the arbitrage strategies began to address new factors, as for example the "functions" of production resulting from the restructuring of the product value chain.

Keywords: *globalization of markets, globalization of production and services.*

1. Introduction

When talking about the economic globalization phenomenon one can easily observe the large diversity of opinions among scientists regarding, on the one hand, the unfolding of the globalization phenomenon, and, on the other hand, its definition and its difference from internationalization.

The economic globalization was considered by different authors as:

- a process of establishing production facilities around the world in order to obtain scale economies (F. Livesey, 1993, "Dictionary of Economics")
- a process of creating a worldwide market as a result of a certain alignment of consumer needs, of the standardization of goods and of the development of communications and mass-media, through the flexibility of companies (De Luca G., MinieriS., Verrili A.,1998)
- a specific stage of capital internationalization everywhere there are resources and markets (C.A.Michalet, 1985, "Le capitalism mondial")
- A system of interconected markets, the globalization of markets implying their integration and the development of „global strategies" by those companies seeking a worldwide presence (A.P. Rhoen, 1996, "International Trade")
- The increased interconnections between countries and societies which lead to the fact that events, decisions and actions taken in one part of the world have a sizable effect on people and communities situated faraway from one another. Globalization has two features: the sphere and the intensity of action (Dunning J.H."The Advent of Alliance Capitalism" and"The New Globalizm and Developing Countries" –1997).
- The unavoidable integration of markets, states and technologies (Th. L. Friedman, 1999, Lexus and the olive tree)

Finally, this diversity of opinions leads to three different perspectives on the globalization process and three groups of researchers:

- the optimists, who accept the positive outcomes of globalization(A.Giddens, D.Harvey, R.Robertson G. Barraclough, J.H.Dunning, D, Moberg, Bimal Gosh, etc.)
- the pesimists, who stand against the globalization process (J.Mander, J.Stiglitz, D.Korten, etc.)
- the moderates, with a balanced view on globalization (Paul Hirst and G.Thompson).

One thing is certain, though. The fact that the topic of globalization is approached by so many authors indicates that globalization is not yet a well-defined, well-structured concept, and any new scientific contribution is welcome.

Content

Regarding the unfolding of the process of the economic globalization, the polemic mainly focused around the explanation of whether globalization is just an advanced stage of the internationalization of relations between companies and states, or it is an altogether different qualitative stage.

In the second case, we can witness two different scenarios: that of quantitative accumulation which generates a new quality, and the other of the appearance of new factors which created an original aggregate, which could not be reached by previous accumulations. Some authors, through their methodological enterprise, come closer to the second model of defining globalization, others dwell on sequential aspects or effects of international relations

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that they assimilate to globalization, from an approach that is not necessarily scientific.

Like other researchers who have studied the global evolution of companies in the past years, we have noticed that both the theoretical model of convergence (Ricardo/Samuelson) and the model of the national diversity of capitalism (Michel Albert, P.Hall-Harvard and D.Saskice-Duke, with the German-Japanese and American-British models), while having their share of truth, are much too generalised. Starting from the macroeconomic level of the functioning of national economies, it is more difficult to infer the concrete reaction of companies to the different limitations and opportunities.

The conclusions of a study completed in 2005 by researchers from MIT, regarding the real strategies of companies, were very different from the predictions of the two models. These elements determined us to approach globalization as well from a microeconomic perspective, as a sum of strategies of restructuring and relocation of the international activities of the companies.

Next, we wanted to get closer to our view on the particularities of the actual globalization processes through a comparative analysis of the characteristics and implications of the "old globalization" and those of "the new globalization". We thought that Richard Baldwin's scientific approach was interesting enough to be mentioned here. He tried in 2006 to clarify the paradigms of the old and the new globalization, seeing the phenomenon as a process characterised by two important decouplings.

The first decoupling, brought about by the rapid drop of transport costs, ended the necessity to manufacture products close to the areas of consumption, allowing the spatial separation between the manufacturers and the consumers.

The second decoupling was brought about by the significant reduction of the international communications and activity coordination costs in the last decade, which ended the necessity to have almost all the production stages in the immediate proximity. In addition, in more recent times, the decoupling of some activities and functions happened through the offshoring of business services. In this way, the second decoupling spatially dissociated factories from offices and lead the global competition to the level of the functions hosted by these structures.

Historically, comparisons are made between the first globalization (1870-1914) and the second globalization (postwar and especially since the'80s) and it argues that the world economy reached only in the 80s the same high levels in terms of capital mobility, foreign direct investment (FDI) and trade which were specific to the first globalization, but with the difference that freedom of immigration is not at the levels of that time. While labor migration has played a major role in the first stage of globalization, in the second, the effects of globalization mainly result from the reorganization and relocation of production.

If you look at economic globalization as a process of acceleration of the world economy and of the national economies, leading to the unification of international markets and creating a global market (Suzanne Berger, 2006), then globalization today is the result of political, economic and technological shocks that synchronized and mutually strenghtend in the early '80, which led to substantial restructuring of the manufacturing process. Once China began in 1979 to open the economy to the west and the Berlin Wall collapsed in 1989, the most powerful political barriers to trade and capital mobility have been dismantled. An important role also played the policies of the industrialized countries towards the liberalization of capital markets and the elimination of barriers in international trade.

We must also mention another very important element of the current globalization process namely the accession to the status of competitors of developed countries by a growing group of developing countries. If poor countries in the past exported food products and natural resources, currently over 70% of total exports of goods of these countries is represented by manufactured products, and the share of developing countries in the world merchandise trade exceeds 1 / 3 of world trade.

A retrospective of the theoretical approaches to economic globalization in the past three decades stresses the shift of attention from the globalization of markets of the 80's to the globalization of production and services of the past two decades. We have to define these hypostases of globalization against the three categories of strategies that transnational companies apply in a certain mixture: adjustment, aggregation ant arbitrage.

The globalization of markets lexically abreviates an set of TNC strategies that are primarily aimed to exploit the similarities between countries as a source of added value. Differences between countries, whether of cultural, administrative, geographic or economic nature, are addressed in these strategies as a set of constraints that need to be overpassed.

Depending on the nature and extent of these constraints we can draw a line between two extremes:

a) a limited globalization of markets, in which "distances" between countries exist and are significant, justifying the emphasis put by companies on strategies of adaptation to the characteristics of each market;

b) an extended globalization of markets, characterized by a significant reduction or even disappearance of the "distances" between countries, which brings to attention the aggregation strategies that enable companies to achieve significant economies of scale based on the international standardization of products.

The globalization of production and services expresses essentially those company strategies meant to exploit the differences between countries, addressing to these national features as to opportunities of realizing added value and not as to

constraints to be overpassed. The difference of approach is obvious and, in order of making clearer the need of customizing the business strategies to the two dimensions of current economic globalization, we propose the following definitions:

a) The strategies of market globalization involve the realization of a product in other countries, depending on the particularities of demand and exploiting, as much as it is possible, the similarities between markets in respect of demand.

b) The strategies of production and services globalization involve an international value chain structuring based on the particularities of the production factors supply on the international market.

The traditional forms that international specialization has taken until now are well-known: inter-sectorial, inter-branches and intra-branches, as well as intra-product. Each of these specializations has the merit of creating new trade flows between different regions and countries and thus generating development.

Nevertheless, in the past 10-15 years we have witnessed the appearance of a new specialization which takes place at the level of the distinct functions of the process of the creation and offer of a new product, which we think we can call as "functional" specialization. This new wave of functional specialization already generates new and qualitatively different dimensions of the phenomenon of economic globalization.

This kind of specialization highly contrasts with the vertically integrated structures of many TNCs and originates in the following two processes:

a) *The modularization of manufacturing* becomes possible within a range of industries due to the technological and organizational changes in the past 15 years. The new "Lego" model of production started in sectors like electronics and clothing where the digital technologies enabled the digital transfer of all the technical details of new products from the designer to the manufacturer, safe and with the possibility of control of the project implementation. This modularity generated a wave of outsourcing which rapidly advanced from fazes of the production process to the production process as a whole, enabling few TNCs to draw out completely from manufacturing, a function which was undertaken by a new type of companies, the "contract manufacturers". They specialized exclusively on the turnkey supply of manufacturing services, an activity which must be differentiated from the previous system of sub-contracting when a brand owning TNC is searching for additional production facilities for some of her original components or equipments. In this case we talk about the entire production function outsourcing related to the manufacturing of a commodity or a full set of commodities.

b) *The reconfiguration of the global value chain* is based on the same functional specialization which exceeds this time the field of the manufacturing process and can be found anywhere along the route of innovation and technology development – manufacturing – distribution and marketing – post sales services. The value chain becomes more and more fragmented as the functions implied by a certain business are differentiated into ever more specialized activities, going to those very narrowly specialized. His growing modularity generates also an increased competition along the value chain, and for every function or set of functions that a company preserves within his own walls it faces with rivals that focus all their resources to become top performers of that function. It has been reached a point when every activity retained by a company within its own structure has to be tested against the performance of the best competitors in the world. Even integrated companies like Sony, which made an option for an independent fulfillment of a much diversified set of functions, are confronting today with the dilemma of selecting the outsourceable functions. Even in many high-technology sectors manufacturing, logistics and distribution have become standardized to a great degree and that for they become tradable packages of activities.

A feature of the globalization of production and services is the implementation of the arbitrage strategy in respect of one or more production factors.

The arbitrage of "traditional" factors of production (cost of labor, capital, innovation) is not a new strategy, but its magnitude is remarkable lately.

Recently, the arbitrage strategies began to address new factors as for example the cost of a "function" resulted from the process of "modularization" or the cost of assembling a number of negotiable "functions".

In this way, within the "globalization of production and services", we have to distinguish between the "modern" component - the strategies of the arbitrage of functions resulted from the "functional" specialization, as opposed to the "classic" component - the strategies of the arbitrage of those production factors that are usually taken into consideration in economic analysis (and which ignores the opportunities of the "functional" specialization).

In respect of the production globalization we have to mention that only between the years 2000-2003, foreign companies have massively relocated their production to China, founding there around 60,000 factories. But we should not fall in the extreme of considering the period of "the globalization of markets" as an outdated historical period. Even now, most MNC are guided by strategies that aim to eliminate the constraints induced by the "distances" between countries. They have not yet connected to the new valences offered by the strategies of production or services globalization, with which they coexist in the last two decades.

Conclusions

Economic globalization represents in its core, the outcome of the implementation by companies of strategies meant to develop their business internationally, such as to overcome the "distances" that separate countries (globalization of markets), or to incorporate the positive effects of these "distances" into a global value chain (globalization of "production").

If talking about the traditional strategic incentives of TNCs regarding foreign investments, we can remember those formulated in 1993 by J.Dunning (inspired by Jack Behrman, 1972) who finds four large incentives categories:

a) search for resources
b) search for markets
c) search for efficiency
d) search for strategic assets

In spite of almost two decades past from the systematization formulated by J.Dunning, the means of the implementation of these strategies are still actual for many companies.

However, in the time passed from Dunnings systematization, new opportunities aroused from the above mentioned "modularity of manufacturing" and "functional" specialization.

In this context we can see that strategies from the "early" category of "market" globalization (based on the adaptation-aggregation mix) have uncounted less alteration compared with the strategies from the "new" category of "production" globalization (based on the concept of arbitrage of factors offered by different nations).

This is the reason for us to consider that an analyses on globalization should focus more on the strategies connected with the globalization of "production" and mainly on its new dimensions which are to be found in the arbitrage of some "classic" factors, but mainly in the arbitrage of these new factors represented in fact by the "functions" of the global value chain.

In this new competition framework there are two essential quests for a strategy making company:

- the selection of specific functions of the global value chain, both of those to keep inside and of those to outsource. A certain trend is already on sight, namely the choice of the TNCs to focus on the less tangible functions of the value chain, such as those knowledge-intensive as product definition, R@D, managerial services and brand management.
- the selection of the best integrators for the outsourced functions and of their location. Some of these integrators have meanwhile reached the status of a TNC.

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BRAND COMMUNICATION ON SOCIAL NETWORKS

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Abstract

The communication represents a basic element for the marketing activity that helps companies to achieve their objectives. Building long-term relationships between brands and consumers is one of the most important objectives pursued by marketers. This involves brand communication and creating multiple connections with consumers, even in the online environment. From this point of view, social networks proved to be an effective way of linking brands and consumers online. This paper aims to present some aspects involved by the usage of social networks in brand communication by analyzing several examples of online marketing campaigns implemented on Facebook on the occasion of Valentine's Day by six different brands.

Keywords: *online marketing, brand communication, online marketing communication, social networks, Facebook.*

1. Introduction

Many points of view reveal that social networks have improved the way brands are relating with their consumers, offering new means of communicating and interacting with them.

For the marketing communication, the development of social networks coincided with the emergence of a new way of transmitting messages between companies and consumers. This new media has provided an alternative of communication and has managed to create innovative ways of making known the activity of the brands. The online marketing communication represents a successful method that helps companies to create complex and varied connections between brands and their audience.

Starting from this assumption, this paper approaches the issue of online marketing communications through social networks and its importance in building the relationship between brands and consumers.

Marketing communications comprise a set of elements designed to act together in order to support the brand. Primarily, this paper will present the most important theoretical aspects regarding brand communication on social networks. Secondly, the paper will present some specific case studies reflecting this concept. The case studies present six different online marketing campaigns implemented on Facebook on the occasion of Valentine's Day.

The research presented in this paper is based on a secondary data analysis which aims to demonstrate that the usage of social networks in brand communication can provide advantages for the online marketing activity.

With the help of this exploratory study will be identified some examples of online marketing communication tactics that can be used by marketers in order to relate more actively with their consumers.

2. Social networks and brand communication

2.1. Theoretical aspects

The communication is considered a key component of the marketing activity, "a way of affirming and supporting the competitive advantage"[1] of a company. Marketing communication plays an important role for managing the relationships between companies and consumers on short, medium or long term.

The scientific literature doesn't provide a single point of view regarding the definition of this concept. One way of understanding marketing communication is by regarding it as "the means by which companies are trying to inform, persuade and remind consumers - directly or indirectly - about their selling products or brands"[2].

In the attempt to clarify the meaning of this concept, it should be noted that there are some opinions according to which marketing communication and promotion are two synonymously terms[3]. This approach is incorrect because the ratio between promotion and marketing communications is from part to whole[4].

Promotion can be regarded as a set of discontinuous organized activities that aim to inform and influence the consumer buying behavior, also supporting the process of selling a company's products or services[5]. On the other hand, marketing communication is a more complex concept, which features a diverse set of operational methods, among

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[1] Ioana Cecilia Popescu, *Comunicarea în marketing (second edition)* (Bucharest: Uranus, 2003), 27.

[2] Philip Kotler and Kevin Lane Keller, *Managementul marketingului* (Bucharest: Teora, 2008), 788.

[3] Olujimi Kayode, *Marketing communications* (Bookboon.com, 2014), 9.

[4] Gabriela Grosseck, *Marketing si comunicare pe Internet* (Iasi: Lumen, 2006), 189.

[5] Popescu, *Comunicarea în marketing,* 18-19.

which the promotion is just one of the several specific methods used for communication between a company and its audience[6].

Marketing communication can be classified in two categories, depending on the content or the nature of the methods and techniques used [7], namely:

- *promotional communication*: is using temporary promotional tools such as advertising, public relations, sales promotion, direct marketing, sales force etc.

- *continuous communication*: is using permanent tools such as the brand, the packaging, the price etc.

These forms of communication are complementary and are mutually reinforcing, acting coherently in meeting the company's overall marketing objectives.

Within the continuous communication tools, the brand plays a significant role, which is why marketing communications can be seen as the brand's voice[8], representing an important tool that can be used for starting a dialog and building a relationship between a brand and its consumers. Marketing communication represents "the ensemble of all the elements included in the marketing mix of a brand"[9], each of those elements serving to support the overall message of the brand. Marketing communication may prove to be a source of competitive advantage for brands.

Therefore the brand is a key component of the marketing communication[10]. The valorisation of the brand's communicational equity must be realized carefully due to the brand's capacity to transmit messages and influence the consumers.

The Internet is a communication medium that can be used independently or integrated for marketing communication purposes. The use of the Internet is associated with the improvement of the communication process in terms of addressing the consumers. On the Internet, the marketing communication process must adapt and it should be conducted at both an informational and a relational level[11].

The use of the online marketing communication may prove successful in terms of supporting the brand's message. Online marketing communication provides an opportunity for companies to develop the brand's relationship with its consumers.

The emergence of social media was occasioned by the evolution of the Internet from a repository of information and static communication technologies into a multidirectional communication space[12]. This evolution was fulfilled by the transition from Web 1.0 to Web 2.0. Based on the specific features of Web 2.0, social media managed to improve the interaction and communication between individuals by means of a wide range of tools, applications and specific services.

Among all of the social media tools, social networks are those that meet the highest growth today and enjoy the greatest popularity among Internet users.

The pace with which social networks have increased globally is impressive. At the end of 2014, the total number of social networks users reached 1.8 billion persons[13]. The largest number of users was registered by Facebook, which totaled about 1.39 billion members. Used in a coordinated manner, this network can prove to be very successful for brand communication. By using some specific tehniques, like contests and incentives, the promotional communication can support the brand coomunication and can stimulate the consumers to interact with the brand.

2.2. Case studies

This paper analyses six different Facebook campaigns organized on the occasion of Valentine's Day by brands such as: Paralela 45 (tourism agency), Garnier BB Cream (cosmetic products), Huawei Romania (telecommunications equipment), Durex (personal care products), Sensiblu (pharmaceuticals) and Garanti Bank (banking services). These case studies were chosen because they reflect a variety of brands that are using social networks for marketing communication purposes. All of the campaigns were analysed using Facebrands Pro, a social media tool providing analytics for Facebook pages.

2.2.1. Paralela 45 – Surprise your loved one with a special gift for Valentine's Day

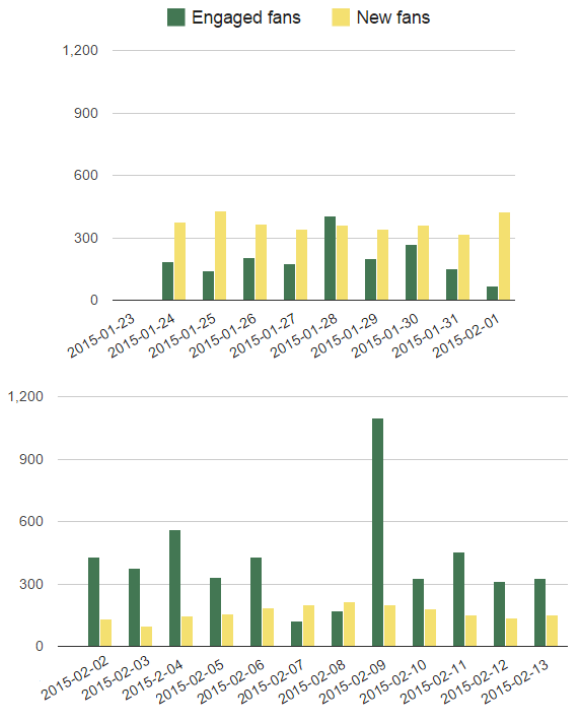
The campaign developed by Paralela 45 took place between January, 23 and February 13, 2015. To enter the contest, each user had to post a photo in which he/she appeared next to their loved one and to add a description regarding how much they love each other and how much they deserve to earn the prize. The prize consisted of a two-night vacation in Sinaia.

At the end of the campaign, on February 13, 2015, the total number of the page fans was 45,733, with 13.02% (5,268 fans) more than at the beginning of the campaign. The average growth speed was of +251 fans per day. The total number of engaged fans during the campaign was 3,193 (21.17% of overall engaged users of the page) and the engagement rate reached the average value of 6.98% of all page fans.

The contest generated a rapid increase in the number of page fans, and also a high level of engagement among the fans. The increase of the total fans number was registered especially at the beginning

[6] Popescu, *Comunicarea în marketing,* 20.
[7] Grosseck, *Marketing si comunicare pe Internet*, 188-189.
[8] Kotler and Keller, *Managementul marketingului*, 788.
[9] Shimp, 1997 *apud* Popescu, *Comunicarea în marketing,* 20.
[10] Popescu, *Comunicarea în marketing,* 58.
[11] Vasile Tran and Irina Stănciugelu, *Teoria comunicării (second edition)* (Bucharest: Comunicare.ro, 2003), 57.
[12] Horea Mihai Bădău, *Tehnici de comunicare în social media* (Iasi: Polirom, 2011), 26.
[13] "Statistics and facts about Social Networks", Statista, accessed January 20, 2015, www.statista.com/topics/1164/social-networks.

of the campaign, while a high level of engagement was achieved only in the second part of the campaign, as shown below:



Source: Facebrands Pro, 2015.

In terms of interactivity and loyalty, most of the fans interacted only once with the brand during this campaign, as shown below:

Interactivity levels	
1 activities	2483 fans
2 activities	531 fans
3-4 activities	332 fans
5-7 activities	199 fans
8-10 activities	101 fans
11+ activities	256 fans

Loyalty levels		
1 active days	2604 fans	66.72%
2 active days	538 fans	13.78%
3-4 active days	343 fans	8.79%
5-7 active days	194 fans	4.97%
8-10 active days	82 fans	2.10%
11+ active days	142 fans	3.64 %
Total	3903 fans	100%

Source: Facebrands Pro, 2015.

The administrators of Paralela 45 page posted a total number of 204 different activities during the analysed period. The structure of the posts by type of content and the average number of triggered interactions per post for this period were:

Posts by type of content	*Interaction trigger rate by type*	*Commens*	*Likes*	*Shares*
Photo	183	87,72	1,1	76,92	9,69
Link	17	58,94	0,12	51,94	6,88
Video	4	25,25	0,25	20,75	4,25
Total	204	-	-	-	-

Source: Facebrands Pro, 2015.

The fans posted 18 different activities during the same period, namely 13 link posts, 3 status posts, 1 photo post and 1 video post.

2.2.2. Garnier BB Cream – Poetry of love

The campaign developed by Garnier Romania for Garnier BB Cream took place during the period February 1-28, 2015 and was implemented by means of a dedicated Facebook application. In order to participate to the campaign, the consumers had to use the application named "Poetry of Love", available on the official Garnier Romania Facebook page, write a stanza and share it with a friend. To enter the draw for one of the prizes, the consumers had to purchase at least one Garnier BB Cream product and write the product code in the application. The list of prizes contained 28 personalised t-shirts and two romantic weekends at a tree house.

At the end of the campaign, on February 28, 2015, the total number of page fans was 256,766, with 0.74% (1,877 fans) more than at the beginning of the campaign. The average growth speed was of +70 fans per day. The total number of engaged fans during the campaign was 3,553 (4.95% of overall engaged users of the page) and the engagement rate reached the average value of 1.38% of all page fans. At the end of the campaign the poetry of love had 810 different stanzas.

During the analysed period, the fanbase evolution was positive and the fans activity showed a significant increase.

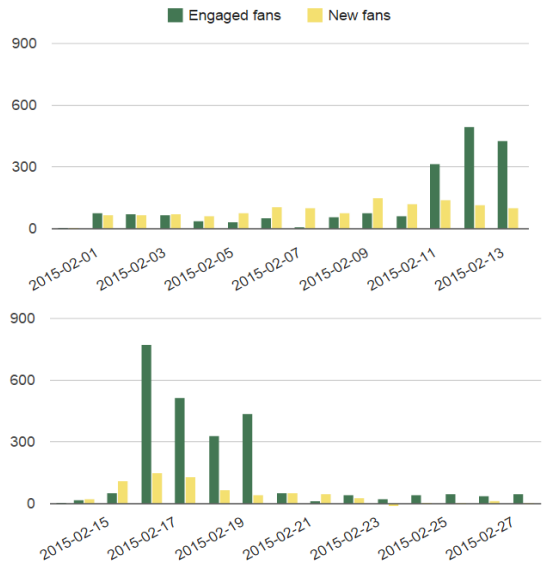
Regarding the interactivity and loyalty of the fans, most of them interacted only once with the brand during this period, as shown below:

Interactivity levels	
1 activities	3116 fans
2 activities	246 fans
3-4 activities	108 fans
5-7 activities	42 fans
8-10 activities	12 fans
11+ activities	28 fans

Loyalty levels		
1 active days	3277 fans	92.23%
2 active days	166 fans	4.67%
3-4 active days	62 fans	1.75%
5-7 active days	21 fans	0.59%
8-10 active days	15 fans	0.42%
11+ active days	12 fans	0.34 %
Total	3553 fans	100%

Source: Facebrands Pro, 2015.

The peaks of engagement were reached right before and after Valentine's Day.



Source: Facebrands Pro, 2015.

The administrators of Garnier Romania page posted a total number of 25 different activities during the analysed period. The structure of the posts by type of content and the average number of triggered interactions per post for this period were:

Posts by type of content		*Interaction trigger rate by*	*Commens*	*Likes*	*Shares*
Photo	20	223,75	10,3	203,3	10,15
Link	3	58,67	8,67	50	-
Video	2	31,50	-	30	1,5
Total	25	-	-	-	-

Source: Facebrands Pro, 2015.

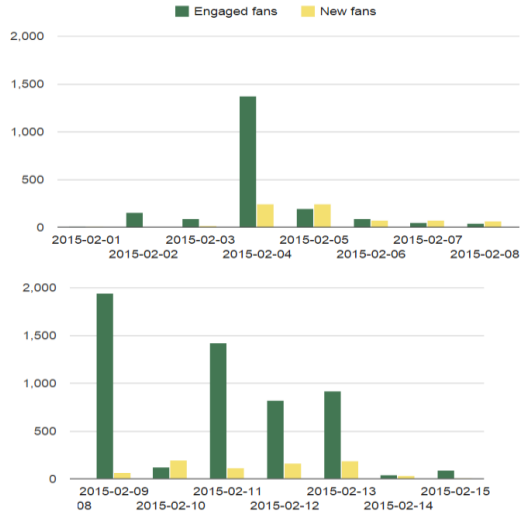
On the other hand, the fans posted 16 different activities during the same period, namely 10 status posts, 3 link posts and 3 photo posts.

2.2.3. Huawei Romania – Find a pair to your phone!

The campaign developed by Huawei Romania took place during the period February 1-15, 2015 and was implemented through a dedicated Facebook application. In order to participate, the consumers had to buy a Huawei Ascend P7 smartphone from Vodafone Romania and to enter the product code in the application. The list of prizes consisted of two Huawei Ascend P7 smartphones and 300 sets containing a phone pouch and a 4GB USB stick.

On February 15, 2015, the total number of page fans was 120,252, with 1.26% (1,494 fans) more than at the beginning of the campaign. The average growth speed was of +107 fans per day. The total number of engaged fans during the campaign was 5,118 (12.94% of overall engaged users of the page) and the engagement rate reached the average value of 4.26% of all page fans.

The fans engagement was more pronounced on the second week of the campaign, when it was also registered an increase of the fan number.



Source: Facebrands Pro, 2015.

Most of the fans interacted only once with the brand during this period, as shown below:

Interactivity levels	
1 activities	3823 fans
2 activities	798 fans
3-4 activities	336 fans
5-7 activities	77 fans
8-10 activities	31 fans
11+ activities	52 fans

Loyalty levels		
1 active days	3903 fans	76.26%
2 active days	775 fans	15.14%
3-4 active days	317 fans	6.19%
5-7 active days	74 fans	1.45%
8-10 active days	30 fans	0.59%
11+ active days	19 fans	0.37 %
Total	5118 fans	100%

Source: Facebrands Pro, 2015.

The administrators of Huawei Romania page posted a total number of 29 different activities during the analysed period, consisting of 28 photo posts and 1 video post. The structure of the posts by type of content and the average number of triggered interactions per post for this period were:

Posts by type of content		*Interaction trigger rate by type*	*Commens*	*Likes*	*Shares*
Photo	28	287,75	7,68	278,14	1,93
Video	1	22	1	21	-
Total	29	-	-	-	-

Source: Facebrands Pro, 2015.

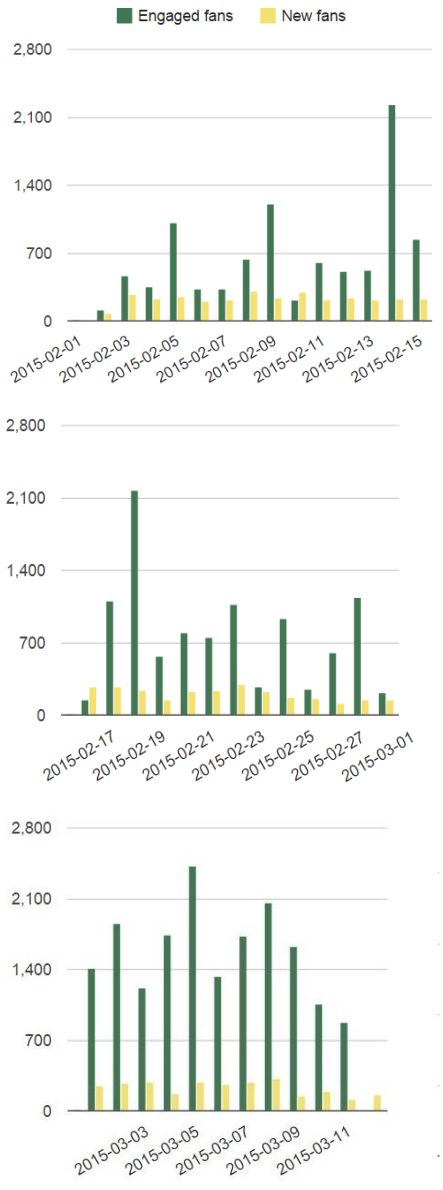
The total number of fan posts was 19, represented by 17 status posts, 1 photo post and 1 link post.

2.2.4. Durex – Why not offer something different?

The campaign developed by Durex Romania took place between 1st of February and 31st of March, 2015 and was implemented through a dedicated Facebook application, called "Give him/her something different!". To enter the contest, the consumers had to first purchase one of the Durex products and then enter the application. After playing a 30 seconds game and introducing the product code, they could enter the draw for winning one of the 10 prizes consisting of a hot-air balloon ride near Bucharest.

After one and a half month of campaign, the total number of page fans was 362,482, with 2.44% (8,649 fans) more than at the beginning of the campaign. The average growth speed was of +222 fans per day. The total number of engaged fans during the campaign was 18,697 (16.08% of overall engaged users of the page) and the engagement rate reached the average value of 5.16% among all page fans.

The engagement peaks were reached right on Valentine's Day and at the beginning of the second month of the campaign.



Source: Facebrands Pro, 2015.

During the analyzed period, most of the fans have interacted only once with the brand, as following:

Interactivity levels	
1 activities	12127 fans
2 activities	3145 fans
3-4 activities	1891 fans
5-7 activities	795 fans
8-10 activities	322 fans
11+ activities	416 fans

Loyalty levels		
1 active days	12432 fans	66.49%
2 active days	3145 fans	16.82%
3-4 active days	1758 fans	9.40%
5-7 active days	725 fans	3.88%
8-10 active days	297 fans	1.59%
11+ active days	340 fans	1.82 %
Total	18697 fans	100%

Source: Facebrands Pro, 2015.

The administrators of Durex Romania page posted a total number of 52 different activities during the analysed period, consisting of 52 photo posts. The average number of triggered interactions per post during this period was:

Posts by type of content		*Interaction trigger rate by type*	*Commens*	*Likes*	*Shares*
Photo	52	810,73	11,04	759,81	39,88

Source: Facebrands Pro, 2015.

The total number of fan posts was 29, represented by 23 link posts, 3 photo posts, 2 status posts and 1 video post.

2.2.5. Sensiblu – How did you meet your half?

The contest organized by Sensiblu took place between 11th and 12th of February, 2015. In order to participate, the users had to post a comment describing how they met their loved one. Three of the most interesting posts were awarded with a set of cosmetic products.

According to Facebrands data, at the end of the contest, the total number of page fans was 105,926, with a fan variation of 77 persons. According to the Sensiblu Facebook page, the contest post registered 476 likes, 404 comments and 232 shares.

2.2.6. Garanti Bank – The Valentine's Day surprise

The contest organized by Garanti Bank on its Facebook page took place on February 11, 2015. To enter the contest, the users had to leave a comment on the contest post writing three words that define Valentine's Day in his/hers opinion. The list of prizes contained 10 boxes of chocolates.

According to Facebrands data, at the end of the contest the total number of page fans was 212,747, with a fan variation of 94 persons.

3. Conclusions

The case studies presented in this paper make possible the formulation of some recommendations for brand communication on social networks.

The use of social networks, or more specifically the use of Facebook, can generate an increase of the consumers' interest for a brand. All these case studies demonstrate that a large number of consumers can be involved in a brand communication activity, especially if the campaigns are offering significant incentives to the consumers.

Facebook is a powerful online marketing tool for brands. Facebook offers the opportunity to create dedicated applications for marketing campaigns, facilitating the development of promotional activities, like contests. Contests are an attractive way of interacting with a large number of consumers on Facebook, due to the fact that the users can obtain some specific benefits from the interaction with the brand. Contests draw the attention of many users which is why they are a popular method to raise the interest among consumers. Promotional communication on Facebook can be used both on short term, to stimulate the sales, and also on long term, to help the developing of the brand community. As it was shown, in all six cases, the brand's fanbase raised at the end of the campaigns and the brand community was enlarged. But for a brand it is not enough to create large communities around it. The communities must be involved in specific interactions with the brand and the companies should create a close and continuous relationships with their consumers[14]. Social networks are not primarily a place to advertise, but a place to communicate and strengthen relationships[15].

[14] Otilia-Elena Platon, Irina Iosub, and Mihail-Cristian Ditoiu, "An analysis of the AIDAT model based on Facebook promotional contests", Procedia Economics and Finance 15 (2014): 1570, accesed March 5, 2015. http://www.sciencedirect.com/science/article/pii/S2212567114006273.

[15] Platon, Iosub and Ditoiu, "An analysis of the AIDAT model", 1571.

All the results presented above can help marketers to develop useful online marketing campaigns meant to attract the consumers' attention and stimulate their interactions with the brand. Social networks offer a new way of interacting and connecting the brands with consumers. The consumers are willing to interact with brands on social networks. These case studies demonstrate that most of the fans prefer to interact with the brands in a simple manner, expressing their interest for a campaign.

Further research direction would imply an analysis of the consumers' perspective regarding the usage of social networks for brand communication purposes.

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THE ROLE OF BEHAVIORAL ECONOMICS IN EXPLAINING CONSUMPTION DECISION

Mihaela Andreea STROE[*]

Abstract

The new economic approach starts from the idea that the individual does not need food, but feels the need to feed, or do not require newspapers, but feels the need of information. In this way, those who changes are not human preferences, but the way we satisfy them. At this stage of the paper, we explain the inconsistency in consumer preferences and the exceptions to the standard theory by making light upon what is called in behavioral economics: the effects of property, loss aversion and framing effects. In which concerns the standard economic model, it seems that there are discrepancies between objective measures of sources of comfort / discomfort and measures reported subjective sensations. Many defenders of classical model would argue that the measures are not reported subjective feelings of economic phenomena and therefore are not of interest to economists. However, when such feelings and sensations affect or may affect future decisions, things become relevant for the economy. Limited Rationality implies both that the agent is imperfectly informed decision-making in a complex and dynamic environment, and a limited ability processing.

Keywords: *standard model, exceptions, framming effects, loss aversion.*

1. Introduction

In an ideal world, defaults, frames, and price anchors would not have any bearing on consumer choices. Our decisions would be the result of a careful weighing of costs and benefits and informed by existing preferences. We would always make optimal decisions. In the 1976 book The Economic Approach to Human Behavior, the economist Gary S. Becker famously outlined a number of ideas known as the pillars of so-called 'rational choice' theory. The theory assumes that human actors have stable preferences and engage in maximizing behavior. Becker, who applied rational choice theory to domains ranging from crime to marriage, believed that academic disciplines such as sociology could learn from the 'rational man' assumption advocated by neoclassical economists since the late 19th century. While economic rationality influenced other fields in the social sciences from the inside out, through Becker and the Chicago School, psychologists offered an outside-in reality check to prevailing economic thinking. Most notably, Amos Tversky and Daniel Kahneman published a number of papers that appeared to undermine ideas about human nature held by mainstream economics. They are perhaps best known for the development of prospect theory (Kahneman & Tversky, 1979), which shows that decisions are not always optimal. Our willingness to take risks is influenced by the way in which choices are framed.

Consumption differs from consumption expenditure primarily because durable goods, such as automobiles, generate an expenditure mainly in the period when they are purchased, but they generate "consumption services". Neoclassical (mainstream) economists generally consider consumption to be the final purpose of economic activity, and thus the level of consumption per person is viewed as a central measure of an economy's productive success.

The study of consumption behaviour plays a central role in both macroeconomics and microeconomics. Macroeconomists are interested in aggregate consumption for two distinct reasons. First, aggregate consumption determines aggregate saving, because saving is defined as the portion of income that is not consumed. Because aggregate saving feeds through the financial system to create the national supply of capital, it follows that aggregate consumption and saving behaviour has a powerful influence on an economy's long-term productive capacity. Second, since consumption expenditure accounts for most of national output, understanding the dynamics of aggregate consumption expenditure is essential to understanding macroeconomic fluctuations and the business cycle**.**

2. Content

In the study of consumption, economists generally speak about a common theoretical framework by assuming that consumers base their expenditures on a rational and informed assessment of their current and future economic circumstances. This "rational optimization" assumption is untestable, however, without additional assumptions about why and how consumers care about their level of consumption; therefore consumers' preferences are assumed to be captured by a utility function. For example, economists usually assume (1) that the urgency of consumption needs will decline as the level of consumption increases (this is known as a declining marginal utility of consumption), (2) that people prefer to face less rather than more risk in their

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consumption (people are risk-averse), and (3) that unavoidable uncertainty in future income generates some degree of precautionary saving. In the interest of simplicity, the standard versions of these models also make some less-innocuous assumptions, including assertions that the pleasure yielded by today's consumption does not depend upon on one's past consumption (there are no habits from the past that influence today's consumption) and that current pleasure does not depend upon comparison of one's consumption to the consumption of others.

But modern theories imply that rationality does not always apply in making consumption decision, most economists bring some plausible refinements to the original ideas. For example, the modern models imply that the marginal propensity to consume out of windfalls is much higher for poor than for rich households.

Research into the consequences of this type of "comparison utility" suggests that observable individual spending behaviour is much the same whether one cares about absolute or relative levels of consumption, because there is nothing that the typical individual can do to change the consumption levels of others. If, however, the pleasure yielded by an individual's current consumption depends partly on a comparison to that person's past consumption habits, then rational consumers will realize that they will be happier if they increase their level of consumption gradually over their lifetimes (instead of equalizing consumption at different ages, as the life-cycle model suggests). Habit formation also implies a very different reaction to income shocks that reflects a gradual adaptation to new circumstances.

While economic rationality influenced other fields in the social sciences from the inside out, through Becker and the Chicago School, psychologists offered an outside-in reality check to prevailing economic thinking. Most notably, Amos Tversky and Daniel Kahneman published a number of papers that appeared to undermine ideas about human nature held by mainstream economics. They are perhaps best known for the development of prospect theory (Kahneman & Tversky, 1979), which shows that decisions are not always optimal. Our willingness to take risks is influenced by the way in which choices are framed, this is to say that they are context-dependent.

The new economic approach starts from the idea that the individual does not need food, but feel the need to feed, or require newspapers, but feels the need of information. In this way, those which change are not preferences, but the way to satisfy them.

In terms of standard economic model, it seems that there are discrepancies between objective measures of sources of comfort / discomfort and measures reported subjective sensations. Many defenders of classical model would argue that the measures are not reported subjective feelings of economic phenomena and therefore are not of interest to economists

However, when such feelings and sensations affect or may affect future decisions, things become relevant for the economy. Another weakness refers to the effect of expectations. There is some evidence that high expectations about the degree of happiness can lead to disappointment.

The conventional model it is assumed that a larger quantity of a good consumed produce more total utility. Regarding the nature of utility, in addition to the types of utility that we had in the previous subsection account, it is clear that the standard economic model for decision making under risk is "theory of expected utility ".

It was widely accepted and implemented as a descriptive model of economic behavior and as a normative model of rational choice; that means that rational people would like to obey the axioms of the theory and, in general, they do it. Decision making under risk can be considered a process of choosing between different possibilities or "gambling".

A prospecting consists of a number of possible outcomes, along with their associated probabilities. Thus, any theory of choice under risk will take into account the consequences of the choices and their probabilities. All theories described so far were models of maximizing preferences, assuming that agents behave "as if" preference would optimize certain features specific to context.

Specific features of these models include the existence of limits of rationality and the consequence of using heuristic decisions.[1]

Limited Rationality implies both that the agent is imperfectly informed decision-making in a complex and dynamic environment, and a limited ability processing; agent targets may also be defined imperfect. One of the best known anomalies of expected utility theory is a phenomenon sometimes called "boredom happiness." For example, the average income in the US increased in real terms by more than 40% from 1972 to the present, but despite the fact that their level of income and welfare are far better, Americans usually say that they are not happier than before . The phenomenon seems to occur because experts can not rely on data reported by subjects; if examined other indicators of happiness or unhappiness, such as the suicide rate, the incidence of depression, we see the same thing. Expected utility theory of diminishing marginal utility and the concave shape of the utility function as the cause of risk aversion. This theory seeks to explain risk aversion in terms of expected value and dispersion. Next, the focus will be on the concepts of ownership effects, loss aversion and framing effects, that they find relevant in explaining consumer decision of the buyer.

[1] Decisions that are based on behavioral heuristic that ignores the often complex flowcharts and methodology of decision, intervening on experience, intuition or mental "shortcuts".

a) The effects of property and loss aversion

In theory individual consumer choices are determined by an order of preference on consumer packages, independent of the effects of allocation. But Kahneman showed that preferences are subject to the current allocations and individuals are risk averse. This contradicts the theory transitivity and reversibility consumer preferences. It seems that more people demand to give up an object than would be willing to pay to get it.

Samuelson calls this effect "status quo" as a preference for current status. All these effects underlying loss aversion prospecting Theory developed as an alternative theory of choice under uncertainty. The essence of the phenomenon is that the utility is not independent of possesion. It has been shown that people who have become good in one way or another, either through purchase or gift, tend to assign a higher evaluation than others would do it. For example, a study by Kahneman, Knetsch and Thaler (1990) made the subjects gift or a cup or a pencil, randomly. Both groups were allowed to exchange goods among themselves on a minimal transaction costs, and if preferences were independent of the effect of ownership, one would have expected that the amount fraction of subjects who changed pen cup and back to equal to one.

It was noted that only a quarter of the subjects were making the transaction. The main factor underlying psychological effects of loss aversion is property. A person is risk averse if they prefer definite prospect (x) any risky prospect which has expected value x. The expected utility theory, risk aversion caused by the concavity of the utility function. This feature is in turn explained by the law of diminishing marginal utility. An example is the observation of asymmetric elasticity of demand for goods in the price. Elasticity to price sensitivity is defined as the amount required in relation to price change, both expressed as a percentage.

Loss aversion consumers are disturbed by price increases gain more than they like you would get the discounts and reduce the amount purchased as a result of price increases more than if they had raised it if the price would be reduced by the same

percentage. Therefore, loss aversion implies that the price elasticity to be asymmetrical, being more elastic demand when price increases than when it drops.

b) Framming effects

This is one of the most important phenomena of behavioral economics which violates the principle of invariance. Numerous studies have established that people answer - in terms of values, attitudes and preferences - depends on the context and the processes involved in getting these answers. For example, when subjects were asked to assess the overall level of happiness, their response was influenced by a previous question related to the number of previous meetings they have had lately. This is an example of the effect of anchor: for this effect, people's answers are "anchored" to the other phenomena existing in their consciousness, no matter how irrelevant they may seem.

Frammng effects are particularly important because they produce a reversal of preferences. This phenomenon is related to situations where individuals are favorable to option A if the question or problem is laid or framed in a way, but changes its option and choose B when the same issue is posed differently. To illustrate the reversal of preferences we refer to a classic, often called the problem "Asian Disaster"[2].

Framing positive:

Option A: save 100 lives with certainty

Option B: 1/3 chance to save the 300 men and 2/3 chance of not save any

Choice: Most choose A.

Framing negative:

Option A: 200 people die for sure.

Option B: likely to die all 300 2/3 and 1/3 chance to save all

Choice: Most choose B.

It should be noted that the options are identical in terms of possibilities result. This example illustrates, in addition to the framming effects, preference reversal, and loss aversion (saving lives is perceived here as a gain and death as a loss). There is also a situation where if individuals are to choose between two prospecting, one of which is clearly in advantage if they would not go to comparison with the status of others, it was concluded that they choose the option that gives them more utility having in consideration the fact that they feel superior to others from the perspective of the choice made. Here is the relevant concept of reference point indicating that views on the same subject are likely to change in time. It is often assumed in the analysis that relevant reference point in assessing gain and loss is the current status of wealth or welfare, but not always so. In particular, the relevant reference point can be the expected state rather than the current state, an example was given when we discussed about anomalies. The reference points are also strongly influenced by the status of others. In this case, the new information changes the reference point, turning what was previously considered a win in a loss. It seems that, in view of these considerations and psychological consumer choices may include some defects that can be explained using us what behavioral economics seeks to develop the foundations and additions to the standard economic model.

Rational consumer behavior is considered to be one that provides maximum consumer satisfaction with a minimum cost maximum efficiency. The fact that there are many needs in the context of limited resources makes the consumer to choose the priority

[2] "Choice, values and frames", D. Kahneman, A. Tversky, American Psychologist, p.341-350.

criterion. The opportunity cost in this context is seen as abandoning consumer value. All decisions about spending an amount of money will be made taking into account the opportunity cost. Additional costs and benefits of an election should be measured not only in money but in terms of risk and comfort. We can refer to a psychological cost defined as the sacrifice made by the buyer in just moments choice of product variants and abandoning others, that ist o say that each decision entails opportunity costs.

3. Conclusions

Tversky and Kahneman's work shows that responses are different if choices are framed as a gain or a loss. When faced with the first type of decision, a greater proportion of people will opt for the riskless alternative, while for the second problem people are more likely to choose the riskier. This happens because we dislike losses more than we like an equivalent gain: giving something up is more painful than the pleasure we derive from receiving it. Decisions are not always optimal. There are restrictions to human information processing, due to limits in knowledge (or information) and computational capacities (Simon, 1982; Kahneman, 2003). People are supposed to be rational when they make the best possible use of limited information-processing abilities, by applying simple and intelligent algorithms that can lead to near-optimal inferences. The idea of human limits to rationality was not new among the econimists, but Tversky and Kahneman's 'heuristics and biases' research program made important methodological contributions, in that they advocated a rigorous experimental approach to understanding economic decisions based on measuring actual choices made under different conditions. A good portion of the research he discusses involves prices and value perception.

As far as we know, the model of rational decision making assumes that the decision maker has full or perfect information about alternatives; it also assumes they have the time, cognitive ability, and resources to evaluate each choice against the others. This model assumes that people will make choices that will maximize benefits for themselves and minimize any cost. Rational decision making models involve a cognitive process where each step follows in a logical order from the one before. By cognitive, I mean it is based on thinking through and weighing up the alternatives to come up with the best potential result.

Indeed, this is true in the majority of time but as well, it is equired to have into consideration tha anomalies that occur in this proccess and the external or psychological factors that is demonstrated to alter the consumption decision.

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ASPECTS REGARDING THE USE OF SOCIAL MEDIA IN QUALITATIVE MARKETING RESEARCH

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Abstract

In order to carry out an efficient marketing activity, it is well known that entrepreneurs have to find out, first of all, where and how consumers spend their time, what are the communication channels and forms they prefer and then try to interact with the customers on their territory and on their own terms. The forms of communication that are gaining momentum currently, are taking place online, especially in the social media. A growing number of consumers have become open towards and familiar with social media, sharing their opinions daily through these means. Since the emergence of the social media phenomenon, its use has grown and has become widespread in a short period of time. In response to this phenomenon, social media marketing has developed at a similar pace and in a similar direction, and this is also reflected in the existing opportunities for using social media in qualitative marketing research.

Keywords: *marketing research, social media, consumer behavior, qualitative research, social marketing.*

1. Introduction

In order to carry out an efficient marketing activity, it is well known that entrepreneurs have to find out, first of all, where and how consumers spend their time, what are the communication channels and forms they prefer and then try to interact with the customers on their territory and on their own terms[1]. The forms of communication that are gaining momentum currently, are taking place online, especially in the social media. A growing number of consumers have become open towards and familiar with social media, sharing their opinions daily through these means.

Since the emergence of the social media phenomenon, its use has grown and has become widespread in a short period of time. In response to this phenomenon, social media marketing has developed at a similar pace and in a similar direction.

Thanks to the progress of information technology and the spread of broadband internet connectivity, consumers have now the opportunity to see the stimuli used, usually, in the context of a qualitative research and share important data like images and videos alongside text messages. Making these exchanges, marketers can get a significant amount of symbolic data without the inherent disadvantages of field work, without the high costs and logistical restrictions caused by the transport of persons and the timing of meetings. In these circumstances, all the compromises that occur in organizing and carrying out a traditional qualitative research can be reduced by using the blogosphere as a data gathering medium for the qualitative research.

2. The development of marketing through social networks

Lately we can easily observe that social networks, blogs and other online communities seem to thrive everywhere around us. Nowadays, people use social networks as a primary source for an extremely broad range of information, a phenomenon that keeps gaining momentum. Apart from social networks, people are used to communicate on forums, too; the people they meet there are strangers, but they share the same passions and interests. Online, people communicate sincerely, they share their thoughts openly, and the barrier between an introvert and an extrovert keeps getting slimmer. At the same time, "blogging", as an activity has become widespread and keeps growing, experts from various fields holding it today under close scrutiny.

The beginnings of social media date back to 1979, when Tom Truscott and Jim Ellis from Duke University created Usenet, a system that allowed worldwide conversations between people, by the online posting of public messages. However, the era of "Social Media" as we understand it today started probably about 20 years earlier, when Bruce and Susan Abelson founded "Open Diary", a social networking website that brought together the users of online journals in a single community. At the same time the term "weblog" saw its first use; a year later it was truncated into the term "blog", when a blogger jokingly turned the noun "weblog" into the sentence "we blog". Later, widespread access to high-speed Internet along with increased popularity of the concept of social media, led to the creation of social networks such as MySpace in 2003 and Facebook in 2004.

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[1] Hornby, J., 2012, *The case for conversational marketing*, The Knowledge Exchange, SAS Institute Inc., 7 November 2012, http://www.sas.com/knowledge-exchange/customer-intelligence/featured/the-case-for-conversational-marketing/index.html

All these led in turn to the invention of "social media" as a term and determined the importance that social media has today. The most recent addition to this term has been the so-called "virtual worlds" - computer simulated environments, populated by three-dimensional avatars; a well-known example being Linden Lab's creation, "Second Life".

In early 2009, the founder of Facebook, Mark Zuckerberg, equivalated Facebook to a nation claiming that it was the eighth largest country in the world. Since 2014 though, Facebook has exceeded by 1 billion users the limits described previously, reaching the position of third largest country in the world, right after China and India, and before the United States.

It hasn't been long since social media has overtaken email at the top of the online activities, placing itself first in this moment, an assertion that will surely remain valid in the foreseeable future, considering this field's development.

Marketing has reacted to this progress accordingly developing a new specialization - marketing activities through social networks (social media marketing). Thus, according to a survey made by TWI Surveys Inc. on behalf of the Society for New Communication Research, the investments in marketing activities through social networks and conversational marketing will have exceeded the investments in traditional marketing activities as early as 2012.

The explosive growth in using social media and blogging suggests that the society has reached a certain degree of "comfort" in carrying out these activities. This is also revealed by the results of the study "Intel UltraYou", commissioned by Intel and conducted by Mercury Research, according to which Romanians spend, on average, 31 minutes a day to update their social networks accounts, surpassing the European average in this field. Among the existing social networks, Romanians prefer Facebook, which is the most popular network in our country, followed by Hi5, Google+, Netlog and Twitter. 39% of them post at least once a day on these channels and postings consists mainly of photos (69% of the respondents), while 66% of the respondents post opinions, and 62% various information[2]. On the other hand, according to Facebrands, in Romania there are approximately 7.8 million Facebook users[3].

3. Qualitative marketing research characteristics

Researchers in the field of marketing have intensively used in the past few decades, focus groups and in-depth interviews in order to cover the need for information of qualitative nature. These methods are based on the premise that the respondents are aware of the reasons behind their consumer behaviors under certain circumstances, and that they're also willing to share them[4]. Unlike quantitative research, qualitative research involves questioning a nonprobabilistic sample of a relatively small number of consumers, carried out either within individual in-depth interviews (intensive interviews) or group discussions (focus groups).

These qualitative research techniques can contribute to the achievement of a wide range of objectives. Qualitative research can be used either following a quantitative research in order to understand in depth the findings of the latter, or before a quantitative research in an early stage in order to explore and gather information about an area that will be subject to quantitative research that will take place in a later stage. Also, qualitative researches can be made as stand-alone studies, and not as completing stages before or after a quantitative research. On these occasions, making this type of research suffices to achieve the objectives set in the early stages of the research.

Regardless of the place that the qualitative researches occupy within an integrated research program, the above mentioned techniques stand out from those specific to quantitative researches, primarily through the information obtained, data that reflect the abundance of elements (symbolically speaking) that form the basis of the consumers' needs and wishes, and of the criteria governing brand choice decisions, beyond the estimates and inferences made on a representative sample of target population parameters.

However, qualitative research methods, while achieving effectively the objectives they were designed for, have some inherent disadvantages. These methods are somewhat artificial, because they involve extracting the respondent from his role as an actual consumer, during the interview. This is a common disadvantage of standard qualitative research methods, which as such removes the possibility to gather data in a natural setting, as is the case of observation. Also, the presence of the interview moderators is considered invasive and inappropriate. Moderators ask questions for which they hope to receive honest answers, trying at the same time to limit the respondents exposure to the influence caused by moderators' presence (such as, for instance, social desirability). At the same time, qualitative research methods rely heavily on people's memory, considering that the vast majority of surveys require respondents to recall relevant experiences and express opinions based on these memories.

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[2] Fantaziu, I., 2012, *How much time do Romanians spend on Facebook*, evz.ro, 10 October 2012, http://www.evz.ro/detalii/stiri/Ct-stau-romnii-pe-Facebook-1004927.html

[3] FaceBrands.ro – Romanian brands on Facebook, accessed February 1, 2015, http://facebrands.ro/

[4] Stanciu, M., 2006, *Consumption patterns research methods*, Review of Economic Studies and Research, vol 42, Romanian Academy, http://www.iccv.ro/romana/articole/Modele%20consum%20metodologie.pdf

There are voices saying that the days of researches based on focus groups and in-depth interviews are numbered[5]. In this respect, new instruments are being proposed to be used in marketing research, such as mobile applications that enable researchers to observe the consumer during the process of decision-making regarding his purchase. Unfortunately, these tools are quite invasive, up to the point where the consumer would not agree to participate in such research. On the other hand, qualitative research still provides a series of essential information that cannot be obtained otherwise. Also, current changes of the online environment offer new opportunities to improve the methods of qualitative research, with technology eliminating the disadvantages listed above.

4. New opportunities for carrying out qualitative researches online

The use of new technologies for improving the marketing research process is not a novelty. Looking back to its development we can observe how in the past decades technological progress has improved the conditions in which the marketing research is carried out, improvements that concern its effectiveness, costs and process control.

As we all well know, in the beginning, the only method to collect data for marketing research was the personal one, and once the computer-assisted telephone interviewing (CATI) appeared, a series of key research coordinates saw improvement. CATI offered researchers a better control over the data collection process, a systematic treatment of the respondents, a more accurate measurement of the phenomena, a better use of sampling and a better management of the quotas structure, a better representation of the sample in relation to the target population, a faster delivery of data and, last but not least, much lower costs in relation to the personal survey. Then the online research appeared which led to even greater improvements that further lowered research costs. However, quantitative research was the one to benefit the most from technological improvements. There are no reasons why the technological progress cannot be used today to the benefit of qualitative research.

It is well known that blogging and social media allow the handling of information in text, video and audio form; people can both gather information and post it in order to share it with others. These activities are comparable to those made in the process of qualitative marketing research, being characterized by the presence of the interview or focus group moderator who addresses a series of questions to probe participants' behavior. Simplifying further, we can say that qualitative research is a discussion between the moderator and the participants, fueled by a series of questions and answers exchanged between them. Sometimes the moderator presents to the participants certain "things" to which they are asked to express their attitude and opinions, and other times, the moderator requests the participants to show certain "things" so that they can be seen, heard and/or discussed. All these lead us to the conclusion that there are a number of similarities between blogging-specific activities and qualitative research-specific ones. These similarities support the use of the computer and the Internet to conduct the activities specific to marketing qualitative research. To achieve this it is necessary to change the traditional methodology that has dominated the qualitative research for decades in a row, replacing the personal probing of individuals with a survey conducted through online environment. This change should not encounter great difficulties if we take into account the comfort level reached by the people in using this communication environment.

One of the obstacles that might occur in the way of this goal can be represented, according to some, by one of the major disadvantages of using the Internet, i.e. the impersonal nature of communication, a characteristic improper to qualitative research. In these circumstances, the main question that a specialist in the field must answer is whether some critical human particularity is lost while using the Internet, out of the emotions conveyed by the respondent. Not long ago, communication made by means of personal computer was considered poor, cold and shallow. Unlike personal communication, the online one has long been regarded as poor in social cues and characterized by the inability to convey non-verbal information such as voice inflections, facial expressions, posture, body language, etc. In time, however, the society has adapted and developed new ways of expressing these non-verbal cues in written form, using for this purpose new symbols and electronic paralanguages such as emoticons, special strings of characters, deliberate misspellings, absence or presence of corrections, use of capitalization, and even use of images and sounds.

On the other hand, carrying out a qualitative research online allows minimizing and eliminating many of the flaws and shortcomings inherent in traditional qualitative research, and even improving on some aspects. Thus, a website used in research can be designed in such a way as to have a similar look and content with the social networking websites Facebook, Twitter or LinkedIn, and where the population of interest can easily navigate and the respondents are able to fulfill their responsibilities related to the survey and receiving in return the incentives that usually accompany the qualitative research. At the same time, the moderator can post on the website the content of the interview guide drawn up for that research and the recruited participants can access it, see the questions

[5] Stephens, D., 2011, *Death of the Focus Group: Research Meets Mobility*, Retail Prophet, 5 February 2011, http://www.retailprophet.com/blog/advertising/death-of-the-focus-group-research-meets-mobility/

posted by the moderator and respond to them appropriately.

All the elements that make the qualitative research carried out online a viable method, become more relevant when we bring into question two existing realities: widespread Internet access and the ubiquity of digital technology, all of them causing a high level of interpersonal computer communication convenience and readiness for people.

It is clear that the current technology offers specialists the opportunity to identify consumer attitudes and opinions within the marketing research, through the use of images, videos and other stimuli. Consumers are also equipped to provide researchers with the same type of stimuli, while they can upload content on research websites, as they do on Facebook or Youtube, to be seen and analysed by qualitative research experts. People feel comfortable and willing to use their mobile phones to take pictures, make videos which they then send to friends via email, upload them on social networking websites and blogs, and then access those websites to express their opinion on a particular topic using their personal computers or smartphones, without feeling intimidated to express their honest opinion in the presence of strangers.

In addition to traditional qualitative researches, the Internet provides a strong sense of anonymity to survey participants and unwanted influences upon the answers (social desirability) are minimized online. Therefore, the qualitative data collected from the online environment tend to be extremely sincere given that respondents feel safe in an anonymous and private environment, having no fear of telling anything to the moderator. Consequently, these data have a much greater validity than those collected in the focus group sessions that use face-to-face interactions. And more than that, depending on the nature of the survey, the respondent's home may actually be the most natural place for the behavior submitted to the survey, representing thus the best place for data collection. People normally participate in online surveys, because the Internet is an environment where they feel comfortable. An environment familiar to the respondents correlates with the quality of information they provide and the sincerity of the opinions expressed. In contrast with the comfort offered today by the online environment, standard facilities used in traditional focus groups or in-depth interviews are simulated and artificial and do not create all the conditions where people can speak and be listened to. These facilities are limited to one room with audio and video recording equipment, and a one-way mirror behind which the experts are observing. In all cases, the respondents are completely isolated from the environment where the behavior submitted to survey happens naturally.

Another advantage of the focus group conducted online is represented by the fact that respondents do not waste time to get used to the ambient of the room, with the recording instruments or with the other respondents; they only need to become familiar with the moderator and the rules of discussion he proposed.

Regarding the amount of data obtained, the design of an online study allows participants to speak at the same time; the guide containing specific research questions is posted on the website, requiring only the authentication of the participants within a period of time announced during their recruitment. This eliminates the limits of traditional qualitative researches that, due to the way in which they are organized, do not allow the participants to speak simultaneously, but only one at a time. In the typical focus group, the respondent has approximately 10 minutes to provide the information that expresses his opinion during a two-hours-long discussion, while an online participant has 10 times more time to accomplish this.

There is another important advantage of online qualitative research, besides the aforementioned ones. This advantage refers to automatic data transcription and its correlation with quantitative data collected during recruitment, which allows the classification of text and other data into subgroups for comparative purposes. At the same time, all the logistics required by organizing traditional focus groups and in-depth interviews (transport, scheduling, room arrangement, coordination, etc.) are no longer needed online, where no time is consumed with traveling away from the office, home and family. Conducting qualitative research online also leads to a drastic cost reduction, stemming from the way research organizing and implementing takes place. Thus, according to the comparisons made by the experts in the field[6], with six focus groups of nine participants each and lasting two hours, the required costs for an online qualitative research amount to only a third of the traditional costs, taking up to 40% less time (which also includes data analysis and drawing up a comprehensive report of research results) and generating more than twice the amount of information of a traditional qualitative research.

Concluding this presentation, we can summarize the advantages of online qualitative research in comparison with the traditional one as follows:

- computer-mediated interaction promotes honesty, attentiveness and essay-type responses;
- time is used efficiently;
- enables the collection of larger amounts of data;
- respondents no longer have their answers influenced by the physical presence of other persons;
- data can be collected in a familiar setting and right when the studied event takes place;

[6] Rubenstein, P., 2011, *Why (and How) the Growth of Social Media has Created Opportunities for Market Research*, The Industrial-Organizational Psychologist, Vol. 49, No. 2, October 2011, pp. 19-26, http://www.siop.org/tip/oct11/492_features.pdf, http://www.siop.org/tip/oct11/04rubenstein.aspx

- multimedia-data and text-data are collected and integrated;
- the data is better organized and easily sorted for subgroup analysis;
- automatic transcription;
- minimal logistics requirements;
- lower costs of research;
- research participation takes less time for the respondent.

In addition, the applicability of online qualitative research can be intensified through the application of new tools, such as *Concept Visualization*, a relatively new technique that involves outlining some design ideas for a product, while it is subjected to a focus group or panel. Therefore, during the development of an online qualitative research, a graphic designer takes the information circulated during the focus group sessions and drafts new product concepts with the help of specialized software. At the end of the research, the graphic designer will have a set of drafts which may constitute the development or innovation portfolio for a product[7].

The information obtained via online qualitative research can be used by companies for the development of new products and services concepts, idea-gathering for promotion campaigns, the development of competitive advantage, the development of branding strategies, new consumer experiences, brand naming ideas, product packaging ideas, etc. In addition, online qualitative research can contribute to the identification of problems relating to various activities such as customer support, packing, distribution and product display, and last but not least, it allows the company to better understand their customers' perceptions and motivations.

3. Conclusions

A growing number of consumers have become open towards and familiar with social media, sharing their opinions daily through these applications. Thanks to the progress of information technology and the spread of broadband internet connectivity, consumers have now the opportunity to see the stimuli used, usually, in the context of a qualitative research and share important data like images and videos alongside text messages. Making these exchanges, marketers can get a significant amount of symbolic data without the inherent disadvantages of field work, without the high costs and logistical restrictions caused by the transport of persons and the timing of meetings.

Market research specialists have long accepted that in order to achieve certain research objectives, a series of compromises regarding its organizing and conducting methodology must be done; it is rare that such compromises don't exist. In this case, the compromises involve setting a balance between quality, speed and cost. And yet, compromises can be reduced by using the blogosphere as a qualitative research data gathering medium and through a viable methodology which provides qualitative research experts with access to human experience on a scale and reach immeasurable for now.

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STUDY CONTESTING TAX RULES ON SOCIAL SECURITY CONTRIBUTIONS BY TAXPAYERS FROM ROMANIA

Adrian Doru BÎGIOI*

Abstract

The management bodies of companies must know and correctly apply tax law. There are, however, the practical situations, when, although they want to respect this, taxpayers are penalized by the tax authorities, because it did not comply with tax obligations. There are many factors that can determine this, among which: circumvent tax rules in order to avoid paying taxes and incorrect application of law. In this study was approached the second factor, namely: analysis of the most common situations in which both taxpayers as well fiscal authorities erroneously apply tax law. To achieve these results, was developed a study regarding the determination degree of contesting the tax rules, in area of social security contributions. Data subject research was extracted in the database officially published by competent insitutions tax. The research was conducted for the period January 1, 2004 and until February 28, 2015. In terms of research methodology, were used both quantitative methods and qualitative methods. Finally, data were centralized by type of articles, they are sorted according to the extent of contestation obtained. The final conclusion is that imprecise definition of the terms tax is one of the main causes which determines incorrect application of tax law. The results can be used especially by the subjects of tax legal relationship, to avoid situations the tax law is applied incorrectly, aspects that may lead to negative situations, both companies and the state institutions.

Keywords: *tax rules, social security contributions, contesting, taxpayers, tax authorities.*

1. Introduction

In compiling this study was started from **Adam Smith's** statement, according to which, "*tax each person is obliged to pay, should be certain and not arbitrary, upon payment, method of payment and the amount of money to be paid must be clear and simple for the taxpayer and any other person".*[1] Starting from this statement, in this study, author aims to determine which tax rules which created the most problems business taxpayers in Romania, in matters of social security. In the last 10 years, tax legislation was amended quite frequently, a major cause being included in the taxable new sources of income. Also, imprecise definition of certain tax rules, can lead to situations where both taxpayers and tax authorities to apply different tax rules. These two reasons have led the author to conduct a series of research studies[2] on determining the degree of contesting rules, in different areas, this paper having as main social contributions. To obtain these consequential, author used data published by official state institutions, analyzing complaints filed by taxpayers and settled by the competent institutions, for a period of 10 years more. The final objective of the research was to highlight mistakes both by taxpayers and tax authorities, so as to avoid such problems in the future.

Taxation concepts are presented in a series of theoretical and empirical studies. Thus, **John Locke,** says, „*the states have governing predetermined laws, which is not changed repeatedly and rules must be applied equally, both the rich and the poor."*[3]

Clemens Fuest, from University of Oxford, with other authors, have developed a study on the relationship between payroll and payroll tax. Data were extracted on samples drawn from the German. The results show that there is an inverse relationship between them. Thus, given that there is a payroll tax increase, while there is a decrease in gross salary fund.[4]

Erik M. Jensen, from Case Western Reserve University School of Law, has prepared an article entitled *The Individual Mandate, Taxation and the Constitution,* the issues addressed in the US Supreme Court in Case National Federation of Business v. Sibelius (NFIB). The author comments on the constitutionality of laws, that establish taxes charged taxpayers.[5]

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[1] Adam Smith, *Avuţia naţiunilor, cercetare asupra naturii şi cauzelor ei, 1776, pag. 677*

[2] Adrian Doru Bîgioi, *Study on the Evaluation of the Contestation Degree of Excise Duty Rules,* by Romanian Companies, Revista Audit Financiar, Anul XIII, nr. 123 - 3/2015, pg. 74

[3] John Locke, *Two Treatises of Government Chapter XI Of the Extent of the Legislative Power,* Prepared by Rod Hay for the McMaster University Archive of the History of Economic Thought, 1823, Paragr. 142, Pg. 167

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[5] Erik M. Jensen, Case Western Reserve University School of Law, *The Individual Mandate, Taxation, and the Constitution,* Journal Taxation of Investments, p. 31, Fall 2012, Case Legal Studies Research Paper No. 2013-4

Paul L. Caron, from Pepperdine University - School of Law and other authors, have developed a paper entitled Occupy *the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth,* they discussed issues respecting the principle of equity in terms of tax law. Thus, according to the authors, major social inequality harms, they persisted over generations. From this perspective, the authors criticize the policy states no corresponding tax proceeds from inheritance.[6]

Robert Carroll, together with other authors, have developed an article entitled *The X Tax: The Progressive Consumption Tax America Needs?,* they did an analysis of the influence they have on the economy, income tax and consumption tax. Thus, according to the authors, increasing the income tax affects household savings decline, while increasing the consumption tax, lowering influence consumption.[7]

Avneesh Arputham has prepared a paper entitled *Constitutionality of Taxing Services Provided and Received Outside India,* in which he analyzed the constitutionality of rules issued by the Indian authorities regarding the taxation of services, rendered outside India, just because the service recipient is located in India or have permanent establishment in India.[8]

Emily Cauble from DePaul University - College of Law has prepared an article entitled *Was Blackstone's Initial Public Offering Too Good to Be True?: A Case Study in Closing Loopholes in the Partnership Tax Allocation Rules*, addressed the issues of tax incentives that can benefit some American companies, by forced interpretation of the law or with legal authorities.[9]

2. Content

Subject research data were extracted from the database formally published by the tax authorities, being selected a sample of 2,098 complaints, a total of 68,809 total complaints extracts, which represents a rate of 3.04% of the total complaints filed, the sample being representative. The total number of complaints was determined based on the general rule that, complaint filed by a taxpayer includes in turn, one or more articles challenged. In terms of research methodology, methods were used both quantitative and qualitative methods.

Normative acts were surveyed following: Law no. 19/2000 on public pensions and other social insurance rights, published in the Official Gazette no. 140/1 April 2000, Law no. 76/2002 on unemployment and stimulate employment, published in the Official Gazette 103 of February 6, 2002, Law no. 346/2002 on insurance for work accidents and occupational diseases, published in the the Official Gazette. 454 of 27 June 2002, Law no. 571/2003 regarding the Fiscal Code, published in published in the Official 927 of 23 December 2003, Law no. 95/2006 on healthcare reform, published in the Official Gazette no. 372 of 28 April 2006, Law no. 200/2006 regarding the establishment and use of the guarantee fund for salary payment, published in the Official Gazette no. 453 of 25 May 2006.

In further study, we sorted the data collected and based on quantitative methods, we estimated the extent of contestation of articles in the field of social contributions.

In order processing, we defined the following general empirical testing function:

General function estimating the degree of challenge to the rules in area of social security contributions: (hi(Csi))

We define the function:

$h: R^{+*} \rightarrow R^{+*}$, where

$h_{1i}(Cs_{1i})$ represents general function on estimating the degree of challenge to the rules relating to social security and is given by:

$h_{1i}(Cs_i) = h(\xi_{1i}, \xi_{2i}, \xi_{3i}, \xi_{4i} \ldots \xi_{ni})$, where

$0 \leq h_{1i}(Cs_{1i}) \leq 100$ and

$\xi_{1i}, \xi_{2i}, \xi_{3i}, \xi_{4i}, \ldots \xi_{ni} \in [0; m]$, $i \in [0; 68809]$.

In this case, the degree of challenge to the rules on social security contributions, h_{1i} (Cs1i) is given by:

$$h_{1i}(Cs_{1i}) = h(\xi_{1i})/h(\xi_{1i}) + h(\xi_{2i}) + h(\xi_{3i}) + \ldots$$

$$\ldots. + h(\xi_{ni}) \times 100, \text{ where}$$

,

$\xi_{1,} \xi_{2,} \xi_{3,} \xi_{4,} \ldots, \ldots \xi_{ni}$ - represents the section of the contested tax rules in area of social security contributions

m – represents item number of the laws subject research matters raised by objectors social contributions where, $m \in Z_+$

i – represents tier appeal represents made by taxpayers in matters of social security contributions.

[6] Paul L. Caron, Pepperdine University - School of Law, James R. Repetti, Boston College - Law School, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth,* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200270, Pepperdine Law Review, Vol. 40, p. 1255, 2013, Boston College Law School Legal Studies Research Paper No. 280, U of Cincinnati Public Law Research Paper No. 13-02 January 13, 2013

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[8] Avneesh Arputham, *Constitutionality of Taxing Services Provided and Received Outside India,* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691785, October 13, 2010

[9] Emily Cauble**,** DePaul University - College of Law, *Was Blackstone's Initial Public Offering Too Good to Be True?: A Case Study in Closing Loopholes in the Partnership Tax Allocation Rules*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236325, Florida Tax Review, Vol. 14, Number 5, 2013, DePaul Legal Studies Research Paper No. 13-06

The parameters of this function were extracted based on questionnair.

Following the development of the study on estimating the degree of contestation the rules on social contributions we obtained the following results:

Table 1 Contestation laws based social contributions - Law no. 19/2000 on public pensions and other social insurance rights

Tax rules	Area	Number of appeals	Degree of appeal (%)
24	Monthly basis for calculating social insurance contributions payable by the employerr	354	37.5 %
23	Monthly basis for calculating the individual social insurance contribution	352	37.2 %
18	Defining taxpayers	94	9.9%
5	Categories of insured persons	85	9.0%
31	Failure to pay social insurance contributions	46	4.9%
27	Social insurance	13	1.4%
3	Organizing CNPAS	1	0.1%
Total	X	945	100%

Source: own, based on data extracted from the website of the National Agency for Fiscal Administration

Table 2 Contestation laws based social contributions Law no. 95/2006 on healthcare reform

Tax rules	Area	Number of appeals	Degree of appeal (%)
257	Monthly basis for calculating social insurance contributions payable by the employer	185	62.7 %
258	Monthly basis for calculating the individual social insurance contribution	52	17.6 %
211	Defining taxpayers	47	15.9 %
363^1	Categories of insured persons	11	3.7%
Total	X	295	100%

Source: own, based on data extracted from the website of the National Agency for Fiscal Administration

Table 3 Contestation laws based social contributions Law no. 76/2002 on pt. unemployment and stimulate employment

Tax rules	Area	No. of appeals	Degree of appeal (%)
26	Calculation of employer contributions to the unemployment fund	327	49.3%
2	The general framework of rules on unemployment	263	39.7%
19	The categories of insured (required)	28	4.2%
31	Deadline for submission of declarations	22	3.3%
23	Unemployment insurance budget	6	0.9%
24	Establishment contribution to the unemployment fund	6	0.9%
27	The calculation of employee contributions to the unemployment fund	6	0.9%
29	The quotas of the contribution to the unemployment fund	4	0.6%
20	The categories of insured (optional)	1	0.2%
Total	X	945	100.0%

Source: own, based on data extracted from the website of the National Agency for Fiscal Administration

Table 4 Contestation laws based social contributions - Law no. 346/2002 on insurance for work accidents and occupational diseases

Tax rules	Area	Number of appeals	Degree of appeal (%)
101	The application contravention sanctions	54	42.9%
5	The categories of persons compulsory insured	39	31.0%
96	Taking the fund reserves	15	11.9%
140	Fixed contribution of 0.5%	8	6.3%
108	Exemption actions in court for judicial stamp duty	7	5.6%
6	Categories of insured persons option	2	1.6%
10	Drawing statement on insurance for work accidents and occupational diseases	1	0.8%
Total	X	126	100%

Source: own, based on data extracted from the website of the National Agency for Fiscal Administration

Table 5 Contestation laws based social contributions - Law no. 200/2006 regarding the establishment and use of the guarantee fund for salary payment

Tax rules	Area	Number of appeals	Degree of appeal (%)
7	The calculation of the contribution to the guarantee fund	17	100%

Source: own, based on data extracted from the website of the National Agency for Fiscal Administration

Table 6 Contestation laws based social contributions- Law no. 571/2003 regarding the Fiscal Code

Tax rules	Area	Number of appeals	Degree of appeal (%)
296^18	Calculation, withholding and payment of social security contributions	52	100%

Source: own, based on data extracted from the website of the National Agency for Fiscal Administration

3. Conclusions

After analyzing the results, we obtained the following conclusions:

I. Articles of the Law no. 19/2000 on public pensions and other social insurance rights that were most frequently challenged by taxpayers were as follows:

- Article 24, which has a degree of contestation of 37.5% of the total subject research articles being challenged 354 times;
- Article 23 which has a degree of contesting of 37.2% of the total subject research articles being challenged 352 times;
- Article 18 which has a degree of contesting of 9.9% in the total number of articles submitted research being contested 94 times;
- Article 5 which has a degree of contesting of 9% of the total subject research articles being challenged 85 times;
- Article 31, which has a degree of contesting of 4.9% of the total subject research articles being challenged 46 times;
- Article 27 which has a degree of contesting of 1.4% of the total subject research articles being challenged 13 times;
- Article 3 which has a degree of contesting of 0.1% of the total subject research articles being challenged once;

II. Articles of the Law no. 95/2006 on healthcare reform that were most frequently challenged by contributors were:

- Article 257 which has a degree of contesting of 62.7% of the total subject research articles being challenged 185 times;
- Article 258 which has a degree of contesting of 17.6% of the total subject research articles being challenged 52 times;
- Article 211 which has a degree of contesting of 15.9% of the total subject research articles being challenged 47 times;

- Article 363 ^ 1 which has a degree of contesting of 3.7% of the total subject research articles being challenged 11 times;

III. Articles of the Law no. 76/2002 on the unemployment insurance system and stimulation of employment were most frequently challenged by contributors were:

- Article 26 which has a degree of contesting of 49.3% of the total subject research articles being challenged 327 times;
- Article 2 which has a degree of contesting of 39.7% of the total subject research articles being challenged 263 times;
- Article 19 which has a degree of contesting of 4.2% in the total number of articles submitted research being challenged 28 times;
- Article 31, which has a degree of contesting of 3.3% of the total subject research articles being challenged 22 times;
- Article 23 which has a degree of contesting of 0.9% of the total subject research articles being challenged 6 times;
- Article 24, which has a degree of contesting of 0.9% of the total subject research articles being challenged 6 times;
- Article 27 which has a degree of contesting of 0.9% of the total subject research articles being challenged 6 times;
- Article 29 which has a degree of contesting of 0.6% of the total subject research articles being challenged 4 times;
- Article 20 which has a degree of contesting of 0.2% of the total subject research articles being challenged once;

IV. Articles of the Law no. 346/2002 on insurance for work accidents and occupational diseases were most frequently challenged by taxpayers were as follows:

- Article 101 which has a degree of contesting of 42.9% of the total subject research articles being challenged 54 times;
- Article 5 which has a degree of contesting of 31% of the total subject research articles being challenged 39 times;
- Article 96 which has a degree of contesting of 11.9% of the total subject research articles being challenged 15 times;
- Article 140 with a grade of 6.3% of the total contesting submitted research articles being challenged 8 times;
- Article 108 which has a degree of contesting of 5.6% of the total subject research articles being challenged 7 times;
- Article 6, which has a degree of contesting of 1.6% of the total subject research articles being challenged 2 times;
- Article 10 which has a degree of contesting of 0.8% of the total subject research articles being challenged once;

V. Articles of the Law no. 200/2006 regarding the establishment and use of the Guarantee Fund for salary payment which were most commonly challenged by taxpayers were as follows:

- Article 101 which were contested by 17 times;

VI. Articles of the Law no. 571/2003 regarding the Fiscal Code which were most frequently challenged by taxpayers were as follows:

- Article 296^18 which has been challenged 54 times.

Based on the results it follows that the tax rules with the highest degree of contestation are those relating to the basis for calculating social security contributions, because the authorities have extended the tax base in the period under study and the rules were not very clear in this regard. We recommend more precise definition of terms and their stability while tax.

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CHANGES IN INCOME TAX IN ROMANIA

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Abstract

The Romanian legislation changes quite often, a situation that prevents companies to establish an action plan in the longer term. Income taxes affect the company's liquidity. In many cases legislative changes were announced shortly before application. In this article we intend to identify changes in income tax in Roamnia for a period of time and their implications on the company.

Keywords: *income tax, legislation, impact, profit, tax.*

1. Introduction

Tax legislation plays an important role regarding earnings remained for an enterprise after withholding taxes. Fiscal policy also influences the decision of foreign investors to conduct business in firms established in Romania.

For profit tax or income tax are set different tax rates, different taxable bases and hence the size of the effect on net profit is different.

The purpose of the present study is to present the characteristics of micro enterprises' income tax (definition, conditions, optional of mandatory nature of the application, taxable base, tax rate). The main objective of the study is to highlight changes to micro enterprises' income tax and to identify the frequency of legislative changes.

The period referred to in the study is 2003-2016. Data is extracted from the Fiscal Code and implementing rules (periodically modified variants) published on the website of the National Agency for Fiscal Administration.

"These small companies, which individually do not have a financial power and no substantial taxable bases, but overall can generate significant revenues to the budget,"[1] received a big beating in 2013 by the requirement to apply micro enterprises income tax.

"Authorities found more appropriate (again) to COMPEL taxpayers to pay a tax that has nothing to do with profitability."[2]

Stenzler (2013) made a study on the effect of compulsory of this tax on the companies in Romania and he shows that this tax "is not equitable in relation to different categories of companies by not considering (..) value added, income tax is burdensome for traders and producers.

Taxation system in Romania was studied by other authors. Bîgioi (2015)[3] examines complaints submitted to the National Agency for Fiscal Administration. 8% of total complaints relate to income tax.

2. Content

Profit tax and income tax represent revenue for the state budget. In Romania these taxes are regulated by the Fiscal Code (Law no 571/2003).

Definition of microenterprise

In 2003 a microenterprise is a firm for which the following conditions are met on December 31 the previous year:

a) The company has as main activity the production of goods, services and/or trade;

b) The company has between 1 and 9 employees;

c) Revenues did not exceed the Ron equivalent of 100.000 euros;

d) The share capital is not owned by the state, local authorities or public institututions.

First condition changes in August 2006, with effect from 2007: revenues, other than those of consulting and management, are more than 50% of total revenues.

For 2010 income tax provisions are abrogated by Government Emergency Ordinance no 109/2009, which eliminates the possibility of opting for such a tax.

In 2011, microenterprise income tax becomes an option again, resuming previous conditions, except for the first. Incomes derived can not be related to the

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[1] Daniel Stenzler, "How micro enterprises will be affected by income tax?", 2013

[2] Sorin Biban, "Lump-sum tax: How will encourage evasion, instead of it decrease", 2013

[3] Adrian Doru Bîgioi, „Study on the Evaluation of the Contestation Degree of Excise Duty Rules, by Romanian Companies", *Revista Audit Financiar, Anul XIII , nr. 123 - 3/2015, pg. 74*

activities of banking, indurance or reinsurance, capital market, with the exception of persons performing brokerage in these areas, gambling, consultancy and management. The share capital can not be owned by a shareholder or associate (legal person) with more than 250 employees.

Note that the performance of activities of management and consultancy no longer offers the possibility to opt for this type of tax, regardless of the share in total income.

The year 2013 brings substantial changes regarding the conditions for classification as a microenterprise. Thus, there was no restriction on ownership of share capital by a shareholder or associate (legal person) with less than 250 employees, was eliminated the condition of having between 1 and 9 employees, and income threshold decreases from 100.000 euros to 65.000 euros.

In 2014 a microenterprise has allowed to optain income from consultancy and management but less than 20% of total revenues. In addition, the microenterprise should not be in the situation of dissolution with liquidation.

2015 draft amending the Fiscal Code proposes to modify the total income threshold as follows: for 2017- 75.000 euros, for 2018- 85.000 euros, for 2019- 100.000 euros.[4] At the same time, companies with business exploration and development of oil and natural gas deposits are excluded from the application of this tax.

Increased threshold for total revenue will be difficult to overcome it. A newly established trading company will pay 3% on all sales (excluding VAT), although they gain is the profit margin. Convenient in this case is the income tax, but the company will have to have a high volume of sales to benefit from this tax.

The date of payment

Calculation and payment of income tax for microenterprises are made quarterly by the 25th of the month following the quarter for which the tax is calculated.[5] The tax is declared until the date of payment.

Note that for companies that pay profit tax, final tax is declared and paid up to March 25 next year. Final tax is due for the last 3 months of the year, taking into account the profit tax calculated during the year. A microenterprise has a shorter deadline for payment. The income tax for the last 3 months of the year must be payed until January 25 next year. The difference lies in two months. This period has influence on the cash flow of the firm. Equivalent income tax can generate value by investing for two months.

The option to pay income tax

Since 2003 enterprises' income tax is optional.

A company paid profit tax can opt for income tax early next year if the conditions were met and if the company not ever enjoyed in the period prior to this option. A newly established company could opt for income tax from the first year if the condition on the number of employees was accomplished within 60 days after registration of the company.

If at the end of a year, one of the conditions is not met, the company is forced to quit this taxation system starting next year, without the possibility of benefit from this tax, even if the conditions are met again later.

The Government Emergency Ordinance no 138/2004 introduces the possibility that microenterprises with income tax to pot for profit tax starting next fiscal year.

The choice for microenterprises' income tax is possible by 2012, except for 2010 when the law obligates companies to pay profit tax.

2009 brings a novelty: the minimum tax (see paragraph on tax rates)

The year 2013 is atypical. If a company meets the conditions at December 31 the previous year, the company is required to pay income tax since February 2013. Note that this obligation is introduced by Government Emergency Ordinance no 8/20013 published on January 23.

That same year, the law provides that a newly established company fall under this type of tax if, the date of registration, the company has a share capital owned by others than the state or local authorities. Law 168 of May 2013 mentions two exceptions fro newly established firms mentioned above, givind the possibility to choose profit tax: the intention to carry out activities which do not fall under income tax, or the existence of a capital of at least 25.000 euros when setting up the company.

The second exception made final the option for profit tax for the period of existence of the legal person under the condition of maintaining minimum share capital. The law mentions the exchange rate of the National Bank on the date of registration of the legal entity.

Microentities' income tax is compulsory between 2014 and 2016 (with the exceptions listed above).

A legal entity is not required to apply the income tax system starting next year, if at December 31 one of the conditions that define microenterprises is not fullfiled. Type of tax changes during the year if the threshold of total revenues is exceeded during the year (change from 2006).

Thus, if during the year revenues exceed the threshold (100.000 euros or 65.000 euros since 2013) the company will pay profit tax beginning with the quarter in wich threshold was exceeded, taking into account incomes and expenses from early and income tax payments made during the year[6].

[4] Article 46, paragraph (2), Draft of Fiscal Code published on February 18, 2015
[5] Article 112^9, Law 571/ 2003
[6] Art 107^1, Law 571/ 2003

Since 2007 a new condition is added: revenues from consulting and management can not be greater than 50% (20% in 2014) of total revenues. Exceeding this value during the year requires the change mentioned in the previous paragraph, without the possibility of benefit for the next period of this type of tax.

Consulting work involves high income and low costs. For this reason it is more convenient to state that these activities are taxed at 16%.

For 2016 changing the type of tax during the year occurs if during the quarter the company begins to develop activities in banking, insurance, reinsurance, gambling, mining oil and gas fileds.

The novelty is that for calculating the profit tax it takes into account the revenues and expenses incurred in the quarter (not from beginning ofyear, as it was previously).

The tax base

The tax base includes all revenues except:

- Income related cost of inventories of products and services in progress
- Revenue from the production of tangible and intangible assets
- Income from subsides
- Income from provisions and adjustments for depreciations
- Income from interes and penalties cancellation, expenses not deductible in computing taxable profit
- Income from damages from insurance companies for damage to tangible assets or own stocks.

The acquisition value of the cash register is deducted from the taxable base in the first quarte of functioning.

In 2013 are eliminated from the taxable base, the trade discounts granted after invoicing and commercial discounts are added subsequently received invoice.

An important aspect is the exchange gains or losses. For 2013 foreign exchange gains was included in taxable base; the income tax was paied for a possible gain, if we consider monthly revaluation of the debt and liabilities denominated in foreign currencies or according to a currency.

Since January 2014[7] is eliminated from the taxable base the foreign exchange gains and is added the difference between commercisal discounts received and granted after invoicing. Regarding the exchange rate differences, in the tax base is included in the fourth quarter, only favorable difference between exchange gains and losses recorded cumulative from the beginning of the year.

Draft of Fiscal Code for 2016[8] increases tax base with:

- reduced or canceled reserves, representing legal reserves or revaluation of assets reserves which have been deducted in calculating taxable income and not taxed in the period in which the company was paying profit tax;
- - reserves representing tax breaks , established in the period in which the company was paying profit tax

The tax rate

Enterprises'income tax is paid quaterly.

In 2003 the tax rate was 1.5%.

The Government Emergency Ordinance no 138/2004 and Law no 343/ 2006 change tax rat as follows: 2% for 2007, 2.5% for 2008 and 3% for 2009.

In 2009 a company paid the greater of the tax obtained by applying the rate of 3% and annual minimum tax. The annual minimum tax depends on the total incomes obtained in the previous year less the same income falling outside the tax base for microenterprises:

Annual total incomes (lei)	Annual minimum tax (lei)[9]
0 - 52.000	2.200
52.001 - 215.000	4.300
215.001 - 430.000	6.500
430.001 - 4.300.000	8.600

In 2010 income tax is repealed.

Starting 2011, the tax rate is 3%.

The draft for Fiscal Code for 2016 mentions different rates of tax depending on the number of employees:

- 1% (over 2 employees, including)
- 3% (an employee)
- 3% + 1530 lei quaterly (without employees). This amount is updated according to the evolution of the minimum gross salary guaranteed
- 3% for microenterprises without employees and which is in one of the following situation:

1. dissolution followed by liquidationi;
2. temporary inactivity;
3. not active at the head office/ secondary offices

1530 lei amount is recalculated based on the number of days that microenterprise is not in cases 2 or 3.

Change in number of employees during the year change the tax rate in the first quarter of this change.

Note that it is considered that the employee is a person employed by individual labor contract full time, which means that hiring part-time employees involve an additional tax of 1530 lei.

Fixed income tax mandatory for microenterprises without employees is 1530 quarter, ie 510 lei/month. The costs for a full-time employee with

[7] Government Emergency Ordinance no 102/2013 published in November 2013, with effect from January 2014
[8] Draft for Fiscal Code, published on February 18, 2015
[9] Fiscal Code 2009, article. 18, paragraph 3

a minimum gross salary per economy (975 lei since January 2015[10]) are approximately 1196 lei, of wich 724 lei is the net salary and 472 lei are taxes.

Note that the state earns about the same amount as taxes if the microenterprise has no employees or a full-time employee with a minimum gross salary.

Since July 2015 the minimum gross salary will increase to 1050 lei/month, implying a net salary of 777 lei and 513 lei related taxes, as follows:

Tax	Percentage of gross salary	Value
Employee contribution to social insurance	10,5%	110
Employee contribution to unemployment	0.5%	5
Employee contribution for health insurance	5.5%	58
Wage tax		100
Net salary		777
Employer contribution to social insurance	15.8%	166
Employer contribution to health insurance	5.2%	55
Employer contribution to unemployment	0.5%	5
Employer contribution for work accidents	0.15%[11]	2
Employer contribution for wage claims guarantee fund	0.25%	3
Employer contribution for medical leave health insurance benefits	0.85%	9

Certainly from January 2016 will be decided a new increase for the minimum gross salary.

"Ministry of Finance argument in support of this tax grid is that 30.000 of the nearly 500.000 microenterprises operate without employees, which shows that employees have no legal employment."[12]

The arguments of Ministry of Finance for such taxation are[13]:

- microenterprise represents 78.3% of all active companies, achieving a turnover of only 2.4% of the total turnover achieved by the companies in Romania;
- the labor force engaged in micro-enterprises account for 14% of all employees in companies that submit balance sheets;
- 47.2% of micro enterprises registered net loss on December 31, 2013
- microenterprises will be more interested in business fairness and reduce the hidden economy.

At the end of 2013 the number of microenterprises in Romania was 498.583, of which 56.1% had no employees. Is easy to calculate the gain derived from the fix tax imposed on microenterprises without employees.

The Ministry of Finance estimates for the first 3 quarters of 2016 additional revenue of 316 million lei and identifies the following benefits[14] for the economy in the medium term:

- the increase employment by about 101 thousand;
- increasing profit / loss reduction for micro-enterprises with more than 2 employees;
- increased revenue from income tax and social contributions if some of these microenterprises will hire one or two employees to benefit from tax of 1%.

3. Conclusions

The study on microenterprises' income tax took into account the identification of characteristics of this type of tax.

For the period considered is observed changes in all these characteristics: conditions, tax rate, optional character, tax base.

The need to increase state budget revenues changes the taxes imposed on legal persons. This explains the introduction of the minimum tax in 2009. The same explanation is valid on binding nature of the enterprises'income tax with effect from February 2013.

A mandatory profit tax for mangement and consulting activities ensures a higher tax than microenterprises' income tax.

The proposed changes in the Draft of Fiscal Code for the period 2016 – 2018 are considering linking income tax rate for microenterprises with the number of full-time employees (before 2013 a microenterprise was supposed to have between 1 and 9 employees). Measures are designed to stimulate the hiring of labour (the tax rate is smaller for two or mre employees), inexistence of employees imposing an additional quarterly tax.

This additional tax is established so state gain is approximately the same if the microenterorise has no employees or a full-time employee with a minimum gross salary.

Moreover, the law for microenterprise' income tax does not allow to take into account prior fiscal losses for income tax calculation. The prior fiscal losses can be considered if company retursn to profit tax and if the period of 7 consecutive years to recover

[10] Government Decision no 1091/ 2014

[11] between 0.15% and 0.85% depending on the company's main activity

[12] Diana Zaharia, "Proiectul Codului Fiscal: Impozitarea efectivă aproape se dublează atât pentru microîntreprinderi, cât şi pentru PFA", 2015, www. Capital.ro

[13] Ministry of Finance, "Tax reform measures and expected results", www.mfinante.ro, February 18, 2015

[14] Ministry of Finance, "Tax reform measures and expected results", www.mfinante.ro, February 18, 2015

the loss does not expire[15]. Given the proposal to increase the threshold of total revenues for microenterprises will be difficult, if not impossible, to be able to benefit from tax losses obtained before transition to income tax.

Fiscal Code provides that any change is made by law promoted by 6 month before the entry into force and implementation of change is the first day of the next year[16].

But there were times when modifications have been implemented in a very short time. Government Emergency Ordinance no 8/2013 was published in January 2013 with application since February the same year.

The estimated values of taxes for that year were not available anymore, the cash flow changed for most companies.

Businesses can not adapt to the impact of fiscal changes in a timely manner.

We notice more frequent change of rules on income tax in recent years.

The income tax is much easier to calculate, and in addition, the risk to adjust the tax is removed (the size of expenses and the percentage of its deductibility decrease the profit tax).

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[15] Article 26, paragraph (4), Law 571/ 2003
[16] Article 4, Law 571/ 2003

TAX OPTIMIZATION FOR BUSINESS START-UPS IN ROMANIA

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Abstract

One of the most important early decisions for an entrepreneur is choosing the optimal form of organization for his business. According to the data provided by the Registry of Commerce, Romanian entrepreneurs usually choose between: Limited Liability Company (LLC) and Authorized Natural Person (ANP).

LLCs offer liability protection for its owner. This advantage has made the LLC a popular business form for smaller companies, who don't plan to grow the business significantly. Newly set-up companies in Romania are required to apply the micro-companies revenues tax *system starting with their first year of operation. For next years, this system is applied only if annual turnover does not exceed EUR 65,000.*

An individual can pursue an economic activity as an ANP. An advantage of the ANP is the reduced number of tax returns field. In adition, in certain circumstances, an ANP may opt for a very advantageous system of taxation of personal income tax, based on predetermined fixed income.

Each one of these entities involves fiscal advantages and disadvantages, which we will try to highlight in this paper.

Keywords: *Tax optimization, Limited Liability Company, Authorized Natural Person, personal income tax, corporate income tax, micro-companies revenues tax.*

1. Introduction

Tax optimization includes any decision which may reduce or streamline tax burden. Newly formed businesses have an important tax planning opportunity. A start-up has several options when it comes to the legal structure of the new business. For a small business there are usually two options: Authorized Natural Person (ANP) and Limited Liability Company (LLC). Each option has different tax consequences, as well as other implications, such as the extent of personal liability for business debts or the way to withdraw profits from the new business, for example, by paying dividends (if the option is a company).

In section 2 we compare taxes owed by companies (separately for micro-companies and ordinary companies) with those due by ANP. We analyze only those taxes that are different for each type of entities: micro-companies revenues tax / corporate income tax / personal income tax (due by ANP), tax on dividends and mandatory social contributions related to commercial revenues. We do not treat value added tax and compulsory social contributions related to wages, because their value is the same regardless of the type of entity (ANP or LLC).

Forecasting income and expenses is very important since the start-up. To make use of tax optimization strategies, it is essential that the entrepreneur estimates the revenues and the expensess for the next few years. This forecast will help him to estimate the overall tax burden and to choose the most effective form of bussines organization (the one that involve the minimum overall tax burden. The practical examples from section 3 illustrate this process.

In section 4 we highlight the advantages and disadvantages of each form of organization, taking into account not only the fiscal aspects, but also by other specific issues such as: setting-up / split-up conditions, legal status, liability for business debts etc.

2. Newly formed business tax optimization

For entrepreneurs who are starting a business it is essential to know what taxes due. These taxes vary depending on the type of entity as follows in table no. 1.

Table no. 1: LLC taxes versus ANP taxes

LLC taxes	ANP taxes
▪ Corporate income tax CIT=16%xFiscal income; or ▪ Micro-companies revenues tax MRT=3%xRevenus ▪ Tax on dividends TD=16%xDividends	▪ Personal income tax PIT=16%xNet income ▪ Individual health insurance contribution IHIC=5,5%xNet income ▪ Social security contribution ▪ SSC=26,3% xMonthly income insured

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2.1. Tax obligations for Limited Liability Companies

2.1.1. The micro-companies revenues tax (MRT)

According to the Fiscal Code, a mandatory revenue tax system is applicable for Romanian micro-companies which meet both of the following criteria at the end of the previous fiscal year:

- their annual turnover is lower than the RON equivalent of EUR 65,000 euros in the course of a year **(**the exchange rate for converting euro into RON is that of the closing of the previous fiscal year);
- their shares are held by entities other than the state or local authorities;
- the companies are not in winding up with winding-up proceedings.

It is not considered micro-company the entity that:

- derive income from consultancy and management activities, in a proportion greater than 20 % of total revenue (nature of the revenue shall be justified by the contracts and other documents)
- derive income from activities other than banking, insurance and reinsurance, capital market or gambling.

The micro-companies revenues tax (MRT) is mandatory for entities which meet the conditions referred to above.

Newly established companies are required to follow the micro-companies tax regime starting with the first fiscal year, if their shares are held by entities other than the state or local authorities. However, if the share capital is at least EUR 25,000, companies may opt for normal tax regime (corporate income tax-CIT). The option is for good.

The taxable base comprises the revenue derived from any source, with several exceptions:

- Revenue related to the costs of inventories;
- Revenue related to the production cost of work in progress;
- Revenue related to the capitalised costs of tangible and intangible non-current assets;
- Revenue from subsidies for operating activities etc.

The tax rate applicable to micro-company revenues is 3%.

The calculation and payment of the tax is made quarterly, no later than 25 of the month following the quarter for which the tax is calculated.

If, during a fiscal year, a microcompany registers a turnover greater than EUR 65,000 or derives revenues from consultancy and management activities exceed 20 % of its total revenue, the company will pay corporate income tax starting with the quarter in which the limit is exceeded. The tax will be calculated based on expenses and revenues registered from the beginning of the fiscal year as follow:

CIT due = CIT calculated from the beginning of the year - MRT due in that year

2.1.2. Corporate income tax (CIT)

A company whit an annual turnover exceeding EUR 65,000 due CIT.

The standard CIT is 16%.

The taxable base is calculated as follows:

Taxable income = Revenue derived from any source - Expenses incurred in obtaining that taxable revenue - **N**on-taxable revenues + Non-deductible expenses - Deductions

The most relevant types of ***non-taxable revenue*** stipulated by the Romanian Fiscal Code are:

- Dividends received from a Romanian legal person or from a foreign legal person paying profit tax or a similar tax, located in a third country with which Romania has a convention for the avoidance of double taxation, if the Romanian legal person receiving the dividends holds at the date of their distribution at least 10% of the share capital of the Romanian or foreign legal person distributing the dividends, for a continuous period of one year;
- Dividends received by a Romanian company from a subsidiary situated in an EU Member State, provided the Romanian company pays corporate income tax and has held at least 10% of the subsidiary's shares for a continuous period of at least one year prior to the dividends being distributed;
- Favourable fluctuations in the price of shares and long-term bonds, registered by the company in which the shares and long-term bonds are held, as a result of capitalisation of reserves, benefits or share premiums;
- Revenue from reversal or cancellation of provisions / expenses that were previously non-deductible, recovery of expenses that were previously non-deductible and revenues from reversal or cancellation of interest and late payment penalties that were previously non-deductible;
- Revenue from the annulment of a reserve registered as a result of a participation in kind in the capital of other legal entities;
- Revenue from deferred income tax etc.

Expenses fall into three categories: deductible expenses, limited deductibility expenses and non-deductible expenses.

Expenses are deductible only if incurred for the purpose of generating taxable income.

Accordind to the Fiscal Code, the following expenses shall have a ***limited deductibility***: [1]

- Protocol expenses are deductible up to the limit of 2% of (the total taxable revenue - the total expenses related to the taxable revenue, other than protocol and profit tax expenses);
- Social expenses are deductible up to 2% of salary expenses. Social expenses can include: maternity allowances, expenses for nursery tickets, funeral benefits and allowances for serious or incurable diseases,

[1] Law no. 571 of 22 December 2003 regarding the Fiscal Code, as amended and completed.

as well as expenses for the proper operation of certain activities or units under taxpayers' administration (i.e. kindergarten, nurseries, canteens, sports clubs, clubs, etc).

- Meal tickets expenses are deductible up to the limit of one ticket per employee per worked day;
- Health insurance premiums are deductible for employers up to the limit of EUR 250 per employee per year;
- private pension insurance premiums are deductible up to the limit of EUR 400 per person per year;
- Expenses incurred with company vehicles weighing under 3,500 kg and with fewer than nine passenger seats (including the driver's seat) that are not used exclusively for business purposes are deductible up to 50%.

Non-deductible expenses include**:**

- Profit tax expenses;
- Expenses related to non-taxable revenues;
- Interest, fines and penalties due to Romanian or foreign authorities;
- Expenses incurred for management, consultancy, assistance or other supply of services if no written contracts or any other lawful agreements are entered into and the beneficiary cannot justify the supply of such services for the activities performed and their necessity;
- Sponsorship and patronage expenses and those related to private scholarships;
- Expenses recorded without justifying documents;
- Expenses in favour of shareholders, other than those related to goods or service provided by the shareholders at market value;
- Expenses representing fixed assets impairment, when as a result of a revaluation, a step-down in value is recorded;
- Expenses incurred from deferred profit tax and changes in fair value of real estate investments by taxpayers applying the International Financial Reporting Standards;
- Expenses relating to missing or damaged non-imputable inventories or tangible assets, for which no insurance contracts have been concluded etc.

The deductions include:

- interest expenses related to loans contracted from other entities than banks or financial institutions carried over from previous period
- legal reserve fund are deductible up to 5 % of adjusted accounting gross profit and until it reach a fifth part of the share capital;
- fiscal depreciation
- fiscal provisions

CIT is calculated as follows:

CIT = 16% x (Taxable income - Fiscal losses to be recovered from previous years)

CIT due =CIT - Sponsorship and patronage expenses (up to 0.3% of turnover or 20% of the profit tax due, whichever is lower)

As a general rule, the statement and payment of the CIT should be done quarterly, until 25th, inclusive, of the first month following the end of the I-III trimesters. Starting with January 1st 2013, companies may choose to declare and pay the annual profit tax with quarterly advanced payments.

2.1.3. Tax on dividends

If the owner of a LTD decides to distribute the net income of the company in the form of dividends, he will have to pay new tax:

Tax on dividends = 16% x Gross Dividends

Companies paying dividends must compute, withhold and pay the tax. The tax must be paid by the 25th day of the month following that in which the dividends were paid. However, withholding tax on dividends which have been declared but not paid by the end of the year must be paid by 25 January of the following year.

2.2. Tax obligations for Authorized Natural Persons

2.2.1. Personal Income Tax (PIT) calculated in the real tax system

Authorized natural persons are required to fill in certain specific simplified accounting records: the journal of receipts and payments, the inventory ledger and keeping tax records.

Net income (NI) from independent activities and PIT shall be determined as follows:

NI = Gross Revenue - Deductible Expenses

PIT = 16% x NI

As in the case of CIT, expenses incurred by individuals fall into three categories: deductible expenses, limited deductibility expenses and non-deductible expenses. Rules of deductibility are very similar to those in the case of CIT.

Authorized Natural Person has to make quartely advance tax payments for the PIT due during the fiscal year (until 25th, inclusive, of the last month of each quarter). In order to achieve definitive taxation, tax payers shall submit until 25 May of the following year a statement of income, based on which the tax authority determine the difference of PIT to be paid or to be charged.

2.2.2. Personal Income Tax (PIT) calculated on the basis of a fixed income

Natural persons who obtain income from commercial activities that are included in the list drawn up by the Ministry of Public Finance[2] may calculates PIT on the basis of a fixed income annual allowance. This tax system is optional.

[2] Order of the Minister of Public Finance no. 2875/2011 approving the Nomenclature of independent activities in respect of which the net income may be determined on the basis of a fixed income annual allowance.

Local tax authorities shall determine and publish annualy these fixed incomes before 1 January of the year for which they were established. Fixed incomes may be reduced in certain circumstances. For example, the income shall be reduced by 50% for persons who have a contract of employment, for an indefinite period, or for people with disabilities. For women over the age of 60 years and men over 65 years the income shall be reduced by 40%.

For these individuals PIT shall be determined as follows:

PIT = 16% x Fixed income

The calculation and payment of PIT is made quarterly, no later than 25 of the last month of each quarter.

If in the previous fiscal year individuals have recorded an annual gross income of more than EUR 100,000 euros, they have to apply the real tax system starting with the next fiscalyear.

2.2.3. Social contributions due from natural persons authorized

The taxable income obtained by Authorized Natural Persons is subject to social security contributions (SSC) as well as to individual health insurance contribution (IHIC), calculated as follows (Table no.2):

Table no. 2:SSC and IHIC due by ANP

	Social Security Contribution	Individual Health Insurance Contribution
real system	SSC=26.3%x declared monthly income*	IHIC=5.5%x estimated/ obtained monthly income**
fixed income system	SSC=26.3%x monthly fixed income	IHIC=5.5%x monthly fixed income

** Declared monthly income is choosen by the ANP. The insured amount cannot be lower than 35% of the average gross salary (RON 2.415 in 2015) or higher than five times the average gross salary per month that applies in the year concerned.*

***Monthly income = (Revenues - Expenses, excluding social contributions) / 12. The base cannot be lower than the applicable national gross minimum wage (RON 975 in 2015), if the income derived from independent activities is the only income on which health insurance contributions apply*.

SSC is not due if individuals already derive other income (e.g. employment) that is subject of SSC or they receive pensions or unemployment benefits.

Both SSC and IHIC are payable quarterly, in four equal instalments, no later than 25 of the last month of each quarter.

3. Case Studies concerning tax optimization for a start-up

A start-up has several options when it comes to the legal structure of the new business, each one having different tax consequences. For a newly small business the options include:

- Limited Liability Company, obligated to pay Micro-companies revenues tax (MRT) in the first year
- Limited Liability Company, which opt to pay Corporate income tax (CIT) - only if the share capital is at least EUR 25,000
- Authorized Natural Persons, obligated to pay Personal income tax (PIT) calculated in the real tax system
- Authorized Natural Persons, which opt to pay PIT calculated on the basis of a fixed income annual allowance - only if his activity is included in the list drawn up by the Ministry of Public Finance)

Table no. 3 includes the entrepreneur's options for the following years, wich depend on income levels registred in the first year of operation.

Table no. 3: Options on the form of organization from the second *year of operation*

Income levels registred in the previous year	Options
under EUR 65,000	• LLC paying MRT • ANP paying PIT calculated in the real tax system • ANP paying PIT calculated on the basis of a fixed income
EUR 65,000 – EUR 100,000	• LLC paying CIT • ANP paying PIT calculated in the real tax system • ANP paying PIT calculated on the basis of a fixed income
over EUR 100,000	• LLC paying CIT • ANP paying PIT calculated in the real tax system

The entrepreneur has to choose which involves the minimum overall tax burden

We will take an example for each of the three situations in which we can put total revenues: less than EUR 65,000, between EUR 65,000 and EUR 100,000 and over 100,000 EUR.

Case Study 1 (for revenues under EUR 65,000): an entrepreneur residing in Bucharest wants to start a business under the following conditions:

- Object of activity: repairing computers and peripheral equipement (**CAEN code** 9511)
- He is qualified in this field and can prouve it through documents
- Initial capital held: RON 10,000
- He does not obtain other income outside of the business (e.g. wages, pensions or unemployment benefits).
- He estimates that it will get in a year (2015) the

following revenues and expenses:

- Total Revenues from providing services (repairing computers) RON 250,000
- Total Expenses RON 120,000, of which:
- Materials expenses RON 35,000
- Other external charges (energy and water) RON 2,000
- Expenditures on salaries (for 1 employee) RON 60,000
- Expenditures on rent RON 20,000
- Other deductible expenses RON 3,000

The entrepreneur has the following options for the organization of his activity:

(A) LLC paying MRT

(B) ANP paying PIT calculated in the real tax system

(C) ANP paying PIT calculated on the basis of a fixed income. For Bucharest the fixed income for this activity (**CAEN code** 9511) is of 16,200 RON.

If he chooses the ANP form, the entrepreneur will need to submit the Statement Nr. 600 on the income secured from the public pension system. We assume that the income declared is RON 850.

(A1) LLC paying MRT

First, we determine earnings before taxes (EBT), then the micro-companies revenues tax (MRT) and net income (NI):

EBT= 250,000-120,000=130,000 RON

MRT=3%x250,000=7,500 RON

NI=130,000-7,500=122,500 RON

On the assumption that the net income is distributed in its entirety as dividends, the tax on dividends will be:

Tax on dividends=16%x122,500=19,600 RON

Total taxes=7,500+19,600=27,100 RON

The remaining amount for entreprenor is:

Dividends net=130,000-27,100=**102,900 RON**

Entrepreneurs will benefit from this amount next year, when the dividends will be distributed.

(B1) ANP paying PIT calculated in the real tax system

First, we determine monthly taxable base for Individual Health Insurance Contribution (IHIC):

(Revenues-Expenses, excluding social contributions)/12 =(250,000-120,000)/12= 10,835 RON

The social contributions monthly will be:

SSC = 26.3% x monthly income declared = 26.3%x850=224 RON

IHIC =5.5 %x10,835=596 RON

Total annual contributions=12x (224+596)= 9,840 RON

Net income will be:

NI = 130,000 - 9,840 = 120,160 RON

Personal income taxe:

PIT=16%xNI=16%x120,160=19,226 RON

Total taxes=9,840+19,226=29,066 RON

The remaining amount for entreprenor is:

130,000 - 29,066 = **100,934 RON**

Entrepreneurs will benefit from this amount anytime they want during the year.

(C1) ANP paying PIT calculated on the basis of a fixed income

Social contributions monthly:

SSC = 26.3% x 850 = 224 RON

IHIC = 5.5 % x monthly fixed income = 5.5%x16,200/12 =5.5 %x1,350=74 RON

Total annual contributions=12x(224+74)= 3,576 RON

PIT=16% x Fixed income =

16%x16,200=2,592 RON

Total taxes paid=3,576+2,592=6,168 RON

The remaining amount for entreprenor is:

130,000 - 6,168 = **123,832 RON**

Entrepreneurs will benefit from this amount anytime they want during the year.

Conclusion1: For this level of revenues and expenses, optimum choice (which corresponds to a minimum of total taxes) is ANP paying PIT calculated on the basis of a fixed income. If the activity are not included in the list drawn up by the Ministry of Public Finance, optimum choice would be the LLC paying the micro-companies revenues tax**.**

Case Study 2 (for revenues between EUR 65,000 and 100,000 EUR): an entrepreneur residing in Bucharest wants to start a business under the following conditions:

- Object of activity: repairing computers and peripheral equipement (**CAEN code** 9511)
- He is qualified in this field and can prouve it through documents
- Initial capital held: RON 10,000
- He does not obtain other income outside of the business (e.g. wages, pensions or unemployment benefits).

He estimates that it will get in a year (2015) the following revenues and expenses:

- Total Revenues from providing services (repairing computers) RON 360,000
- Total Expenses RON 200,000, of which:
- Materials expenses RON 50,000
- Other external charges (energy and water) RON 4,000
- Expenditures on salaries (for 2 employee) RON 120,000
- Expenditures on rent RON 20,000
- Other deductible expenses RON 6,000

Because revenues are greater than EUR 65,000, the entrepreneur has the following options for the organization of his activity:

(A) LLC paying MRT at the beginning of the activity and paying CIT after having exceeded the ceiling of EUR 65,000 euro.

(B) ANP paying PIT calculated in the real tax system

(C) ANP paying PIT calculated on the basis of a fixed income. For Bucharest the fixed income for this activity (**CAEN code** 9511) is of 16,200 RON.

If he chooses the ANP form, the entrepreneur will need to submit the Statement Nr. 600 on the income secured from the public pension system. We assume that the income declared is RON 850.

(A2) LLC paying MRT and CIT

At the beginning of the activity the company will pay micro-companies revenues tax (MRT). The company will pay corporate income tax (CIT) starting with the quarter in which the limit is exceeded. The tax will be calculated based on expenses and revenues registered from the beginning of the fiscal year, as follow:

EBT = 360,000 - 200,000 = 160,000 RON

IP = 16% x 360,000 = 12,960 RON

NI = 160,000 - 12,960 = 147,040 RON

On the assumption that the net income is distributed in its entirety as dividends, the tax on dividends will be:

Tax on dividends=16%x147,040=23,526 RON

Total taxes = 7,500+19,600=27,100 RON

The remaining amount for entreprenor is:

Dividends net=160,000 - 36,486 = **123,514 RON**

Entrepreneurs will benefit from this amount next year, when the dividends will be distributed.

(B2) ANP paying PIT calculated in the real tax system

Monthly taxable base for Individual Health Insurance Contribution (IHIC):

(Revenues - Expenses, excluding social contributions)/12 = (360,000 - 200,000/12 = 13,333 RON

Social contributions monthly:

SSC = 26.3% x 850 = 224 RON

IHIC = 5.5 % x 13,333 = 733 RON

Total annual contributions = 12x(224+733) = 11,484 RON

Net income will be:

NI = 160,000 - 11,484 = 148,516 RON

Personal income taxe:

PIT=16%xNI=16%x148,516=23,763 RON

Total taxes=11,484+23,763=35,247 RON

The remaining amount for entreprenor is:

160,000 - 35,247 = **124,753 RON**

Entrepreneurs will benefit from this amount anytime they want during the year.

(C2) ANP paying PIT calculated on the basis of a fixed income

Social contributions monthly:

SSC = 26.3% x 850 =224 RON

IHIC = 5.5 % x monthly fixed income =

5.5%x16,200/12=5.5%x1,350 = 74 RON

Total annual contributions=12x(224+74) = 3,576 RON

PIT=16%xFixed income = 16% x 16,200 = 2,592 RON

Total taxes = 3,576 + 2,592 = 6,168 RON

The remaining amount for entreprenor is:

160,000 - 6,168 = **153,832 RON**

Entrepreneurs will benefit from this amount anytime they want during the year.

Conclusion2: For this level of revenues and expenses, the optimum form of organization is ANP paying PIT calculated on the basis of a fixed income. If the activity are not included in the list drawn up by the Ministry of Public Finance, optimum choice would be ANP paying PIT calculated in real system**.**

Case Study 3 (for revenues over EUR 100,000): an entrepreneur residing in Bucharest wants to start a business under the following conditions:

- Object of activity: activities of consultancy in information technology (**CAEN code** 6202)
- Possess documents evidencing qualification in this field
- Initial capital held: 10,000 RON
- He does not obtain other income outside of the business (e.g. wages, pensions or unemployment benefits).

He estimates that it will get in a year (2015) the following revenues and expenses:

- Total Revenues from providing services (consultancy in information technology) RON 500,000
- Total Expenses RON 200,000, of which:
  - Materials expenses RON 50,000
  - Other external charges (energy and water) RON 4,000
  - Expenditures on salaries (for 2 employee) RON 120,000
  - Expenditures on rent RON 20,000
  - Other deductible expenses RON 6,000

Since revenues come entirely from consultancy and management activities, the company does not comply with the conditions for the micro-companies revenues tax system. Therefore, the company will pay CIT from the beginning of the activity. Even if the revenues would be of other nature, during the year the company would have exceeded the threshold of EUR 65,000 and would have become liable for pay CIT.

The entrepreneur has the following options for the organization of his activity:

(A) LLC paying CIT

(B) ANP paying PIT calculated in the real tax system

(C) ANP paying PIT calculated on the basis of a fixed income. For Bucharest the fixed income for this activity (**CAEN code** 9511) is of 26,000 RON. The entrepreneur benefits from this tax system only in the first year. If in 2015 the threshold of EUR 100,000 is exceeded, the entrepreneur will have to go to the real system of taxation in 2016.

If he chooses the ANP form, the entrepreneur will need to submit the Statement Nr. 600 on the income secured from the public pension system. We assume that the income declared is RON 850.

(A3) LLC paying CIT

EBT = 500,000 - 200,000 = 300,000 RON

CIT = 16% x 300,000 = 48,000 RON

NI = 300,000 - 48,000 = 252,000 RON

On the assumption that the net income is distributed in its entirety as dividends, the tax on dividends will be:

Tax on dividends=16%x252,000=40,320 RON

Total taxes=48,000+40,320=88,320 RON

The remaining amount for entreprenor is: Dividends net = 252,000-40,320=**211,680 RON**

Entrepreneurs will benefit from this amount next year, when the dividends will be distributed.

(B3) ANP paying PIT calculated in the real tax system

Monthly taxable base for Individual Health Insurance Contribution (IHIC):

(Revenues - Expenses, excluding social contributions)/12 =(500,000 - 200,000)/12 = 25,000 RON

Social contributions monthly:

SSC = 26.3% x 850 =224 RON

IHIC = 5.5 % x 25,000 = 1375 RON

Total annual contributions:

12x(224+1375)=19,188 RON

Net income will be:

NI = 300,000 - 19,188 = 280,812 RON

Net income will be:

PIT=16%xNI=16%x280,812= 44,930 RON

Total taxes=19,188+44,930 = 64,118 RON

The remaining amount for entreprenor is:

300,000 - 64,118 = **235,882 RON**

Entrepreneurs will benefit from this amount anytime they want during the year.

(C3) ANP paying PIT calculated on the basis of a fixed income (only in the first year of activity)

Social contributions monthly:

SSC = 26.3% x 850 =224 RON

IHIC = 5.5 % x monthly fixed income =

5.5%x26,000/12=5.5%x2.166,67=119 RON

Total annual contributions=12x (224+119)= 4,116 RON

PIT = 16% x Fixed income=16%x 26,000 = 4,160 RON

Total taxes = 4,116 + 4,160 = 8,276 RON

The remaining amount for entreprenor is:

300,000 - 8,276 = **291,724 RON**

Entrepreneurs will benefit from this amount anytime they want during the year.

Conclusion3: For this level of revenues and expenses, optimum choice from the fiscal point of view is ANP paying PIT calculated on the basis of a fixed income. This option is only possible in the first year of activity. For the next years the optimum choice would be ANP paying PIT calculated in real system**.**

4. Conclusions

Analysis of the examples showed that the entity that ensures a minimum payment of taxes is Authorized Natural Person paying personal income taxe calculated on the basis of a fixed income.

For a right decision on the optimal form of organization should be considered both taxes, as well as other non-fiscal issues such as: the setting-up / split-up conditions, liability in the event of insolvency, mandatory professional training in the field of activity etc.

Only a comparative analyse of the advantages and disadvantages of each form of organization will result in a optimal decision.

Synthetic, these advantages and disadvantages are:

Advantages of ANP

- The process of setting-up is shorter, requires fewer papers and the cost is less than in the case of LLC;
- The accounts shall be kept in a simplified system. The cost of an accountant is small;
- Tax returns to be filed are fewer than in the case of LLC;
- ANP will benefit from the income of his business anytime he wants during the year, unlike the owner of a LLC, who has to wait the end of the year and the distribution of the dividends;
- ANPs don't have to pay tax on dividends;
- For split-up an ANP, the process is easier and takes less than for LLC.

Disadvantages of ANP

- Liability in the event of insolvency is a maximum;
- For each CAEN code chosen (each activity), entrepreneurs must justify their professional training in that field;
- The taxable income obtained by ANPs is subject to social security contributions (SSC) and individual health insurance contribution (IHIC).

Advantages of LLC

- Entrepreneurs may choose several CAEN codes, without the need to demonstrate their professional training in the fields of activity chosen;
- The LLC owners are protected from personal liability for business debts and claims. They stand to lose only the money that they've invested in the LLC;
- For entrepreneurs who open their first business, there is a form of LLC which offers significant advantages: LLC-D (for debut. (rule is: they never had shares / social parts at any enterprise in the european economic space). Cost for setting up a LLC-D are zero and the entrepreneur can obtain a non-refundable financial assistance of up to EUR 10,000.

Disadvantages of LLC

- The process of setting-up is longer, requires more documents and the cost is higher than in the case of ANP; in addition, to set up a LLC requires social capital;
- The accounts shall be kept in a double entry system and requires the signature and the stamp an accounting expert;
- As an associate, in order to benefit from company's money, you have to wait the end of the financial year and the distribution of the net income as dividends;
- The LLC owners must pay a tax of 16% on dividends received;

- The split-up of a LLC is extensive and can take quite a lot.

ANP is a suitable form of organization for those who intend to carry out a limited number of activities, with few trading partners. The greatest disadvantage of ANP is unlimited patrimonial liability.

For entrepreneurs who intend to engage in complex activities, with more trading partners, on longer terms and safer, it is preferable setting-up of a legal person, in the form of limited liability (LLC) or joint stock company, depending on the number of founders and their power of participation.

Companies who obtain low income, but have, instead, a high profitability are advantaged by the revenue tax system (applicable for micro-companies). But not all companies comply with conditions for eligibility under this category.

Tax optimization is a continuous process, given that in Romania the tax law changes very often. In the draft law on the new Fiscal Code published by Ministry of Public Finance[3], the government proposes a fiscal reform of the system for taxing the income of the entrepreneurs. Measures which have an impact on optimal decision regarding the form of the organization are:

- elimination of tax on dividends from 1st January 2016
- Reduction of the unique rate of CIT and PIT from 16% to 14% in 2019
- Gradual increase of the ceiling for framing as micro-company, from EUR 65,000 at present to EUR 75,000 in 2017, to EUR 85,000 in 2018 and even EUR 100,000 from 2019
- Alternation of rates of MRT as follows:

- 1% for micro-companies which have more than two employees, including;
- 3% for micro-companies which have only one employee;
- 3% + RON 1,530/quarter for micro-companies which does not have employees.
- 3% for microcompanies which does not have employees and are in one of the following special situations:

- dissolution followed by liquidation;
- temporary inactivity, according to the law;
- nonexisting activities at headquarters / secondary headquarters, in according to a declaration on his own responsibility.

Of all these measures, the elimination of tax on dividends seems to have the most significant impact on the decision of the form of organization. ANP, generally the most advantageous form of organization for small entrepreneurs in this moment, is losing ground in favor of the LLC.

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BREAK-EVEN IN THE DECISION MAKING PROCESS

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Abstract

Integrated in a competitive environment, the companies are forced to know better their costs, to determine as precisely as possible the sales prices and the profit margins achievable per product. When the entrepreneurs initiate a new business, invest in a new project or when they supervise the current work, the study of breakeven allows minimizing of the risks and the uncertainties, and also allows measuring the performance of the projects.

Break-Even is an indicator that allows the company management to set minimal commercial targets to meet the expenses of the enterprise or that sets the degree of utilization of production capacities in relation to a desired level of profit.

It highlights the correlations between the dynamic of production, implicit of income and the dynamic of costs, grouped into variable costs and fixed costs. Used in a prospective fashion, Break-Even allows planning and optimizing of the enterprise's sales and costs, not only short-term but also medium and long term.

Keywords: *break-even, costs, turnover, profit, decision.*

1. Introduction

This paper identifies a simple and effective method of analysis which helps entrepreneurs in planning and optimization of sales and costs, and therefore profits, in the context of an environment governed by the uncertainties and risks.

The study develops the concepts and shows the importance of the break-even analysis in sizing the volume at which production becomes profitable, highlighting the correlation between revenues and costs, or in determining the degree of utilization of production capacities in relation to a desired level of profit.

Break-even analysis is a way to quickly answer a number of important questions about the profitability of a company's products or services. Break-even analysis can be used with either a product or service.

The first part presents the concepts and usefulness of specific indicators. In the second part of the paper, we present case studies with presentation and interpretation of results.

The subject approached in our work was the object of numerous research reflected in academic articles, in professional journals, in accounting and management control books. Existing studies support our demarche and are summarized in the specialized literature section.

2. Break-even analysis - tool in making management decisions

Economic sense is an essential element for success in business, but to lead a company only after flair is certainly a risky act. Any decision, regardless of the extent of its implications, involves accepting risk. Leading an enterprise through decisions involves continuous risk taking. The management accounting and cost calculation becomes useful in decision making because it provides the opportunity to distinguish profitable from the unprofitable activity.

Integrated in a competitive environment with a multitude of products and production processes, enterprises have felt the need to know very well its costs to determine as precisely as possible selling price and profit on each product.

Management accounting is the one that opens the "black box". It shows the stages in the transformation of inputs into outputs.

2.1. Specific indicators break-even analysis. Concepts and utility

Break-even analysis is used to give answers to question such as “what is the minimum level of sales that ensure the company will not experience loss” or “how much care sales be decreased and the company still continues to be profitable”.

Break-even analysis is extremely important before starting a new business (or launching a new product) because it gives answers to crucial questions such as “how sensitive is the profit of the business to decreases in sales or increases in costs”. This analysis can be also extended to early stage business in order to determine how accurate the first prediction was and monitor whether the firm is on the right path or not. Even mature business must take into consideration their current break-even point and find ways to lower that benchmark in order to increase profit.

Owners and managers are constantly faced with decisions about selling prices and cost control. Break-

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even analysis is the analysis of the level of sales at witch a company or a project would make zero profit. As its name implies, this approach determines the sales needed to break-even. Break-even analysis can be very useful in following practical situations:

- at starting a new activity;
- when introducing new products into production, in which case can be determined the turnover for the new product;
- with expanding general level of activity of the company;
- when making projects in fixed assets (modernization or automation).

We can use break-even analysis to answer the above questions from a pure cost and profit perspective and when marketing departments are considering strategies that involve the granting of discounts or conduct promotional campaigns. Next question often arises: "Should we offer a discount?" The answer to this question is far beyond simple and straightforward. It involves the examination of many factors such as the competition, the elasticity of demand etc. If the discount offer is made with a final objective to increase profit through an increase in sales volume caution should be exercised on the fact that the expected increase in sale (incremental sales) will be adequate to make up for the "lost" profit from the discount offer.

Break-even analysis is based on categorizing production costs between those which are variable and those which are fixed.

Variable cost consists only of variable expenses delineated in each product, whether direct or indirect, costs that vary depending on the volume business activity without necessarily exists proportionality between costs and changes in production volume variance.

In contrast, **fixed costs** are considered period costs that are borne regardless of production volume and they refer to the full capacity of the company to produce and sell, reflecting entirely in annual profit. Taking into account the fixed costs it is considered to approximate the full costs of the actual values.

The temptation to explore information (cost; result) leads to the study of cost-volume-profit relation.

The cost-volume-profit relation is, in fact, a model for predicting the outcome, which highlights the correlations between the factors that may influence the profits of an enterprise. It involves three elements:

- Cost - the cost of making the product or providing a service
- Volume - the number of units of products produced or hours/units of service delivered
- Profit - Selling Price of product / service - Cost to make product / provide service = Operating Profit

The first two items are information available to business managers, about their own business, products and services. This type of information is not generally available to those outside the business. They constitute important operating information that can help managers assess past performance, plan for the future, and monitor current progress. As for the third item, a business can't stay in business very long without profits.

Based on the distinction between variable costs and fixed costs, break-even analysis is a useful instrument for decision. Using break-even analysis we can analyze a single product, a group of products, or evaluate the entire business as a whole.

Specifics indicators (break-even point, the coverage factor, factor of safety and confidence interval) are used to reveal different aspects of profitability or unprofitability. Each of these indicators has clear meanings and ability to suggest various ways to improve the business.

2.1.1. The Break-Even Point is the sales volume that enables a zero profit. At this critical point total sale equals total expenses (fixed and variable) of the company. When sales are below the break-even point a company is operating at a loss; above the break-even point they will be operating at a profit.

Mathematically, the break-even point (Pe) is calculated as the ratio between fixed costs (CF) and unit contribution margin (cb_u):

$$Pe = \frac{CF}{cb_u}$$

The unit contribution margin is the difference between the selling price (pv) and variable costs (cv):

$$cb_u = pv - cv$$

If the enterprise gets a mix of products, the break-even is calculated based on the medium contribution margin. This contribution is the ratio between global contribution margin (CB) and the amount of product (i) manufactured and sold (qv_i):

$$cb_u = \frac{CB}{\sum q_i}$$

2.1.2. The coverage factor (Fa). This indicator provides information about the product or products that have the highest capacity to absorb fixed costs and make a profit. Production and sale policy will focus on products with the highest coverage factor, permitting optimization of the production and sale program.

The coverage factor can be calculated for each product or global, with the following formulas:

a) *For each product:*

$$Fa_i = CB_i / CA_i * 100$$

CB_i = the global contribution margin for the product i

CA_i = turnover for the product i

b) Global:

$$Fa = CB / CA * 100$$

or

$$Fa = CF / CA^* * 100$$

CB = the global contribution margin for the entire production manufactured and sold;

CA = turnover for the entire production manufactured and sold

CA^* = critical turnover, i.e. break-even sales value

2.1.3. The Dynamic safety coefficient (Ks) indicates how much sales can fall to reach the balance point and not get into the losses. There are three formulas for calculating this coefficient:

a) $Ks = 100* (CA - CA^*) / CA$

CA= sales value

CA^* = critical turnover, i.e. break-even sales value

b) $Ks = R / CB * 100$

R = profit

CB = global contribution margin for the entire production manufactured and sold

c) $Ks = 100\% - g$

100% = the maximum activity level

g = degree of activity in the break-even point

2.1.4. The range of safety or the margin of safety (Is) allows calculating the influence of the reduction in sales volume on the result. It is the excess of expected future sales above the break-even point, in other words it indicates how much sales volume can be reduced without risk of incurring losses.

$$Is = CA - CA^*$$

CA = expected future sales

CA^* = sales at break-even point.

Statistical studies indicate the following situations:

- unstable situation, if CA is increased by up to 10% than CA^*
- relatively stable situation, if CA is increased by up to 20% than CA^*
- comfortable situation, if CA exceeds more than 20% CA^*

2.2 The calculation of specific indicators of cost-volume-profit relation. Break-even analysis - Case study

The company S.C. Silvarom S.A. has the aim to create furniture. The company manufactures and sells three products, A, B, C. Using the information in the table below will analyze indicators expressing the cost - volume – profit relation.

Explanation	**Product**
	A
1. Quantity produced and sold (q_v)	10.000
2. Unit selling price (pv_u)	1.000
3. Total variable costs (CV_T)	6.500.000
4. Fixed costs	
Turnover (CA)	10.000.000
Unit variable cost (cv_u)	650
Unit contribution margin (cb_u)	350
Global contribution margin (CB)	3.500.000
Financial result (R)	

Explanation	**Product**
	B
1. Quantity produced and sold (q_v)	7.000
2. Unit selling price (pv_u)	3.000
3. Total variable costs (CV_T)	22.505.000
4. Fixed costs	
Turnover (CA)	21.000.000
Unit variable cost (cv_u)	3.215
Unit contribution margin (cb_u)	-215
Global contribution margin (CB)	-1.505.000
Financial result (R)	

Explanation	**Product**
	C
1. Quantity produced and sold (q_v)	9.000
2. Unit selling price (pv_u)	4.000
3. Total variable costs (CV_T)	27.500.000
4. Fixed costs	
Turnover (CA)	36.000.000
Unit variable cost (cv_u)	3.000
Unit contribution margin (cb_u)	1.000
Global contribution margin (CB)	9.000.000
Financial result (R)	

Explanation	**TOTAL**
1. Quantity produced and sold (q_v)	26.000
2. Unit selling price (pv_u)	
3. Total variable costs (CV_T)	56.005.000
4. Fixed costs	8.000.000
Turnover (CA)	36.000.000
Unit variable cost (cv_u)	
Unit contribution margin (cb_u)	
Global contribution margin (CB)	10.995.000
Financial result (R)	2.995.000

The calculation of the previous indicators:

Turnover (CA) = q_v * pv_u

CA_A = 10.000 * 1.000 = 10.000.000 lei

CA_B = 7.000 * 3.000 = 21.000.000 lei

CA_C = 9.000 * 4.000 = 36.000.000 lei

Unit contribution margin $cb_u = pv_u - cv_u$

cb_u = 1.000 - 650 = 350 lei

cb_u = 3.000 - 3.215 = - 215 lei

cb_u = 4.000 - 3.000 = 1.000 lei

Unit variable cost (cvu) = CVT/qv

cvu = 6.500.000/10.000 = 650 lei

cvu = 22.505.000/ 7.000 = 3.215 lei

cvu = 27.000.000/9.000 = 3.000 lei

Global contribution margin CB = cbu * qv

CB = 350 * 10.000 = 3.500.000 lei

CB = - 215 * 7.000 = - 1.505.000 lei

CB = 1.000 * 9.000 = 9.000.000 lei

Financial result = Turnover (CA) – Total variable costs (CV_T) *- Fixed costs* = 2.995.000 lei

After analyzing the primary indicators, we can make the following considerations:

The overall activity of the enterprise is profitable, it releasing a positive result (profit) in the absolute amount of 2.995 million lei;

Product A and C are profitable, each having a positive unit contribution margin, 350 lei/unit for A, 1000 lei/unit for C; they have the ability to cover fixed costs and to develop a profit to pay part of the fixed costs not covered by the product unprofitable B; the product B has a negative unit contribution margin (-215 lei/unit), the selling price (3000 lei/unit) cannot cover the unit cost (3215 lei/unit).

Following improve profitability, the company may decide to abandon the manufacture of B if it is found that there is no demand for this product and its production is not economically justified; otherwise, keep the factory and try to recoup by increasing price or reducing costs by reviewing the variable costs that compose it.

Case 1. *The enterprise produces and sells a single product*, A, thus:

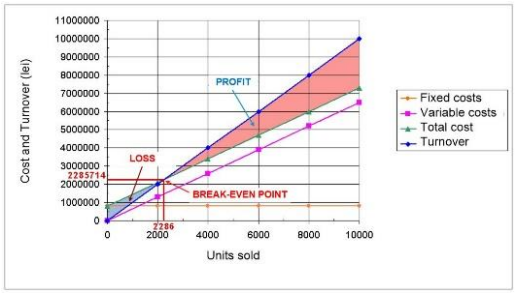
Break-even point:

Pr = CF/cb_u

- Fixed costs (CF) = 800.000 lei
- Unit variable costs (cv) = 650 lei
- Unit selling price (pv) = 1.000 lei
- Quantity produced and sold = 10.000 unit

$cb_u = pv - cv$ = 1.000 – 650 = 350 lei

$Pr = CF/ cb_u$ = 800.000/350 = 2.286 unit.



The company must produce and sell 2.286 units to fully cover variable costs and fixed costs, so that both profit and loss are equal to zero. Any unit of product manufactured and sold over this amount will make a profit of 350 lei as unsold or not manufactured any unit involves a loss of 350 lei.

CA^* = CF / RC = 800.000 / 0,35 = 2.285.714 lei

RC = CB / CA * 100 = 3.500.000 / 10.000.000 * 100 = 35%

The company's activity has evolved a factor of coverage of 35% coverage, which provides coverage of fixed costs and make a profit.

To calculate the break-even point using graphical method is drawn diagram CPV.

OX axis is the quantity produced and sold and OY axis is the cost and turnover.

The break-even point corresponds to a quantity of 2.286 units produced and sold and to a turnover of 2.285.714 lei. In the red area is the profit, the blue area is the loss.

Note that as the quantity produced increases, the share of fixed expense per unit will be lower, since the total fixed costs, maintaining the same level, without being influenced by the volume of production, will be distributed to a larger number of products. This leads to lower costs of production and increase profits.

Case 2. The enterprise produces and sells a mix of products (A, B, C)

The break-even point:

The unit margin contribution is:

$cb_u = CB/\Sigma qv_i$ = 10.995.000 / (10.000 + 7.000 + 9.000) = 423 lei/unit.

$Pr = CF/cb_u$ = 8.000.000 / 423 = 18.912 unit.

The company must produce and sell 18.912 units to cover all expenses through revenues and to obtain zero profit.

Have known the weight of each product:

$g_i = qv_i/ \Sigma qv_i$

g_A = 10.000 / 26.000 = 0,38;

g_B = 7.000/26.000 = 0,26;

g_C = 9.000/26.000 = 0,35

The break-even point for each product: $Pr_i = g_i * Pr$

$Pr_A = g_A * Pr$ = 0,38 * 18.912 = 7.187 unit

$Pr_B = g_B * Pr$ = 0,26 * 18.912 = 5.106 unit

$Pr_C = g_C * Pr$ = 0,35 * 18.912 = 6.619 unit

18.912 unit

The critical turnover for 18.912 units is 48.750.761 lei, as follows:

RC = CB / CA * 100 = 10.995.000 / 67.000.000 * 100 = 16,41%

CA^* = CF / Rc = 8.000.000 / 16,41% = 48.750.761 lei

The coverage factor

– For each product:

$Fa_A = CB_A / CA_A$ * 100 = 3.500.000 / 10.000.000 * 100 = 35%

$Fa_B = CB_B / CA_B$ * 100 = - 1.505.000 / 21.000.000 * 100 = - 7,16%

$Fa_C = CB_C / CA_C * 100 = 9.000.000 / 36.000.000 * 100 = 25\%$

For profitable product A and C, the coverage factor is positive indicating their ability to support fixed costs and generate profit.

Critical analysis of the information obtained shows that A is the most profitable product, with a coverage factor of 35%, followed by the product C. For these products may decide to boost production and sale.

For product B, the selling price should be increased by 7,16% for cover it cost, or the cost should be decreased by 7,16%.

- The global coverage factor:

$Fa = CB / CA * 100 = 10.995.000 / 67.000.000 * 100 = 16,41\%$

$Fa = CF / CA^* * 100 = 8.000.000 / 48.750.761 * 100 = 16,41\%$

16.41 % of value of products produced and sold may cover fixed costs and provide profit. The amount of fixed costs and their share is required to be analyzed, for not having a wrong judgment.

The share of fixed costs in total sales is calculated as follows:

$R_{CF} = CF / CA * 100 = 8.000.000 / 67.000.000 * 100 = 11,94\%$,

This means 11% of turnover is needed to cover all fixed costs, the remaining 4,47% (16.41% - 11.94%) represent potential profit. This information suggests that the production and sales ensure the profitability of the enterprise.

Dynamic safety coefficient

$Ks = (CA - CA^*) / CA * 100 = 67.000.000 - 48.750.761 / 67.000.000 * 100 = 27,23\%$.

The company can decrease sales by maximum 27.23% not to exceed the break-even point.

$Ks = R / CB * 100 = 2.995.000 / 10.995.000 * 100 = 27,23\%$

27,23% of the current activity generates a positive result.

The margin of safety

$Is = CA – CA^* = 67.000.000 - 48.750.761 = 18.249.239$ lei

Sales may register a decrease of 18.249.239 lei to maintain profit.

The last two indicators assessed risk of becoming unprofitable. Negative values indicate losses. As these indicators have higher values, the risk is lower.

Some of the advantages of the break-even analysis are:

- allows to establish the size at which production becomes profitable
- determines the use of production capacity in correlation with a desired level of profit
- allows to establish the production volume required to achieve a certain level of profit
- helps in studying the consequences of increasing sales or turnover
- highlights correlations between the dynamic of production respectively revenue and the dynamic of cost, grouped into variable costs and fixed costs

3. Conclusions

In conclusion, the break-even point is one of the most important information of a business plan. Break-even is a very useful tool, especially when starting a new activity or a project to validate the realism of the project. It helps to reduce risk and uncertainty and to establish a minimum activity level required to avoid losing money.

The objective of the break-even analysis is to reduce uncertainty about the launch of a new project and the objective of the company is as break-even point to be as low as possible. This forces the company to study fixed costs and variable costs as well as turnover.

Also, when the company wants to invest in new machinery and high-tech, the breakeven analysis is recommended to assess the possibility of investing in these fixed assets or to estimate the results of an increase in production volume in relation to new production capacities.

However, a simplistic approach cannot justify a decision on a new project, even if the analysis would measure as accurately as possible the fixed costs and variable costs and would result in turnover depending on the market (selling prices in with respect to product quality). Break-even analysis is important for planning and optimizing sales and costs of the enterprise in the short, medium and long term in various sectors (manufacturing, commerce, services).

Break-even analysis is useful as a first step in developing financial applications, which can be use in invoicing and budgeting. The main purpose of this analysis is to have some idea of how much to sell, before a profit will be made.

The approach that the authors of this paper have done is theoretical and he recognizes the need for some case studies to understand the complexity of situations that involve the use of break-even analysis, could thus overcome the barrier between the academic discourse and the practice, which would be beneficial to both sides. Other lines of research could be identification of additional effective tools to help professionals in the consolidation of information necessary for making management decisions.

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MONETARY POLICY AND PARALLEL FINANCIAL MARKETS

Adela IONESCU*

Abstract

Monetary policy is one of the economic policy "tools" through which it acts on the currency demand and supply in the economy. The importance of monetary policy results from its primary objective - price stability, plus limiting inflation and maintaining internal and external value of the currency. Responsibility for achieving these objectives rests with the Central Bank, which has a monopoly in the formulation and the implementation of monetary policy targets. Price stability is the primary objective of monetary policy and also the central objective of economic policy, alongside with: sustainable economic growth, full employment of labor force, balance of external payments equilibrium. To achieve these overall objectives of economic policy, monetary policy acts through currency as an instrument of action and it represents the overall action exercised by the monetary authority to influence economic development and to ensure price stability. In economic processes numerous factors emerge to the sale or purchase of capital available for a shorter or longer period and to achieving their aspirations of maximize capital gains, they are negotiating, they are confronting and agreeing within specific market relationships.

The entirety of relations between various economic issues, enterprises and individuals, between them and the banking intermediaries, as well as the relationship between banks and other credit institutions on the transfer of cash money as specific form of debt and fructification of capital, form capital markets or credit markets.

These markets are carved up according to the nature and purposes of the participants.

Keywords: *structural objectives, operational objectives, monetary variables, bond market, credit market, placing capital, capital circuit.*

1. Introduction

Monetary policies in all countries and in all periods aimed primarily the currency stability, maintaining it at a relatively constant value and purchasing power. Monetary policy can not directly lead to currency stability, no matter how good legislation.

Monetary policy is conducted according to the play of economic forces and the principle of self-regulation.

Effective monetary policies are based on the idea that money embodies cash flows that occur during transactions and domestic and international economic processes. All these flows and exchanges are met in the stability and growth, in balance of payments, in trade balance surplus or deficit of the state. In turn, all these phenomena and economic processes related to the central bank of issue of a country. Any imbalance between transactions, cash flows, either internally or between two or more countries - so internationally, conduce to a currency-based solution, which not only affects the stability and purchasing power of the currency, as well as foreign exchange reserves and the economic power of the one supporting the unfavorable operations.

Monetary policy stands in the global action of the state by specific tools and methodologies on the main economic variables: prices, GDP, employment of labor (unemployment rate), the balance of the balance of payments etc. This action shall be exercised by handling monetary variables, ie certain sizes that are themselves difficult to control, but that monetary policy aims to influence. The target of monetary policy consists of so-called "intermediate targets" such as interest rates, monetary aggregates, the volume of bank credit and the exchange rate.

But in addition to these issues, monetary policy means the multitude of possibilities to act on the currency by currency.

Price stability is the primary objective of monetary policy and also the central objective of economic policy, with sustainable economic growth, full employment of labor and balance of payments equilibrium. To achieve these overall objectives of economic policy, monetary policy acts as an instrument of action by currency and represents all measures exercised by the monetary authority to influence economic development and to ensure price stability.

The government has approved a series of austerity measures due the financial crisis, without aproper analysis of medium and long term effects over economy and population. One of theme asures was the instatement of the minimum income tax that each firm had to pay no matter the profit or loss it had obtained during the financial exercise.[1]

After creating and expanding European Community, later the European Union by the Treaties, EU institutions and Member States were obliged to pursue a policy of deregulation and then abandoning

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[1] Adrian Stefan-Duicu; Viorica Mirela Stefan-Duicu, *Income tax shifts-causes and effects on Romanian enterprises*, Lex ET Scientia International Journal, 2011.

the monopoly structure, which were organized around the major public services. Thus, in the '80s, states have tried a new technique to finance their public infrastructure needs, which they could build without debt.[2]

2. Content

The contemporary era has long given up the concept of monetary neutrality which in the past hid the essence of monetary relations, so that now monetary policy is recognized as an essential component of economic policy. In a market economy, politics is a deliberate intervention of the state in the economy in order to accomplish certain goals of structural or of a certain juncture nature.

In all market economies the state is considered the center of the policy makers and their promoter under the control of parliament who instructs the administration to execute such orders[3].

Because "interim targets" are quite diverse, it is necessary to choose among them some "operational objectives" i.e. monetary variables that authorities can influence in an effective manner with the tools at their disposal. The interbank interest rate or "exogenous monetary base" are targets in a higher extent under the jurisdiction of monetary authorities than, for example, the interest rate on loans Debenture.

Regarding banking system, securitization is a financial transaction recovery of claims by an investment vehicle, which acquires, gathers and uses them to guarantee securities issues. The balance sheet of the banking institutions include in the active side the decrease of bank loans to all its customers, individuals and legal entities and liabilities, and in the passive side are included the deposits and customers current accounts and also, the loans contracted from other banks or financial institutions, plus the bonds issued by the bank, which, in fact means debts, too. In the context of balance sheet of the banking institutions, securitization means a kind of funding by securities issue.[4]

Finally, the monetary authorities have certain tools, i.e. processes that enable them to act on monetary variables. Some of these tools are direct and binding (credit control, foreign exchange control etc.), but in general, it is considered that they must rely on indirect mechanisms, which preserves the action of market laws and allow to subsist a certain adaptive capacity banking system as a whole.

So monetary policy works using tools on operational objectives, which in turn exerts some effects on intermediate targets, which allows achieving endpoints.

The main objectives of monetary policy are:

- Price stability and therefore of the national currency;
- Ensuring an increase in the number of the employees;
- An appropriate rate of foreign exchange;
- A high rate of economic growth.

To achieve these objectives are also necessary some constraints, which are all four:

- Prevent financial panics;
- Avoid excessive volatility in interest rates;
- Prevent certain sectors of the economy to bear the burden of restrictive policy;
- To gain and maintain the confidence of foreign investors. Goals or objectives are:

Price Stability

This target seems evident in any modern economy, but is far from being realized. Inflation is a danger for not properly redistribute income. Specifically, all salaries, contracts, laws, taxes and accounting procedures are adapted to inflation.

Rising inflation has three drawbacks:

- The maximum price and catalog prices are to be modified frequently;
- As long as the prices cannot be changed continuously, they are out of balance short periods of time between two changes;
- Inflation impels to keeping a very low amount of currency, for currency loses its preserved value without the benefit of a higher nominal interest rate than other assets.

Monetary policy takes into account that inflation cannot always be predicted correctly, and economically it neither can be fully indexed. For example nominal income (salary etc.) is more a subject to taxes than income from real interest.

Monetary policy tries to reduce inefficient allocation of investments fund for periods of inflation. It intends to reduce the impact of inflation on the distribution of income and wealth. Non-anticipation of inflation bother creditors and the retired persons and it's in favor of borrowers. The impact of inflation disadvantages employees if wages are following prices.

Inflation causes insecurity and uncertainty. Families cannot plan their future for a longer period for they do not know what real value will have their fixed assets. People are inclined to save but the lack of inflation anticipation punishes them severely.

Inflation increases government revenue over expenditure and monetary policy must determine the extent for that. The balance should not be broken as

[2] Stoica Emilia Cornelia –Financement des projets publiques par la technique PPE.

[3] Basno C., Dardac N., Floricel C-tin – "*Monedă, Credit, Bănci",* Ed. Didactică şi Pedagogică, Bucureşti, 2001 [Basno C., Dardac N., Floricel Constantin - *"Currency, Credit, Banking"*, Didactic and Pedagogic Ed., Bucharest, 2001].

[4] M. Sudacevschi, Ion Niti „ The Innovations on the financial matkets. Useing derivatives for banking market risk coverage"- *Internal Auditing & Risk Management, 2010.*

government is the largest debtor in the economy and therefore it wins from inflation. When inflation increases, the real value of government debt and the interest it has to pay is reduced.

The state has privileges in times of inflation also because the currency and bank reserves that it is holding.

Increasing the Number of Employees

Monetary policy aims as well increasing employment (avoiding unemployment), and determine its most appropriate level.

There are two selection criteria:

- The unemployment rate to be effective in terms of maximizing production;
- A minimum unemployment rate, determined on the basis of monthly tracking of families.

The last is uncertain and less effective, so ultimately lead to accelerating inflation. This is also because unemployment data may not be accurate. For example, are eliminated those who have given up looking for work or those who work part time are not counted partial unemployed.

The number of unemployed depends on the level and duration of compensation payments.

An Appropriate Rate of Exchange

It's taken as read that monetary policy must consider the increase in the exchange rate of the national currency (i.e. exchange rate). This leads to lowering inflation. Exporters win and the direct result is the entry of a larger amount of currency on the national market.

Economic Growth

Monetary policy contributes decisively to a constant rate of growth, which in turn promotes the growth of loans. To promote investment, monetary policy envisages a very real low interest rate. This measure must be accompanied by a restrictive fiscal policy, including maintaining a lower budget deficit.

Constraints:
Preventing financial panic

Financial panic and recession lead to increased unemployment, so no way to increase the number of employees, which was seen to be an objective of monetary policy. Those who bought assets on credit can sell their obligations by paying the creditors. As some of loan applicants fail because they cannot pay off loans, some of their lenders give themselves bankrupt (e.g. banks). Bank failures and their temporary inability to replenish were the main features of financial panics. To prevent financial panics in countries with developed market economy were created reserves (e.g. the USA - the Federal Reserve).

Interest rate stability

Keeping interest rates relatively stable is a monetary policy of balance, but peaks too high for interest rates should be prevented. Financial markets operate more efficiently if interest rates are stable. If increase of interest rates is to high, the value of banks and insurance companies portfolios decreases, which is equivalent to a loss of capital. Financial panics occur also because people have an aversion to risks. Therefore, they prefer to sell their assets at prices below their value. Unstable interest rates lead to fluctuations in exchange rates as well.

Burden on Some Economic Sectors

Tight monetary policy makes some sectors suffer more than others. The most affected sectors are products or services exporting sector and housing construction one.

Restrictive policy goal is to reduce the demand for resources, when this request is excessive and too inflationary.

Maintaining the Confidence of Foreign Investors

Monetary policy should pay more attention to how foreign investors respond to changes in monetary and financial market movements. If a country's assets are declining, foreign investors will withdraw their capital. They sell stocks and obligations held in the country. Therefore, prices of stocks and bonds reduce (increases supply). This cutting down of prices leads to reduced wealth and increased costs of investment and ultimately to economic recession.

The objectives of monetary policy largely overlap with those of fiscal policy to the extent that both are instruments of macroeconomic stabilization. Another possibility which monetary policy has to improve monetary circulation is budget constraint, namely its ability to finance from loans.

Debt, i.e. the budget deficit can be monetized (e.g. the currency issue and stabilizing interest rate).

In general, in a developed market economy monetary policy does not impose laws that increase or reduce aggregate demand.

There are two types of monetary policy instruments: general (indirect) and specific (direct) ones.

The former are used in most contemporary economies and acting on monetary mechanisms without blocking their operation. Thus handling re-discount fee, open market policy and required reserves policy intervention are general tools; they are based, each, on some logic inherent in a particular economic-monetary mechanism: the loan and its historical form - the discount (in re-discount case), financial market (in the case of open market policy), monetary creation (if required reserves policy).

The second category of tools are used only in certain countries and periods and acts directly on the financial position of commercial banks, imposing on them a certain conduct. The selectivity (routing) and rationalization (capping) of loans are coercive procedures that transform ordinary commercial banks in common credit distributor officers to economic

sectors and branches designated by the state power, in proportions determined through administrative means.

At present, the general evolution of monetary policy is characterized by a return to indirect instruments, particularly those that rely on capital markets mechanisms and therefore, on the interest rate action.

Re-Discount Tax Policy

The usual discount rate is the interest rate for loans extended by the bank of issue within the re-discount operations.

The specific name comes from the fact that for a long time the main form of credit by the bank of issue was re-discount based on discount operations. Today the bank's lending operations have diversified and have other structures, but the bank of issue continues to fulfill in the economy the role of a source of credit, related to its main function of issue.

Open Market Policy

Open market operations are operations whereby the central bank buys and sells securities in the money market. Unlike re-discount, which relates directly commercial banks with the central bank, at the initiative of the former, open market operations allow the central bank to take the initiative and intervene in the money market, from which it supplies commercial banks with liquidity. The interest rate related to these operations forms on the mentioned money market – which the central bank can influence however -, that by modulating its cash contribution - achieved through purchases of securities they carry out and by modulating the withdrawal of liquidity - made by sales of securities they perform. Open market policy is historically a natural companion to re-discount policy, both originating in the English economy where they were used complementary in order to ensure the desired direction of trends for liquidity, credit and interest. This tool is applied by the National Bank of Romania who is all the time in the know of the price and interest rate. Also the N.B. of R. grants credit to banks for the recovery of economy, primarily the investment.

Required reserves policy

Required reserves are the primary currency availability that banks must preserve in their assets proportional to the aggregate deposits or other aggregate established by the monetary authorities. Determining the level of required reserves can be done by applying one or more coefficients differentiated by envisaged calculation basis. Thus, as a general rule, for deposits is used a type of coefficient, another factor for term deposits, etc.

Required reserves policy effectiveness depends on the degree of dependency of the commercial banking system to the central bank.

NBR has the capacity to float reserve requirements within certain limits. Increasing reserve requirements affects the money stock (e.g.: if reserves are in excess it's used the money issue).

If reserves are high, banks do not build up anymore deposits for individuals and body corporate or lower interest rates. In developed countries, the required reserve is not changed for decades.

Monetary Policy and Parallel Credit Markets

Money market or credit market comprises the available short-term capital and foreign exchange market, being also a bound compartment to capital flows to and from the outside. As stated, these markets are individualized by functional institutions and the conduct of transactions in these markets. But it is estimated, with good season that on the one hand the boundaries between these markets cannot be clearly defined and on the other hand, the links between these markets are really tight. Thus, events and trends in a market can influence the events and trends in other markets, the more so as since many participants operates in several markets and thus can transfer if deemed favorable, their participation in other markets. Between the two possible extremes respectively "permanent" hiring of capital by purchasing shares/bonds and loans from day to day, there is a differentiated range of ways of placing it in the capital or credit markets, different but gradually close to each other.

Money market or credit market works with large participation of the population, of companies and especially intermediaries of banks, institutions with broad functionality in this market.

The complexity of relationships within the monetary market leads to its specific segmentation, based upon the natural diversity of certain sides of the process of modernization and activation of available capital. The general credit market functionality is provided by the activity of some component markets, each of them with specific participants and specific operations.

The Relationship between Money Market and Classical Parallel Markets

In the money market we distinguish:

- Money market (the classic one);
- Parallel markets.

Money market, the so-called classic one has in fact several aspects:

- Money market or discount market;
- The actual money market.

The first state - money market or short-term discount market comprises a broad framework of the relationship regarding on the one hand the mobilization of monetary availability from companies, people, institutions of credit and on the other hand granting loans to companies or individuals. Specific credit periods in this market are at sight for maximum one year (US) or 18 to 24 months in the European banking systems. The resources that are mobilized on the market are usually current availability of firms and

individuals, respectively balances of the call deposit accounts or current accounts.

Distribution of these resources is carried out by loans to companies in order to meet current needs related in principle to providing in advance the production costs or those related to the movement of goods from the producer to the distribution network. Also, families are beneficiaries to receiving loans mainly for the purchase of housing and consumer goods. Mobilization of availabilities and credit distribution is performed under market conditions, participants to transactions manifesting freely their preferences according to the best interest level that could maximize earnings.

In its second state - the actual money market, there mainly the banks lend to each other the amounts needed to square the interbank operations relations related to the liquidation of balances from mutual operations within 24 hours or more. This particular circuit of available capital has an important role in regulating and establishing record- setting monetary circulation and balanced functioning of the banking system. The smooth operation of the money market is closely related to savings market which can be considered an auxiliary market for the money market. The banks attract their customers based on permanent collaborative relationships and in competitive conditions, mainly resources from the sphere of the savings banks, credit unions, insurance companies, pension funds, investment funds, well-established institutions for mobilizing and specific fruition of an important part of the population savings[5].

Parallel markets were gradually formed in the aftermath of the Second World War, in specific historical and economic development circumstances, which led to structure new credit markets, independent in their operation and with restricted direct communication channels with the other markets belonging to the traditional credit markets. This is the origin of their name as parallel markets. The first existing parallel market in the developed countries is the Euro-currency market, Euro-currency is representing receivables denominated in the currency of a country that is used across national borders by non-residents.

The prefix "euro" initially reveals the location of this market in Europe for dollar-denominated resources (where the name of Euro-dollar comes from) is routinely used today to characterize all such operations carried out in the world, with the object mostly in dollars but pounds and yen as well etc.

The Euro-currency market is a credit market, its main mission is to mobilize and redistribute by credits, with the goal to best taking advantage of the existing availability in this market.

Direct participants in this market are the banks licensed in foreign currency operations, according to the laws of each country. Contracting and negotiations take place between banks independently of their nationality and borders, being agreed different loan terms and amounts and at the interest level appropriate to this market. Obviously, banks issue offers and extend requests in relation to the possibilities and needs of its own clientage. The Euro-currency resources of this market have different origins: exporters, large transnational companies, commercial and issuance banks of various countries, depending on their foreign exchange reserves. In their turn major credit recipients are recruited from importers and the categories listed above.

Euro-currency market plays a major role in the economies of developed countries; provides additional liquidity and related resources to companies' expansion and to the accomplishment of capital exportation. As a parallel market it leads to a significant increase of credit resources, countervailing the national policies and often accounting for inflationary stimuli.

Another parallel market is the market for credit between companies (intercompany market). This market has developed under the challenge of credit restrictions which at the beginning obstructed credit relationships in developed countries and that consisted in the advancement of significant amounts from some firms to others for a short term. This was a form of avoidance of intermediaries, called also disintermediation, which provided participants an extra yield profits at the expense of proper banking intermediaries.[6]

In England, these loans are brokered by specialized brokers between major companies (about 500) and the minimum circulated amounts are about £ 50,000, loans being actually negotiable.

In the US was created an instrument specific to this commercial market – papers, which are negotiable and represent values between 10,000 and $ 5 million USD with terms from 25 to 270 days. These instruments have grown in relevant rhythms, showing increased preference for this option as an expression of deleveraging processes.

In relation to the respective economic characteristics and to national banking systems, appear as parallel markets:

- Financial firms market, in connection with the formation and redistribution of resources for specialized operations as leasing, factoring and others;
- Mortgage market, in connection with the establishment of resources, especially through short-term loans, necessary for the activity of local authorities.

Thus, the nature and specificity of the operations in these markets will be mainly determined by credit institutions which act in those markets.

[5] Moşteanu Tatiana - coordonator, Buget şi trezorerie publicã, ediţia a III-a, Editura Tribuna Economicã, Bucureşti, 2002 [Moşteanu Tatiana – Content master, Budget and Treasury 3rd Edition, Economic Tribune Publishing House, Bucharest, 2002].

[6] Vãcãrel Iulian – coordonator, Finanţe publice, Editura Didacticã şi Pedagogicã, Bucureşti 2003.

It is also useful to remember that markets function scope is elastic, in some cases difficult to mark off, while banking brokers' functionality has boundaries and precise sequence rules paramount to knowing and understanding the mechanism of credit.[7]

Considering of the credit process through point of view of market functionality provides a general guidance allowing positioning and receiving concrete knowledge about banking intermediaries in overall connections of the financial market. Monetary authority supervises the money supply in the economy through monetary policy implementation. The changes occurring in the money supply as a result of applying one of the instruments of monetary policy causes a range of transmission effects that lead ultimately to increase or decrease of the demand in the goods and services market.

Long-term stabilization of prices and therefore inflation is the most important goal of any monetary policy. So the existence of parallel markets financial, i.e. credit and currency market may lead to certain results of the monetary policy that widely differ from those anticipated.

In all developing countries informal credit and foreign exchange markets coexist alongside the official ones. The mobility of capital suggests that assets in the informal credit market and foreign financial assets are imperfect substitutes. Thus a complete description of the financial system in a developing economy requires consideration not only of the interactions between formal and informal financial markets but also more the interactions between informal credit markets and currency markets[8].

3. Conclusions

At any time and in any country, the central bank watches national currency stability. In Romania there was a period especially between the two world wars, when there used to be a strong monetary stability and a very strict monetary policy. First, during this period our currency was backed by gold and was convertible. There is a legal parity of Leu, i.e. the amount of gold it contained. When parity increased or decreased as a result of monetary flows and economic situation, the central bank intervened and balanced the demand and supply of money. At that time, the balance was made especially by importing or producing gold. A convertible currency and monetary stability meant maintaining the balance between points of exit and entry of gold.

When it happened to be an unfavorable balance of payments, the central bank was promptly intervening, providing the money and foreign exchange market with gold or foreign exchange. But its cover stock was in danger, so the central bank had to recover the potential loss. If there were no other options, the central bank was forced to restrict the issuance and circulation of paper money, which were covered in gold, and thus increased (relative) gold and foreign exchange reserves. Withdrawing some of the money (notes) in circulation, the percentage of gold cover up against the money in circulation was maintained. Another solution was the central bank to lend domestically discount only with great caution. This was done simply, i.e. by raising the discount rate at the central bank and by a more rigorous management of bills and other debt and securities. Raising interest (discount rate) delays some initiatives, some transactions and thus reduces credit. With an increasing discount rate, the currency becomes more sought after, so increasing purchasing power. It means that prices begin to fall which encourages exports and limit imports. In this way it can be obtained an improvement in the trade balance and it can balance foreign exchange reserves.

The great importance that monetary policy has in any economy has led incessantly in applying safeguards measures of cash and removing currency imbalance factors.

Monetary policies have often considered a control of flows and domestic and international monetary transactions that each country is involved in. There are also required surveillance measures of the exchange rate and of trade with foreign currency and securities.

Many of the instruments of monetary policy from between the two world wars are even now in use in our country.

Internationally monetary policy is lately characterized by a relaxation on the coercive, interventionist and legislation levels. Protectionist policies no longer represent the number one factor in the stability of national currencies. Much more important are the policies of opening and adjustment, those of determining the purchasing power of currencies based on complex calculations and models with a high degree of accuracy and rigor. There are occurring regional developments of monetary policy and creation of monetary unions. The latest and most spectacular is the creation of the European Monetary Union (or the Euro-zone). Weak currencies increasingly depend on reference currencies and international currencies, implicitly on international monetary and financial organizations.

[7] Văcărel Iulian – coordonator, Finanţe publice, Editura Didactică şi Pedagogică, Bucureşti 2003.
[8] Moşteanu Tatiana – Content master; Budget and Treasury 3rd Edition, Economic Tribune Publishing House, Bucharest, 2002.

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FINANCIAL CRISIS AND THE CENTRAL BANK SYSTEM

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Abstract

The financial crisis that began in 2008 gradually developed into a global economic crisis and continues to this day. There is a lot of causes standing behind the creation, depth and process of the crisis, which is the deepest since the thirties of last centrury. One of the reasons can be found in the risky behavior of commercial banks, especially in the excessive lending of credits and mortgages. Its share on the financial crisis have central banks and their failure as the financial supervisory authority. But there is a lot of another causes of failures in the commercial banking system. And some of the causes lies outside the banking system and monetary policy. Its share of the blame has also become from state and its expenditure on the social policy.This article analyzes the role of the commercial banking system and the central banks on the financial crisis including prevention options and measures.

Keywords: *Financial Crisis, Central Bank, Monetary policy, Money, Deficit.*

1. Introduction

Financial and banking crises properly defined consist either of panics or of waves of costly bank failures. These phenomena were rare historically compared to the present. A historical analysis of the two phenomena (panics and waves of failures) reveals that they do not always coincide, are not random events, cannot be seen as the inevitable result of human nature or the liquidity transforming structure of bank balance sheets, and do not typically accompany business cycles or monetary policy errors. Rather, risk-inviting microeconomic rules of the banking game that are established by government have always been the key additional necessary condition to producing a propensity for banking distress, whether in the form of a high propensity for banking panics or a high propensity for waves of bank failures (Calomiris, 2009).

Other risk-inviting rules historically have involved government-imposed structural constraints on banks, which include entry restrictions like unit banking laws that constrain competition, prevent diversification of risk, and limit the ability to deal with shocks. Another destabilizing rule of the banking game is the absence of a properly structured central bank to act as a lender of last resort to reduce liquidity risk without spurring moral hazard.

Macroeconomists and policy makers often remind us that banking crises are nothing new, an observation sometimes used to argue that crises are inherent to the business cycle, or perhaps to human nature itself. Charles Kindleberger (1973) and Hyman Minsky (1975) were prominent and powerful advocates of the view that banking crises are part and parcel of the business cycle, and result from the propensities of market participants for irrational reactions and myopic foresight.

Some banking theorists, starting with Diamond and Dybvig (1983), have argued in a somewhat parallel vein that the structure of bank balance sheets is itself to blame for the existence of panics; in their canonical model, banks structure themselves to provide liquidity services to the market and thus create large liquidity risks for themselves, and also make themselves vulnerable to self fulfilling market concerns about the adequacy of bank liquidity.

In fact, a central lesson of the history of banking crises is: banking crises are not an historical constant, and therefore, the propensity for banking crises cannot possibly be said to be the result of factors that have been constant over time and across countries for hundreds of years, including business cycles, human nature, or the liquidity transformation inherent in bank balance sheets. The structure of the rules governing the banking system within a country – defined by the rules that govern the location, powers, and operations of each of the banks, including government subsidies or special rights granted to favored participants in the banking system and the incentive consequences of those subsidies and rights – has been at the center of the explanation of the propensity for banking crises for the past two centuries. In times and places where politically determined microeconomic rules of the banking game have encouraged risky practices or prevented effective private measures to limit banking crisis risk, the risk of banking crises is high; conversely, the absence of such adverse political rules of the game have resulted in stable banking systems (Calomiris, 2009).

This review offers important insights for policy makers. The crisis of 2007–2009 has sharpened or redefined many public policy questions of central

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importance to prudential financial regulation (a means of preventing crises) and the proper role of government assistance policy (a means of mitigating the costs of crises).

2. The Banking Crisis Era Before 2008

In the past thirty years roughly 140 episodes have been documented in which banking systems experienced losses in excess of 1% of GDP, and more than 20 episodes resulted in losses in excess of 10% of GDP, more than half of which resulted in losses in excess of 20% of GDP - these extreme cases include, for example, roughly 25–30% of GDP losses in Chile in 1981–1983, Mexico in 1994–1995, Korea in 1997, and Thailand in 1997, and a greater than 50% loss in Indonesia in 1997 (Caprio & Klingebiel, 1996).

Some of empirical studies of this era of unprecedented frequency and severity of banking system losses has concluded uniformly that deposit insurance and other policies that protect banks from market discipline, intended as a cure for instability, have instead become the single greatest source of banking instability.

It is also significant that the four countries that suffered the most severe bank failure episodes of the pre-World War I era – Argentina, Australia, Norway, and Italy – had two things in common:

a) all of them suffered real estate booms and busts that exposed their financial systems to large losses,

b) prior to these crises all of them had employed unusually large government subsidies for real estate risk taking that were designed to thwart market discipline (Calomiris, 2007).

In Argentina, that subsidy took the form of special mortgage guarantees issued by the government, which guaranteed holders of the mortgages repayment. Banks were licensed to originate these guaranteed mortgages, and then resold them as guaranteed liabilities in the London market, where they were traded as Argentine sovereign debts. The less dramatic banking system losses during the Norwegian and Italian land busts reflected less aggressive, more regionally-focused government policies promoting land development. In Norway, that was achieved through government-sponsored lending and accommodative monetary policy. The Norwegian banks' losses amounted to roughly three percent of GDP, and the Italian banks' losses (which largely reflected exposures to the Roman land market) were roughly one percent of GDP (Calomiris, 2007).

3. The Crisis After 2008

The crisis, like the episodes of historical banking crises described above, was not just a bad accident. On an ex ante basis, subprime default risk was excessive and substantially underestimated during 2003–2007. Reasonable, forwardlooking estimates of risk were ignored, and compensation for asset managers created incentives to undertake underestimated risks. Those risk-taking errors reflected a policy environment that strongly encouraged financial managers to underestimate risk in the subprime mortgage market. Four categories of policy distortions were most important in producing that result.

3.1. Lax monetary policy, especially from 2002 through 2005, promoted easy credit and kept interest rates low for a protracted period.

The history of postwar monetary policy has seen only two episodes in which the real federal funds rate remained negative for several consecutive years: the high-inflation episode of 1975–1978 (which was reversed by the rate hikes of 1979–1982) and the accommodative period of 2002–2005. The Fed deviated sharply from the "Taylor Rule" in setting interest rates during 2002–2005; the federal funds rates remained substantially and persistently below levels that would have been consistent with that rule. Not only were short-term real rates held at persistent historic lows, but unusually high demand for longer term Treasuries related to global imbalances and Asian absorption of U.S. Treasuries flattened the Treasury yield curve during the 2002–2005 period, resulting in extremely low interest rates across the yield curve. Accommodative monetary policy and a flat yield curve meant that credit was excessively available to support expansion in the housing market at abnormally low interest rates, which encouraged the overpricing of houses and subprime mortgages.

3.2. Numerous housing policies promoted subprime risk taking by financial institutions by effectively subsidizing the inexpensive use of leveraged finance in housing.

Those policies included:

a) political pressures from Congress on the government sponsored enterprises (GSEs), Fannie Mae and Freddie Mac, to promote "affordable housing" by investing in high-risk subprime mortgages,

b) lending subsidies for housing finance via the Federal Home Loan Bank System to its member institutions,

c) Federal Housing Administration (FHA) subsidization of extremely high mortgage leverage and risk,

d) government and GSE mortgage foreclosure mitigation protocols that were developed in the late 1990s and early 2000s to reduce the costs to borrowers of failing to meet debt service requirements on mortgages, which further promoted risky mortgages, and – almost unbelievably,

e) 2006 legislation that encouraged ratings agencies to relax standards for subprime securitizations.

All these policies encouraged the underestimation of subprime risk, but the behavior of members of Congress toward Fannie Mae and Freddie Mac, which encouraged reckless lending by the GSEs in the name of affordable housing, were arguably the most damaging actions leading up to the crisis. For Fannie and Freddie to maintain lucrative implicit (now explicit) government guarantees on their debts, they had to commit growing resources to risky subprime loans (Calomiris, 2008, Wallison & Calomiris, 2009). Due to political pressures, which were discussed openly in emails between management and risk managers in 2004, Fannie and Freddie purposely put aside their own risk managers' objections to making the market in no-docs subprime mortgages in 2004. The risk managers correctly predicted, based on their experience with no-docs in the 1980s, that their imprudent plunge into no-docs would produce adverse selection in mortgage origination, cause a boom in lending to low-quality borrowers, and harm their own stockholders and mortgage borrowers alike. In 2004, in the wake of Fannie and Freddie's decision to aggressively enter no-docs subprime lending, total subprime originations tripled. In late 2006 and early 2007, after many lenders had withdrawn from the subprime market in response to stalling home prices, Fannie and Freddie continued to accumulate subprime risk at peak levels. Fannie and Freddie ended up holding $1.6 trillion in exposures to those toxic mortgages, half the total of non-FHA outstanding amounts of toxic mortgages (Pinto, 2008).

3.3. Government regulations limiting the concentration of stock ownership and the identity of who can buy controlling interests in banks have made effective corporate governance within large banks extremely challenging.

Lax corporate governance allowed some bank management (for example, at Citibank, UBS, Merrill, Lehman, and Bear, but not at Bank of America, JPMorgan Chase, Goldman, Morgan Stanley, and Deutsche Bank) to pursue subprime investments aggressively, even though they were unprofitable for stockholders in the long run. When stockholder discipline is absent, managers can set up the management of risk to benefit themselves at the expense of stockholders. An asset bubble (like the subprime bubble of 2003– 2007) offers an ideal opportunity; if senior managers establish compensation systems that reward subordinates based on total assets managed or total revenues collected, without regard to risk or future potential loss, then subordinates have the incentive to expand portfolios rapidly during the bubble without regard to risk. Senior managers then reward themselves for having overseen "successful" expansion with large short-term bonuses and cash out their stock options quickly so that a large portion of their money is invested elsewhere when the bubble bursts.

3.4. The prudential regulation of commercial banks and investment banks has proven to be ineffective.

That failure reflects:

a) fundamental problems in measuring bank risk resulting from regulation's ill-considered reliance on inaccurate rules of thumb, credit rating agencies' assessments, and internal bank models to measure risk,

b) the too-big-to-fail problem (Stern & Feldman 2004), which makes it difficult to credibly enforce effective discipline on large, complex financial institutions (such as Citibank, Bear Stearns, AIG, and Lehman) even if regulators detect large losses or imprudently large risks.

The risk measurement problem has been the primary failure of banking regulation and a subject of constant academic criticism for more than two decades. Regulators use different means to assess risk, depending on the size of the bank. Under the simplest version of regulatory measurement of risk, subprime mortgages (like all mortgages) have a low asset risk weight (50 percent) relative to commercial loans, although they are riskier than those loans. More complex measurements of risk (applicable to larger U.S. banks) rely on the opinions of ratings agencies or the internal assessments of banks, neither of which is independent of bank management.

Rating agencies, after all, cater to buy-side market participants (i.e., banks, pensions, mutual funds, and insurance companies that maintained subprime-related asset exposures). When ratings are used for regulatory purposes, buy-side participants reward rating agencies for underestimating risk because that helps the buy-side clients reduce the costs associated with regulation. Many observers wrongly believe that the problem with rating agency inflation of securitized debts is that sellers (sponsors of securitizations) pay for the ratings; on the contrary, the problem is that the buyers of the debts want inflated ratings because of the regulatory benefits they receive from such ratings.

The too-big-to-fail problem involves the lack of credible regulatory discipline for large, complex banks. The prospect of their failing is considered so potentially disruptive that regulators have an incentive to avoid intervention. That ex post "forbearance" makes it hard to ensure compliance ex ante. The too-big-to-fail problem magnifies incentives to take excessive risks; banks that expect to be protected by deposit insurance, Fed lending, and Treasury-Fed bailouts and believe that they are beyond discipline will tend to take on excessive risk because taxpayers share the downside costs.

The too-big-to-fail problem was clearly visible in the behavior of large investment banks in 2008. After Bear Stearns was rescued in March, Lehman, Merrill Lynch, Morgan Stanley, and Goldman Sachs sat on their hands for six months awaiting further developments (i.e., either an improvement in the market environment or a handout from Uncle Sam). In

particular, Lehman did little to raise capital or shore up its position. But when conditions deteriorated and the anticipated bailout failed to materialize for Lehman in September 2008 (showing that there were limits to Treasury-Fed generosity), the other major investment banks immediately either were acquired or transformed themselves into bank holding companies to increase their access to government support.

4. Conclusions

Banking crises properly defined consist either of panics or of waves of costly bank failures. These phenomena were rare historically compared to the present. A historical analysis of the two phenomena (panics and waves of failures) reveals that they do not always coincide, are not random events, cannot be seen as the inevitable result of human nature or the liquidity transforming structure of bank balance sheets, and do not typically accompany business cycles or monetary policy errors. Rather, risk-inviting microeconomic rules of the banking game that are established by government have always been the key additional necessary condition to producing a propensity for banking distress, whether in the form of a high propensity for banking panics or a high propensity for waves of bank failures.

Some risk-inviting rules took the form of visible subsidies for risk taking, as in the historical state level deposit insurance systems in the U.S., Argentina's government guarantees for mortgages in the 1880s, Australia's government subsidization of real estate development prior to 1893, the Bank of England's discounting of paper at low interest rates prior to 1858, and the expansion of government-sponsored deposit insurance and other bank safety net programs throughout the world in the past three decades, including the generous government subsidization of subprime mortgage risk taking in the U.S. leading up to the recent crisis.

Other risk-inviting rules historically have involved government-imposed structural constraints on banks, which include entry restrictions like unit banking laws that constrain competition, prevent diversification of risk, and limit the ability to deal with shocks. The most important example of these structural constraints was the U.S. historical system of unit banking, which limited competition and diversification of loan risk by preventing branching, and by effectively preventing collective action by banks in the management of crises once adverse shocks had hit.

More recent banking system experience worldwide indicates a dramatic upward shift in the costs of banking system distress – an unprecedented high frequency of banking crises, many bank failures during crises, and large losses by failing banks, sometimes with disastrous consequences for taxpayers, who end up footing the bill of bank loss. This pandemic of bank failures has been traced empirically to the expanded role of the government safety net, as well as government involvement in directed credit. Government protection of banks and government direction of credit flows has encouraged excessive risk taking by banks and created greater tolerance for incompetent risk management (as distinct from purposeful increases in risk). The government safety net, which was designed to forestall the (overestimated) risks of contagion, ironically has become the primary source of systemic instability in banking.

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TRENDS OF ROMANIAN BANKING NETWORK DEVELOPMENT

Nicoleta Georgeta PANAIT*

Abstract

Since 2009, two trends occurred in the banking world: downsizing of personnel, on the one hand and the reduction of retail units held, on the other hand. The first trend was most notable in countries with unstable or weak economy. The effects were seen immediately. Reducing of the operating costs and more applied of the territorial structure and staff was a decision that credit institutions in Romania took relatively late. Worldwide banks began a restructuring otherwise dictated by this time not so economic crises new market trends - increasing access to the internet for the population and use of the internet in a growing proportion of internet banking site.

Keywords: *branch network, credit institutions, interbank market, financial stability.*

1. Introduction

According to National Bank of Romania (NBR) banks continue to reduce network of branches, while business volumes maintaining low. In economical view NBR expect a year more stable and ready for a substantial growth.

However, Romania's economic indicators depend very much on the situation in Europe, which is threatened again with the danger of recession.

The professionals from bank industry believe that at this time there are too many banks in Romania compared to the size of the domestic market.

The Romanian banking system dominated by foreign-owned banks, it is a system that needs to respect the requirements of the regulations of our country and especially the requirements of supervisors for parent banks to their subsidiaries in our country. So, accordingly with those options, it will choose in most cases the option of reducing lending or maintaining the same level of exposure.

Romania is exposed to risk in its efforts to ensure its sustainable development and achieve the required convergence of its membership to the EU

The compatibility of Romanian banking system with the market must be seen both at micro and macro.

Financial and banking domestic legislation allows local operation of the following types of institutions: banks (commercial); organizations of credit cooperative; savings and loan banks for housing; mortgage loan; electronic money institutions; payment institutions and non-banking financial institutions.

Each of the entities listed above are applicable to a particular kind of customers in terms of regulations and internal rules.

Commercial banks have an overwhelming part in terms of market share. Some of them or their parent banks holdings into other types of institutions, particularly in the IFNs, which makes them more adapted to market conditions.

Also, we do not find any mortgage bank in the national banking landscape and we have a network of credit unions with a relatively small number of members affiliated.

One of the solutions would be even development and adaptations of the Romanian banking system by setting the holdings by commercial banks for new entities which are better adapted to market, and are focused only on specific market segments[1].

Loan risk is perceived as the main threat to the domestic banking system, at this we could adds the macroeconomic risk and the risk of financial derivatives instruments.

2. Mutation regarding networks of Romanian credit institutions

At the beginning of 2015, 14 banks from the 39 credit institutions that operating in Romania had territorial networks that exceeded 100 banking agencies. The situation is not different from that recorded five years ago, with the mention that all banks except Banca Transilvania and OTP Bank have considerably diminished presence in the territory.

It is important to note that the largest 14 banks in Romania by number of agencies dropped to 783 branches in 5782 there were many in December 2009-4999 in December 2014.

The most aggressive banks in the direction of reducing the local network were CEC Bank, BCR and Bancpost (CEC Bank has closed a large number of agents (260) especially in rural areas, Bancpost dropped the most branches, given that the number agencies decreased by almost 80 units, from 286 in 2009 to 207 in 2014, BCR has closed 53 branches in the period 2009 to 2013, but the process was more aggressive in 2012).

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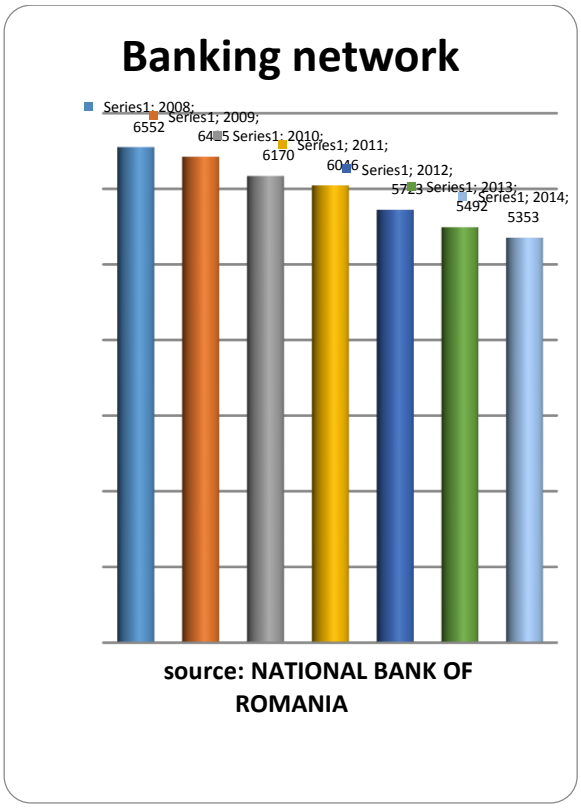
[1] National Bank of Romania (NBR), "Financial Stability Report", 2014.



source: NATIONAL BANK OF ROMANIA

If in the situation of CEC Bank generally we can talk about resizing imposed by the disproportionate number of banking agencies still inherited from the communist period, the BCR and Bancpost had to implement extensive restructuring processes considering the need to reduce costs.

The two credit institutions, which we mentioned above, dropped each to approximately 100 units in recent years.

In contrast, we can find Banca Trasilvania, OTP Bank, Garanti Bank financial institutions that reported a positive evolution of the number of agencies at the end of 2014 comparing with 2009.

In the case of OTP Bank, the bigger number of agencies in its portfolio is given by the acquisition of Millennium Bank last summer; otherwise the Hungarian bank has maintained the same number of units during those 5 years.

Regarding Banca Transilvania the chapter regarding territorial expansion shows the appetite of the financial institution for development. Banca Transilvania is the only operator in the local banking market from the 14 analyzed so far that relied on organic growth in the number of units.

The financial institution originated from Cluj Napoca opened 34 branches in the period 2009 to 2014, increasing its territorial network from 516 to 550 units.

Banca Transilvania has signed a commitment to take over Volksbank, all of the ranches Volksbank (135) will enter in the Cluj – Napoca's bank portfolio

In this way, Banca Transilvania will have a territorial network of about 700 agencies.

In a statement Omer Tetik the General Director of the financial institution, said that Banca Transilvania will decide how many of the 135 units will be kept active Volksbank, but it is expected that many of them are maintained.

In 2014, Garanti Bank opened six new agencies - four in Bucharest, one in Cluj Napoca and one in Timisoara, reaching 84 nationwide, and expanded the network of smart ATMs, with is now over 300 units Bancosmart across the country. Moreover, last year, the financial institution issued corporate bonds of 300 million, the Bucharest Stock Exchange, with a maturity of five years.

BRD, the financial institution which had the most aggressive territorial development in the economical boom (2006 - 2008), in the last 5 years has decreased network with 60 agencies, resizing being established especially in the last two years.

Other banks that have dropped a considerable number of units are the Carpathian Commercial Bank (- 63), Piraeus Bank (- 57), Alpha Bank (- 51), UniCredit Tiriac Bank (- 51) and Volksbank (- 50).

A unique point of view was, the evolution recorded by UniCredit Tiriac Bank, credit institution which started in December 2009 with a number of 235 agencies and between 2009 and 2011 relied on territorial development, inaugurating in two years another 10 units adding a total of 245 branches. But after 2012, UniCredit Tiriac Bank changed its strategy, adopting a comprehensive restructuring process by reducing network to 184 agencies.

Raiffeisen Bank and Banca Romaneasca have reduced territorial networks each with 31 branches in the period 2009 - 2014 ING Bank maintained in this range the same number of branches and 220 units.

TOP BANKS – Territorial Network

Place	Bank	Agencies no. 2009	Employees no. 2014
1.	CEC BANK	1351	1091
2.	BRD	930	870
3.	BCR	661	560
4.	Banca Transilvania	516	550
5.	Raiffeisen Bank	559	528
6.	Ing bank	220	220
7.	Bancpost	286	187
8.	UniCredit Tiriac Bank	235	184
9.	OTP Bank	106	150
10.	Alpha Bank	200	149

11.	Banca Comerciala Carpatica	200	137
12.	Volksbank	185	135
13.	Pireaeus Bank	187	130
14.	Banca Românească	146	115

3. Trends in the evolution of European-wide banking network

Worldwide it is estimated that the "digitalization" will lead to the closure of about 40% of bank branches in Europe between 2013 and 2020.

This means that in 2020, in the EU will be 65,000 fewer bank branches, according to the European Central Bank at the end of 2013 there were approximately 220,000 bank branches in the EU.

Most bank branches were closed in Spain, where many banks are trying to recover from the crisis housing market and debt crisis. Bankia, a institution formed from the merger of seven regional banks Spanish, closed 37% of its network of bank branches and 1,100 in 2013.

Other four major Spanish banks in the top 30 European institutions, Santander, CaixaBank, BBVA and Banco Popular Espanol, closed together approximately 1,774 branches.

Some of these branches were abroad, but most of them were banking offices in Spain.

Italy, Cyprus and Germany are also mentioned as having an over-sized banking network. But banks from these three states have closed branches in lower rate than the average 6% in the case of the 26 European banks.

Italian financial institution UniCredit, who gave up to a large number of employees in the past two years (approximately 8,500) stated in the financial report that most of the staff reduction is due to the outsourcing of IT operations.

KBC from Belgium also cited as a reason for restructuring decrease with 22% in the number of employees Credit institution has sold operations from Russia and Serbia.

Other bank such as BBVA, the decline of all posts was justified by restructuring the activities and asset sales.

The most dramatic downsizing programs were for Spanish bank Bankia, who gave up 23% of employees to meet the terms of a financial aid package from the Eurozone.

The pace of reducing staff slowed to by almost half last year, and most banks are approaching the end of the agreed restructuring programs for financial aid received during crisis[2].

Closing branches means: less personal, reducing lease costs and other costs, and can also quickly generate cash from the sale of land and buildings.

4. Reducing the personnel in Romanian banking sector

The evolution of the human resources in the banking sector in last three years showed significant losses compared to pre-crisis period.

Human resources endowed with a limited number of skills, no matter how high they may be, are a marginal cost too much for any employer.

The graph shows that the profitability of the main business grew rapidly in 2011, despite the increase in provisioning costs.

This means that there was a decrease in revenue and / or a decrease in operating expenses (including staff).

In 2011, the number of employees in the banking sector decreased by 5% compared to the end of 2010, and by 12% compared of the peak reached in 2008.

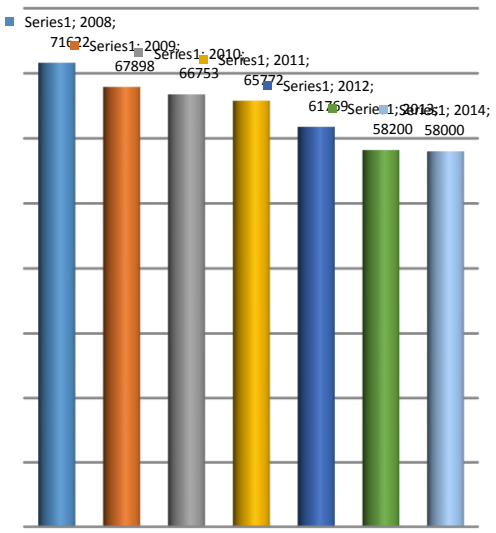
The latest reports of Central European Bank shall specify the dismissal in 2012 of an alarmingly high number of employees in the banking sector in Romania that is over 4,000 and the closure of 323 banking units, placing our country in 2nd place after Ireland.

Negative phenomenon of massive layoffs continued in 2013 reaching the end of the first 6 months to over 2,000 unemployed persons sent concurrently with the closing of over 200 agencies.

Ziarul Financiar estimated that since the crisis began more than 12,000 employees were forced to leave the banking system. At the same time, the number of bank employees decreased by 200 people in 2014 to a total of 58,009 employees.

2 years before, in June 2013, there were 59,823 employees, which means that 1,814 people left the banking system over the last year, most in the second half of last year.

At the beginning of the financial crises, in the end of 2008, there were 71,622 employees in the banking system, which means that the volume of restructuring amounted to 13,613 employees date of banks.



source: NATIONAL BANK OF ROMANIA

Higher profitability of the banking sector attracts through higher wages, labor most qualified; on the other hand, a personal with best preparation is a source of increasing productivity and ultimately to a higher profitability.

In terms of human resources in the Romanian banking system, now the trend is to lose the professionals and professional skills in this area.

5. Conclusions

Last year, only 13 banks succeeded to have a profit after they drew the line, while the remaining 27 had accumulated losses. In the year that just ended, they amounted to almost 1 billion Euros, according to provisional data.

We appreciate that 2014 wasn't a very good year for Romanian banking system.

However, there is some good news if we are looking to indicators that prove the health and stability of the system.

That's mean solvency and liquidity are maintained at great odds.

If we are looking to not performing loans (NPL), they were at the end of the year nearly 14 % calculated on the method IMF and 13% EBA version.

And even better news is that coverage is good, 70 %. But in the first half of 2015 will come some provisions, in particular on account of loans granted by banks to customers who are insolvent.

As the largest bank in terms of assets, no significant changes: most big league players have gained market share before 31 December 2013: Banca Transilvania, UniCredit Tiriac Bank, Raiffeisen Bank, CEC Bank, even ING Bank.

However it continues the decreasing in of heavyweights: BCR and BRD Societe Generale.

If we are looking at the average category of financial institutions, the winners are Alpha Bank, Citibank, Garanti Bank, OTP Bank. In contrast, in the same category, the biggest losses were recorded Volksbank, NBG, Credit Europe Bank and Intesa Sanpaolo.

Banks in Romania have overcome the cost of the event and the risks they have assumed in terms of maturity and currency structure of their assets and liabilities.

We must look differently to the behavior of banks from losses incurred by those from economic downturn to their customers as a result of the recession. It should be noted that the reductions of losses in the banking sector cannot be done through bankruptcy of the clients.

A banker has two solutions to recover a loan from a client whose income is reduced. Whether is considering short-term solution and its repayment on time demanding client bankrupt. This behavior generalized to the entire banking sector can only create systemic risk, because both unpaid chain propagates between businesses and between businesses and banks, and finally between banks.

The second option requires a long-term perspective banker; the key is the relationship with the customer and not profitability moment.

This involves the assumption of profit margins much lower in the short term, but the consolidation of a long-term profitable relationship with the customer. Of course not all cases can be treated as borrowers, because such an attitude could lead to generalized systemic risk. The analysis must be done on a case by case basis, but it requires a change of business model.

Decrease in bank units can become a macro prudential risk if are affected the chances of having access to the resources of balancing the structure of liabilities.

Decreasing the number of agencies in the territory was done most probably without prior consideration of future development banks in two ways:

- territorial profile of future network units must be thought in terms of resources of saving that exist and must be drawn from urban and rural areas respectively.

At the same time, urban areas contain many types of development because Romania has very large cities with high population density, major cities, but low-density and low-density towns.

- profile of products and services offered in banking branch network must be designed considering the clients profile now and in the future.

Such an approach should be accompanied by a multidisciplinary analysis study, leading to understanding and knowledge central element of banking sector activity - and educates the client

regarding the functioning of financial markets and the use of specific products.

The closure of bank branches reflects an online revolution that transforms people's lives, from buying holidays and to borrow books.

In addition, the closing of banks offices it is a way in which financial institutions reducing their costs and strengthen their capital. However decrease networks can be dangerous because it may result in a decrease in the number of customers.

The reform of the regulation and the supervision of the European financial system is an essential part of the EU strategy on the road of recovery of smart, sustainable and inclusive growth, generating jobs and competitiveness strengthened. However these principles are important for:

- the need to strengthen the institutional framework of Economic and Monetary Union to regain confidence and stability in the Euro area
- the need to strengthen the financial services of the EU Market by applying a single set of rules in the field leading to healthy competition and good functioning of financial intermediation

Union Banking is one of the fundamental pillars of the new economic governance framework at EU level.

This construction is a pillar itself to the creation of fiscal union, and a unique surveillance solution mechanism will contribute to the development of a European banking sector safe, responsible and generator of economic progress.

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CONSIDERATIONS REGARDING THE CREATION OF A EUROPEAN BANKING UNION – A KEY ELEMENT IN REINFORCING THE BANKING SYSTEM

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Abstract

The idea of setting up a European Banking Union, an essential element in the reinforcement of the Economic and Monetary Union (EMU), has become a concrete project and it has been outlined as such after the financial crisis started in 2007.

The setting up of a Banking Union is a new project for the European Union and it comes as an answer to the financial crisis; this project has three major components: the Unique Mechanism of Surveillance (UMS), the Unique Mechanism of Resolution (UMR) and the European Deposit Guarantee Schemes.

At the basis of these infrastructure elements there laid: the Single Rulebook", the unique European regulation framework (made up of the capital requirements: "CDR/CRR IV – CRD IV Directive" and "Regulation regarding capital requirements" provided together with the standards and directions issued by the European Banking Authority "ABE") and a set of rules established for state subsidies.

The large flow of important information which exists in the matter makes it necessary for us to deal with this topic in a consistent and complex argumentation[7].

Keywords: *Banking Union, Unique Mechanism of Surveillance (UMS), Unique Mechanism of Resolution (UMR), the European Deposit Guarantee Schemes, European Fund of Stability, European Mechanism of Stability, Single Rulebook – unique set of rules applicable in the financial-banking sector.*

1. Introduction

European economies depend up to 70-75% on the banking finances, while in Romania the domestic banking sector preponderantly supports economy from a financial point of view; in fact, the banking sector ensures about 92% of the finances granted by the Romanian financial system. 90% of the banking system assets are owned by foreign capital institutions. The risks involved in the process of devising, implementing and observing regulations imply: the possibility of reducing exposure and the withdrawal of foreign capital credit institution.

A report published by the European Commission on 22nd June 2012 provided the need to elaborate a long-term strategy for the creation of a future Economic and Monetary Union, which should contribute to the clarification of reforms and decisions both at EU level, and at the level of each member state.

Considering that the enlargement of European integration is a remedy for surpassing the financial and economic crisis, the European Commission members appreciated that the creation of a Banking Union could represent a new step in the European integration that could complete the Monetary Union.

The concept of Banking Union has been highlighted by the President of the European Commission at a formal reunion of the European Council on 23rd May 2012. This suggestion drew the attention of EU politicians to the need to create a Banking Union. Subsequent to this debate, when the European Council gathered on 28th-29th June 2012, the European Commission decided that it is necessary to elaborate a set of implementation measures. On 12th September 2012, the Commission came out with a set of laws comprising two regulations: the former one that granted the European Central Bank (CEB) surveillance powers and the latter one that modified the regulation for the settlement of the European Banking Authority (EBA) with the result that this Authority could bring into line the functioning statute with the new vision on the European surveillance architecture.

We would also like to underline that about 30 proposals for legislative enhancement have been adopted in the financial-banking system ever since the crisis started and up to the moment when the decision regarding the functioning of a Banking Union was made, so that economy could benefit from real advantages. The European Commission consolidated financial stability of the banking system through state subsidies and stability and adjustment programs.

2. Content

Literature Review

Of the measures adopted by the European Commission for increasing financial stability within EU, one should mention:

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I. Measures for improving integrated banking surveillance

The main measures adopted for a good functioning of the integrated EU banking surveillance system after 1st January 2011 are:

- setting up a European Banking Authority that deals with banking surveillance, including with banking re-capitalization;
- creating an Authority for European Titles and Markets that is meant to surveil capital markets;
- creating an Authority for Insurances and the European Pension System that could control the insurance sector.

Each of the 28 EU member states is represented in the three surveillance banking authorities; the role of the member states is to contribute to the development of an EU unique banking surveillance system and to the settlement of potential problems between member states, as well as to risk prevention and trust enhancement in the European banking system.

II. Measures for reinforcing the banking system

a) Increasing bank capitalization and solvability

Due to the financial-banking crisis, turbulent events which have occurred on the financial and bank markets have affected under-capitalized credit institutions (from a qualitative and quantitative point of view); as a consequence, these institutions started to need an unprecedented level of support from national authorities (i.e. from the state and the central bank). In order to tackle this issue, in July 2011 the European Commission suggested bank capitalization (CRD IV)[1] by implementing at EU level the global standards approved by G-20 and known as the Basel III Accord.

In this implementation project, EU plays a key role since it has applied these regulations on more than 8, 000 banks, that is on 53% of the global assets.

This is the reason why the European Commission devised a governing framework, which grants the involved national authorities new bank control powers, as well as sanctioning powers, which are applied whenever the bank risk is increased. For example, credit volume may be reduced if there is an artificial price increase, a fact which may lead to a crisis.

b) Banking restructuring facility.

Imposing conditions on the financial banking sector is one of the political demands required by EU member states, which is financially assisted at international level.

The support of the Euro zone member states is made through the European Financial Stability Facility (EFSF), which offers borrowing facilities to countries so that they could obtain the recapitalization of financial institutions, under certain conditions, as well as through structural reforms that are applied in the internal financial sector. Macroeconomic adjustment programs have been supported through this facility and through the assistance offered for maintaining the payment balance in the following countries: Greece (50 billion Euros for bank recapitalization), Portugal (12 billion Euros for supporting bank solvency), Latvia (600 million Euros to contribute to the stability of the financial sector)[2].

c) Increased protection for bank deposits

At present, if a bank goes bankrupt, according to EU legislation, bank deposits in any member state are guaranteed up to Euro 100,000/person. Such a measure avoids harsh economic consequences like the collapse of the banking system in a member state and it prevents a panic situation followed by massive deposits withdrawal.

At the same time, national authorities have created a new structure outside banks and have transferred certain critical functions to this structure, i.e. deposit insurance as a safe measure. One can refer to the case of the Northern Rock Bank, which was split into a "good" part, comprising safe deposits and mortgages and a "bad" one, including non-performing credits[3].

d) Control of state subsidies granted to banks during the financial crisis period

One of the multiple measures taken for surpassing the banking system crisis is the one adopted by the European Commission – as a generally accepted and efficient solution, i.e. the coordination of activities at EU level in order to avoid massive capital and subsidies transfers from one country to another, which would lead to the collapse of the domestic market.

The threshold for granting state subsidies, which is meant to settle the problems that may seriously affect economic growth, is based on a guide elaborated in 2008[4] by the European Commission (in conformity with Art.107 (3) (b) of the TFEU, the Treaty on the Functioning of EU.

In 2009 the efficient restructuring of banks required that the European Commission should adopt a measure that would allow banks to have long-term profitability by analysing the proportion of costs in relation to the total incomes, and to avoid turbulence

[1] European Commission IP/11/915; Memo/11/527 July 2011
[2] http//ec.europa.eu/economy finance/eu borrower/greek ban facility/index en.htm;
http//ec.europa.eu/economy finance/eu borrower/Portugal/index en.htm;
http//ec.europa.eu/economy finance/eu borrower/balance of payments/Latvia en.htm;
[3] European Commission IP/10/918;
[4] European Commission IP/10/918, January 2011;

caused by potential non-observance of competitiveness principles as a consequence of granting state subsidies[4]. Actually, starting with 1st January 2011, any bank that applies for state subsidies is obliged to elaborate and apply a restructuring plan.

The state subsidies control during a crisis period is meant to achieve two objectives: the surpassing of encountered difficulties by banks and their preparation for the post-crisis period. Ever since the end of 2011, the European Commission has intended to apply a post-crisis strategy; however, tensions recorded on the European markets revealed that the measures implemented during the crisis should be further applied. In consequence, it came as a conclusion that the special regulations adopted and applied by the European Commission at EU level for ensuring stability in the European financial-banking should be enforced as long as it is necessary and, when the market conditions allow, a permanent regime should be applied for state subsidies granted to support the financial sector.

e) Other measures

In order to enhance: bank surveillance, protection of bank depositors, capital requirements imposed on financial institutions and crisis management in the banking sector, the following aspects were considered: the analysis of the restructuring reform by Erkki Lükanen group experts; the elaboration of legislative measures for intermediary banks; credible credit ratings; increased surveillance for financial derivatives, hedge funds and uncovered securities; revision of current regulations for trading bank instruments; reduction of disloyal bank practices; reformation of the audit sector and of the accounting record.

The elaboration of a common legislative framework for the future financial crisis is one of the proposals made by the European Commission; this proposal aims at avoiding the mistakes made in 2008. This framework comes up with common financial instruments and legislative preventive measures, whose role is to reduce the budgetary burden that generates effects on the population of member states. The European Stability Mechanism (ESM) has been set up for this purpose; its capacity is to grant funds with a total value of 500 billion Euros for supporting banks in the Euro zone that face difficulties.

III. The components of the European Banking Union[5,6]

The reform in the regulation and control system devised for financial markets was based on complex analyses of the causes which triggered the financial crisis and of the solutions[7] suggested for settling its consequences.

The adopted decisions are part of a more complex concept which was developed by the European Council and which includes 4 pillars; the first pillar makes reference to the setting up of the Banking Union, with its three components: the Unique Mechanism of Surveillance, the Unique Resolution Mechanism, the European Deposit Guarantee Scheme. Pillar 2 comprises the integrated budgetary framework, pillar 3 creates the integrated framework for economic policies, whereas pillar 4 aims at creating a framework meant to ensure democratic responsibility enhancement.

A. The Unique Mechanism of Surveillance (MUS)

The measure taken for adopting this component, which is an essential and advanced component, reconfigures, at pan-European level, the surveillance architecture of banks; its assets value - related to the whole EU banking system - amounts at 42.9 billion of Euro, i.e. 350% of the EU GDP[8].

This component states the responsibilities of the European Central Bank (CEB) as regards direct surveillance of important banks from the member states starting with the 4th November 2014, on the basis of two regulations: one regarding the prerogatives of the CEB in the area of surveillance and another one regarding the harmonization of the functioning of the European Banking Authority with the new vision regarding EU surveillance.

CEB banking surveillance objectives only concern the banks that are qualified as significant within the Euro zone. There are some limitations imposed on non-Euro states, such as the fact that they cannot fully benefit from the mechanisms which EU member states are entitled to. As an alternative to these limitations, it has been established that states from outside the Euro zone can join this mechanism under certain conditions, i.e. through a cooperation system with the CEB.

130 banking groups, which represent about 85% of all banking assets within the Euro zone, have been identified for the CEB to supervise significant banks. Several subsidiaries of credit institutions from outside the Euro zone are also included in the category of banks surveilled by the CEB, i.e. important banks from Romania, which expressed their commitment to be part of the Banking Union.

Apart from the CEB, national surveillance authorities within the Euro zone are going to directly surveil the other banks qualified as significant. However, CEB is the institution responsible for the efficient functioning of banks within the Unique

[5] "Piata financiara" no.4 (221), April 2014, pag.26;
[6] "Piata financiara" no.5 (222), May 2014, pag.18;
[7] The Report of De Larosier Group, February 2009;
[8] Doc/Com (43) of 29th January 2014;

Mechanism of Surveillance, hence its power to decide to directly surveil small banks, too.

Some of the criteria established for a bank to be qualified as significant are: the size of the bank, its importance for economy, trans-border activity, its application for and receiving public financial assistance at EU level through the European Stability Fund or through the European Stability Mechanism, the question whether that bank is one the three most significant banks in the country. The CEB makes the selection of significant banks by assessing banking assets (AQR) through an inventory and an audit that allow them to see the quality of assets and their level of capitalization.

The tests which the banks within the Euro zone must pass may include capital increase; these tests could, why not, finally lead to a re-directing of the financing towards areas that ensure high financial profitability. Each national competent authority will have to make tests that are similar with the ones imposed by the CEB so that they could identify risky portfolios which are potentially over assessed or which are not sufficiently provisioned. A complete assessment should conclude with an aggregated presentation of results, at country level, together with any recommendations for surveillance measures as imposed by the CEB.

For the efficient functioning of the Unique Mechanism for Surveillance, one should also add the three regulation levels: the ECB regulation, implementation norms regarding surveillance taxes, the working procedure of the Surveillance Council, which are completed with internal norms regarding professional secret and information exchange.

For example, apart from the surveillance tax which European banks should pay to the CEB, there are other important costs imposed on banks, which are linked to the setting up of the Banking Union; thus, all these must be induced through a contribution to the Unique Resolution Fund and to the national deposit guarantee schemes in order to ensure the necessary fund required as a guarantee.

B. The Unique Mechanism of Resolution (UMR)

The regulation of this mechanism forms, together with the Directive that provides the setting up of a resolution framework that includes credit institutions and investment companies (the BRR Directive), the new institutional vision in the banking resolution areas, which is based on a unique regulation framework (known as the Single Rulebook).

The directive offers national authorities common instruments and prerogatives for expressing their opinion *ex-ante* and for settling banking crises issues in an organized manner, including by eliminating from the market non-profitable banks. The set of instruments may be structured on three levels: training and prevention, preliminary intervention and resolution.

There is a general rule which obliges member states to make financial arrangements for financing the resolution, such as:

1. Selling the credit institution *in default*;
2. Setting up a "bridge bank";
3. Separating assets;
4. Internal recapitalization.

The resolution is made when preventive and preliminary intervention measures did not manage to redress the financial situation of the bank and did not avoid major difficulties from occurring. If, at this level, the permanent authority considers that it cannot prevent a crisis situation for the bank, and that this situation generates consequences for key functions and the content of these functions, as well as for the financial stability or for the integrity of public resources, the permanent authority must take control over the credit institution and adopt decisive resolution measures at once.

Another important objective is to provide national requirements for making resolution financial arrangements on the basis of contributions paid by banks and in proportion to their risk profile, as well as to the volume of debts; these will ensure supplementary financing for avoiding the financing of state-resolution decisions.

As to the Unique Resolution Mechanism (URM), it is applied to credit institutions from the member states which are subject to this mechanism. The regulation framework established by the BRR Directive is applied to all EU member states.

The main purpose when setting up URM was to oblige banks with financial difficulties to be recapitalized by their shareholders and creditors without resorting to public resources.

The aim of launching the resolution procedure for a bank depends on three conditions:

a) The bank finds itself or is supposed to find itself in a major difficulty;

b) When such a major difficulty situation cannot be avoided through any mechanism of the private sector;

c) When the resolution is publicly intended because the bank is systemic and it may affect financial stability.

The institutions involved in the decision-making process are: the European Central Bank, the Unique Resolution Committee - a newly set up structure, the European Commission, the EU Council and national resolution authorities. The Unique Resolution Committee functions together with the Unique Resolution Fund, which will be created through the contribution of the member states depending on the risk profile of every credit institution and amounting at an estimated level of 55 billion Euros. The Fund will be set up on the basis of an Inter-governmental Accord as regards the transfer and mutual nature of contributions, which will have to be ratified by member states.

This fund is going to have national compartments within each member state, which will collect contributions and transfer them gradually during the transition period; during the first year, there will be a 40% transfer of the fund target level, continuing with other 20% during the second year and maintaining a progressive and equal increase for the next years.

C. The European Deposit Guarantee Scheme

One has to explain that, so far, no supranational deposit guarantee scheme - whereby protection of depositors could be ensured in case a bank goes bankrupt - has been devised. The goal is to create a network of national guarantee schemes, within which member states could benefit from a guarantee fund for deposits, which would be properly financed *ex-ante*.

For concluding the regulation of this scheme, by reconfiguring the existing ones[9], it is necessary to introduce novel elements, like: reducing the period within which depositors are paid from 20 days at present to 7 weekdays; simplifying and harmonizing payment commitments; introducing *ex-ante* financial agreements, which would include a minimum target level that in general amounts at 0.8% of the guaranteed deposits that must be set up within 10 years, i.e. in 2024; simplified access to the information regarding national deposit guarantee schemes; offering loans on a voluntary basis from the national deposit guarantee schemes.

Another novelty is the access granted to these schemes, thanks to the new reconfiguration, to contribute to financing credit institution resolution. The newly regulated reconfiguration was approved by the European Parliament (EP) on 15th April 2014, so that member states are to include its provisions in domestic legislation within a year after its publication.

One should mention that from the point of view of the funds liquidity, the Fund for Deposit Guarantee in Romania (FGDR) currently has resources for paying 27% of the deposits that are covered by the deposit guarantee scheme (in comparison with 0.8% that is required by the new Directive); this means that our country is in a good situation if we consider the European requirement. Similarly, the Fund for Deposit Guarantee in Romania may currently cover 99.9% of natural persons' deposits of Euro 100,000. The Fund for Deposit Guarantee in Romania and the banking system are facing an infrastructure issue, which has to do with the IT area and which should correspond to the European requirements.

We appreciate the pragmatic level of regulation for the protection of bank deposits, which is going to increase the degree of trust invested in the banking system, as well as the clients' loyalty to the system.

3. Conclusions

The creation of the European Banking Union, together with the other measures adopted by the European Council, is a straightforward and long-term project for the Economic and Monetary Union. The European Banking Union is not a new legal instrument but it rather represents a political vision which is meant to ensure a deeper European integration through the recently adopted measures which are supposed to consolidate the banking sector regulation, as well as through other measures that are going to be adopted in the future.

This new project is expected to prevent the appearance of causes as the ones which led to the present financial crisis. This is the reason why banking surveillance should be reconfigured at European level. In fact, this project cannot achieve its goals and accomplish its purpose unless it is correlated with the creation of a European centralized model which could support banks that are no longer financially competitive by applying a unitary approach to the process of an organized withdrawal from the market.

Similarly, one should avoid obliging stakeholders to support the costs of implementing this process; in the future it will be necessary to set up a supranational institution that guarantees deposits. Such a guarantee project will be a very complex, bold and unprecedented process; it will be by far the most important project ever run at EU level ever since the EU was created.

Avoiding the appearance of a rupture between sovereign states and banks may be regarded as an alternative to the direct recapitalization of banks; this regulation is not provided in the present Treaty on the Functioning of the EU (TFEU). In the future, this subject will have to be analysed because it will help specialists identify the best solutions for avoiding the causes which led to the present crisis of sovereign debts that threatens the economic stability of certain states.

At European level, bank credited economies will remain the main development engine. In consequence, the banking systems will play a key role. After applying the new regulation model, some question will remain unanswered: finance promotion and re-crediting, as well as the evolution of capital allotments and bank exposures because the new regulations require a riskless crediting process; in a contrary case, these should be covered *a priori* with capital.

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- European Commission IP/10/918;
- European Commission IP/10/918, January 2011;
- The Report of De Larosier Group, February 2009;
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COMPARATIVE STUDY ON MAIN SOLVENCY ASSESSMENT MODELS FOR INSURANCE FIELD

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Abstract

During the recent financial crisis of insurance domain, there were imposed new aspects that have to be taken into account concerning the risks management and surveillance activity. The insurance societies could develop internal models in order to determine the minimum capital requirement imposed by the new regulations that are to be adopted on 1 January 2016.

In this respect, the purpose of this research paper is to offer a real presentation and comparing with the main solvency regulation systems used worldwide, the accent being on their common characteristics and current tendencies. Thereby, we would like to offer a better understanding of the similarities and differences between the existent solvency regimes in order to develop the best regime of solvency for Romania within the Solvency II project.

The study will show that there are clear differences between the existent Solvency I regime and the new approaches based on risk and will also point out the fact that even the key principles supporting the new solvency regimes are convergent, there are a lot of approaches for the application of these principles.

In this context, the question we would try to find the answer is "how could the global solvency models be useful for the financial surveillance authority of Romania for the implementation of general model and for the development of internal solvency models according to the requirements of Solvency II" and "which would be the requirements for the implementation of this type of approach?". This thing makes the analysis of solvency models an interesting exercise.

Keywords: *International Financial Reporting Standards (IFRS), Minimum Capital Requirement (MCR), Solvency Capital Requirement (SCR), risk management, solvency II.*

1. Introduction

The outbreak of the current global financial crisis pointed out eminently an increase of the vulnerabilities at the level of insurance systems. Many studies dedicated to the analysis of the current financial crisis underline the fact that one of the major cause that leaded to its outbreak was presented by the existence of certain weaknesses of the regulation and surveillance frame. So, there is an internationally consensus concerning the revision and rethinking of regulation and surveillance frame of insurance activity, materialized in the approach of the authorities to implement the *Solvency II regime* on 1 January 2016.

The insurance industry is characterized by an inversion of classical business cycle: the insurance companies receive extra pay, representing the remuneration for the services provided, before paying the settlement for damages, namely they are doing their work[1]. The insurance contracts are, basically, the money exchanges for different periods of time[2]. The certitude of the policyholders' contractual obligations, as well as, the incertitude of the frequency and severity of the future settlement requests are different characteristics of the policies. The law of large numbers is applied in order to estimate this incertitude. As the number of the insured risks increases, the average loss comes closer to the estimated loss and the standard deviation becomes as lower as possible, coming closer to zero[3].

When the insurance societies invest the raised funds, they are subject to the same risks as the other financial services institutions. Furthermore, they have to face some risks specific to their field of activity as the sub-quotation of extra pays, the wrong calculation of technical provisions, the unpredictable changes of damages' frequency, the improper reinsurance, etc. Finally, they could face up to a series of general risks, common with all types of business: the incompetent or without the honesty management or a defective administration of the development strategies.

The main function of the insurers is to face up to these risks and to administrate them as they could anytime (or at least in many cases) to fulfil correctly and completely their commitments to the policyholders. This capacity of the insurers to fulfil their commitments is known as **solvency**.

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According to Merriam-Webster dictionary, **solvency** is the "state of being able to pay debts"[4]. The debts regarding the insurance contracts are the expected requests and the related expenditures. The current value of these commitments, calculated based on the actuarial methods, is only an estimated value in the end.

The basic problem of insurers' solvency could always be expressed by two essential questions: "would the insurer have the necessary financial resources to cover the damages the policyholder could suffer in the future?" and "If yes, would the insurer be able to pay?"[5]. In this context, the purpose of this research paper is to offer a real presentation and a comparison of the main solvency settlement systems widely used, the accent being on their common characteristics and current tendencies. Thereby, we would like to offer a better understanding of the similarities and differences between the existent solvency regimes in order to develop the best regime of solvency for Romania within the Solvency II project.

2. Materials and method

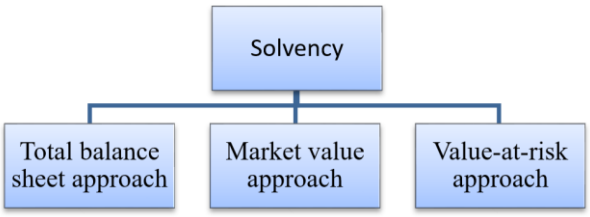
Table1. Analysed models of solvency and types of insurance treated

Analysed models of solvency	**Types of insurance treated**
Solvency I	Life Insurances
	General Insurances
Financial Services Authority of United Kingdom	Life Insurances
	With profit
	Non profit
	Unit linked
	Property and Casualty Insurances
Financial Assessment Framework of Netherlands	Life Insurances
	Unit linked
	Property and Casualty Insurances
MCCSR for Life Insurance Companies and MCT for Federally Regulated Property and Casualty Insurance Companies of Canada	Life Insurances
	Property and Casualty Insurances
Swiss Solvency Test	Life Insurances
	Property and Casualty Insurances
	Health insurances
	Reinsurance
	Life Insurances
National Association of Insurance Commissioners of SUA;	Property and Casualty Insurances
	Health insurances
	Reinsurance

Source: personal overwork of the author

Following research conducted revealed that there are at least three approaches for solvency determination: total balance sheet approach, market - value approach and Value-at-Risk approach (VAR) for the determination of capital necessity and at least three approaches concerning the solvency measure[6]: winding-up approach, going-concern approach and run-off approach.

Fig.1 Approaches concerning the solvency determination



Source: personal overwork of the author

The winding-up approach - an insurance society is solvent if the assets performance value is high enough to face up to the exigibility of debts.

The going-concern approach - the society is supposed to continue to subscribe policies in the near future and the solvency is regularly measured during that period;

The run-off approach - stops the insurance societies from subscribing policies for a short period of time (generally, for one or two years). In this case, the incapacity to maintain an excess of assets on debts does not mean that the society is in the impossibility to satisfy the future requests, but there are not enough resources to start a new business. The regulatory authorities often adopt run-off approaches when they evaluate the solvency of insurance societies because their main arm is to stop the societies to subscribe a new policy.

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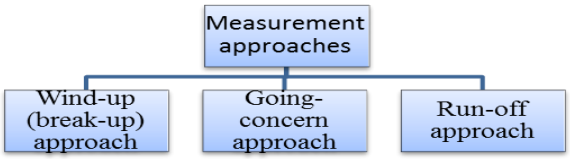
Figure2. Measurement approaches on solvency



Source: personal overwork of the author

The criteria taken into account in the analysis of the solvency models are: the data are taken into account for the determination of capital requirements, the distinction made between (MCR) and (SCR), and the sensitivity of risk profile.

3. Result and discussions

In function of the data taken into account for the determination of capital requirements, the models could be classified in:

- static models, based on data from total balance sheet or profit and loss account and
- dynamic models, based on the estimation of future cash flows.

On static models for the determination of capital requirements, it is considered a fixed position, also called accounting base. The accounting base represents either certain positions of the balance sheet or certain positions of the profit and loss account or eventual "risk" positions as the total exposure to corporate assets with AAA rating. The dynamic models are based on estimations of future cash flows.

The static models are based on accounting and could be divided in:

- models based on simple factors and
- models based on risk factors.

The models based on simple factors are also called simple models because they take into consideration a small number of factors from the accounting positions in order to reach the capital requirements. The size of the factors is not necessary calibrated by a certain level of confidence. The current Solvency I regime is an example of simple model based on factors, because, for life insurances it is reaching to capital requirements by the multiplication of mathematical reserves with a factor of 4% (for the unit-linked insurances, the factor is reduced to 1%) plus a factor of 0,3% added to technical reserves in case of death).

The models based on risk factors are the most frequent in the insurance industry. They apply fixed rates to certain chosen accounting positions. The rates are frequently calibrated in order cover the risk assumed at a certain level of confidence.

As both static models apply well-defined factors, we make reference to them as being based on rules. There are clear rules about which positions should be occupied by the factors that are well-determined.

Similarly to static models, based on accounting, the *dynamic models*, based on the estimation of future cash flows, could be divided into *scenario-based models* and *principle-based models*. In the first category, the calculation methodology of solvency is based on the measurement, made by the insurance company, of the impact of some specific scenarios, on the net value of the goods by the estimation of future cash flows. In many cases, these scenarios are clearly defined by the surveillance organisms and, therefore, we make reference to them as a measurement a rules-based risk. Such example could be given by SST model where the insurance companies have to calculate the impact of a significant decrease in proprieties value over the position of net assets. The insurance companies have to quantify the impact of this re-evaluation both over the assets and over its own capitals and debts. The methodology necessary to reach the real/market values of the elements of the balance sheet is specified by the general principles of the assessment. Consequently, we would consider these models as being based on principles only regarding the assets and debts assessment.

In case of *principle-based models*, there were not established risk assessment and measurement rules but the insurance company has to reach, internal models-based, to its own point of view concerning the capital requirements, following certain calculation principles presented by the surveillance body. An example is the requirement provided by the UK-FSA model for the life insurance companies that have to reach individual capital assessment by help of internal models.

Please note that the sub-classification of the models is not exclusive. For example, it is possible that a model is scenario-based in theory and in practice is a static model, with the scenarios converted in fixed or multiplier factors.

Nevertheless, the analysed models of solvency assessment could be classified according to the above-mentioned rule if some of them have to be subdivided within this classification.

However, it is notable that the models of solvency assessment recently elaborated by the regulation and surveillance organisms, as those from Switzerland, Netherlands and Great Britain include the dynamic model, at least for a part of the underwriting risks, in other words they are flexible. The motivation of this fact could be related to the idea that the standards approach, that contains formulas to establish the minimum solvency requirement are difficult to apply, due to the lack of flexibility. For example, the current solvency regime of UK-FSA uses a risk factor based approach to assess the solvency of the activities of general and life non-profit insurance and a dynamic approach based on cash flows improvement to assess the solvency of life profit insurance. Moreover, UK-FSA requires to life insurance societies to develop their own internal models to assess the requirements regarding the capital.

The main disadvantage of dynamic approaches consists in the fact that they require to make serious implementation efforts.

The models-based solvency adapted to the specific of every company originate from United States and represent the most motivating approach from theoretical point of view. According to this method, a few familiar to the European surveillance institutions, being used only in some Nord-American states, Canada, and Australia, the insurance companies have to do a test that simulate possible financial consequences, starting from the hypothesis of some modifications in the negative sense of the assets value, of the capital or of the society's debts. The difficulty, at the same time the major deficiency of this model consists, mainly, in the selection of the scenario of the test, the taken into account risk factors having to be selected and dimensioned with a special attention in order to obtain a precise view of the solvency of the tested company. The subjective nature of the selection of these work hypotheses, as of the choice of the testing period makes this model a few known.

Table2. Classification of solvency assessment models in function of the data taken into account for the determination of capital requirements

Analyzed models	Static models		Dynamic models	
	Models based on simple factors	**Models based on risk factors**	**Scenario-based models**	**Principle-based models**
European model	Solvency I			
Financial Services Authority of United Kingdom		UK-FSA – (non life and non profit life insurance)	UK-FSA (with profit life insurance– MCR)	UK-FSA (with profit life insurance - SCR)
Financial Assessment Framework of Netherlands		Netherlands - FTK (underwriting risks)	Netherlands - FTK (financial risks)	
MCCSR and MCT of Canada		Canada (life and P&C insurance)	Canada (life segregated funds and P&C – policy liabilities risks)	
Swiss Solvency Test			Switzerland - SST (asset risk scenarios)	Switzerland - SST (additional scenarios for non life insurance
National Association of Insurance Commissioners of SUA;		US- NAIC	-US- NAIC (ALMrisks)	
	Rules-based approach		**Rules-based for risk measurement and principles based for valuation**	**Principles-based models**

Source: Comité Européen des Assurances (CEA)

In function of the difference made between MCR and SCR, the analysed models of solvency are classified into:

- the models that make the difference, as the NAIC model of United States, and
- the solvency models, recently developed, as: SST model of Switzerland, FTK model of Netherlands and FSA model of Great Britain, that are noticeable because they make this difference, but with different approaches.

The solvency assessment regimes of Great Britain, Switzerland and Netherlands encourage actively the companies to develop their model internal capacities of capital risk within their regime of solvency surveillance.

In SST model, the companies are required to define scenarios specific to the company that has to be investigated. In UK-FSA approach, the life insurance companies are required to develop internal models in order to reach the solvency capital requirement (SCR).

According to the sensitivity of risk profile, the models could be classified into:

- model-based adapted to the specific every company,
- risk-based models – risk based capital (RBC);
- models based on the system of the three pillars – Solvency I, Solvency II

Risk - Based Capital (RBC) model large-scale used in United States, was adopted by NAIC for life and health insurance industry for answering to a standard necessity concerning the suitability of the capital considering all risks that every insurer has to face up to during its (technical, investment, commercial, management) activity. The moderate sum of the values appropriate to every risk represents the minimum capital required to the respective policyholder. New versions of this model are used in Canada and Japan.

Many objections raised by the utilization of this model are related to the difficulty and accuracy in calculation, as the lack of transparency in public that this generates.

The model based on the system of the three pillars (SOLVENCY I model) is used in almost all European countries. This system is based on an assembly of three requirements imposed on insurers: proper reserves and assets and minimum imposed margin of solvency. The limits of this approach originated from simplicity, its main quality. Many objections[7] refer to:

- lack of sensitivity to risk: fundamental risks, as credit risk, market risk or operational risk that are not properly taken into account by Solvency I provisions.
- perturbation of well functioning unique markets, and
- non-optimal rules concerning the prudential surveillance of groups: the provisions in force are more and more disconnected from the modality the which the groups are structured and organized in reality.

3. Conclusions

In this context, the next years will be neither easy for the insurance companies nor for the surveillance authorities, having into account the fact that clock is ticking to Solvency II nor the twelfth clock coincides with 1 January 2016.

For the efficient introduction of the future solvency model to insurance domain in Romania, there have made the first steps by approving the Strategy concerning the implementation of International Financial Reporting Standards (IFRS) for insurance domain. The IFRS application, by promoting a performing financial management and a corporate governance culture in insurance societies, represent an absolutely necessary premise for the implementation of the optimal conditions of Solvency II.

During the application process of Solvency II Directive, the insurers could choose between the implementation of the standard (general) model, an internal model or a combination between the two.

The standard model is easier to implement and will treat the risks presented by the specialized companies, this approach being more indicated in case of small-size societies. The assessments will be done on risk classes based on analysis, tests and scenarios, the main risk categories being those resulted in market from the underwriting activity, the operational one or from the non-fulfilment of financial obligations. However, the standard model will not reflect the own characteristics of the company or of the jurisdiction in which this is registered.

However, the internal model involves the identification, measurement and modelling of key components of risk of the insurance companies, as the correlations between these. Giving a high possibility of the specialized companies to establish efficient solutions for risks diminution from costs point of view, will be facilitated the assessment of the capital level necessary to ensure the protection in case of various series of events.

So, the insurers, that have to apply this model, will have the possibility to run more efficiently a business by focusing on domains with high profitability, and will be invested with a high capacity to assess various effects that could not be so easily quantified with the standard model.

The internal models for determining the capital requirements offer a competitive advantage to pro-active players that started the implementation of some coherent systems of risk management. The groups have the opportunity to access the efficiency reserves for capital utilization and to develop unitary platforms of solvency management.

The application of European Directive will influence all the operational processes of the insurance industry and by rapid correction of all solvency aspects, the general frame of insurance surveillance will be radically changed, the difficulty of regulation becoming a competitive advantage.

These being the premises, we could consider that Solvency II is the first major strategic project of European insurers and reinsurers.

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FINANCIAL EQUALIZATION TRANSFERS BETWEEN PUBLIC AUTHORITIES BUDGETS

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Abstract

This paper presents financial balancing mechanisms that it is applied by the most of the states with competitive market economy, in order to ensure equity between local authorities, as well as the stability of the entire national tax and budgetary system. In this regard, it is described the concept of financial equalization and its structure according to two fundamental criteria:

- equalization in accordance with the financial transfers orientation, distinguishing thus (1) horizontal equalization, which is carried out between local authorities and consists in assigning a part of the richest territorial collectivities resources to the disadvantaged ones; (2) vertical financial equalization, achieved through consolidated transfers the state / federal budget to the budgets by territorial administrative units, both for the operating budget section and for the development one;

- financial equalization according to the regional or local disparities observed as a result of territorial-level analyzes: (1) financial equalization based on balancing public revenues of the administrative-territorial units, which tries to correct the differences between the financial resources of each local authority and (2) the financial balancing based on the costs, which aims to reduce differences between standard costs of public services per capita.

Financial equalization mechanisms have as main objective the reduction as far as the total elimination of the regional or local disparities, which are also described in this article.

Keywords: *equalization, revenues, costs, horizontal, vertical.*

1. Introduction

Financial balancing territorial administrative units is a specific mechanism of public finances aiming to reduce the gap between local public income per capita registered or the inequalities between them. In this way, it is compensated the differences between the financial capacity of localities - measured either by tax revenue per capita, as in Romania, either by the cost of public services produced and/or distributed by the public authorities to the people.

The main purpose of financial balancing is to allow sub-national authorities to produce and/or distribute similar quality and the price/cost public services under similar budgetary expenditure, even if tax revenues vary from one community to another.

The financial balancing is considered a mechanism used by general government along with budgetary decentralization, insofar as it seeks to correct the potential imbalances resulting from the autonomy of local authorities.

The importance of financial balancing is underlined not only by its use in all countries with economy based on competition - either federal or unitary - but also because its objectives are defined in the Basic Law of the State, the Constitution, and is a pillar of fiscal and budgetarynational policy.

The role of balancing revenues and costs consists in reducing budgetary disparities between the communities, encouraging them also to increase their economic and administrative capacity, thus contributing to the macro-financial stability.

2. Regional Disparities

The own local resources category is not only reduced to the exclusive local taxes, but also includes other sources of funding that may be, and in some cases, extremely important. These are fees, charges and prices of use, but also of income from the property of land, businesses, financial assets, and the proceeds of public capital sales fixed, stocks, land, etc.

The concept of own resources does not mean that local authorities have necessarily complete control. Thus, regarding local taxes, it is generally the tax required whose elements are defined by law and the local authority have only to set tax rates, often within the limits established also by law.

Regarding the billing of local public services in general, rights, charges and usage prices may be fixed by the local authorities with some freedom. However, in most countries, limits are set at the national level.

The notion of regional budgetary disparities designate tax levy differences in capacity - or budgetary capacity - of collectivity that coexist in the same geographical area.

The flexibility of local authorities in regard to their own resources may be very large or very small. However, local authorities have an important real power, although defined by the law on their own resources, but it is different regarding the transferred resources, including shared taxes, endowments and grants.

Generally, the percentage of tax sharing amounts to a territorial level and terms of allocation to the

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different communities of a given level are set by national legislation and thereby, as part of a tax sharing system, the local government position is stronger than it is when it comes to other forms of transfers.

The endowments are, too, free allocation and local authorities can use these free amounts paid to them in the only limits under the scope of their skills and eventually the distinction between operating expenditures and investment.

As for grants, not just their total amount is set each year based on budgetary availability, but also their use is determined by the authority granting them and allocation takes place based on criteria that allow that authority a discretion important.

Public grants to local budgets can be classified and examined according different criteria and as regards the origin of the inputs its are:

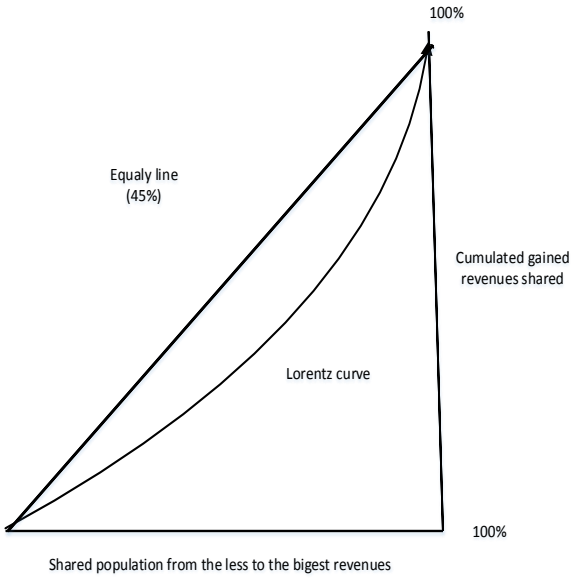
- the contributions of the central state, or the amounts charged to the central government budget;
- the contributions of communities in regional scale and the contributions of other intermediate authorities (provinces, departments, counties, etc.);
- the contributions of the same level of authorities, especially the amounts paid in framework of horizontal equalization mechanisms, or by groups of communities to their members;
- the contributions of international organizations (excluding loans) in particular funding from the European Community.

Local governments provide certain services traditional that might be subject to fees and royalties. Most of these services - garbage collection, road maintenance, building permits, etc. - Could be paid by users and, in theory, it is possible not to provide them at a loss. However, the situation is different when certain free services of the welfare state are decentralized. Given that users are not supposed to pay the cost of these services, they have to be financed by taxes. Thus a redistribution takes place, for example in favor of families with children through free schools, or that of people elderly and sick through free hospitals.

In the case of an important decentralization can result, in terms of horizontal equity, a considerable inequality between people from different communities and thereby it is advantageous to move from one municipality to another, even at the same level of service between the two cities.

The actions taken by public authorities to achieve a near constant level of public income per capita available in all communities shows as the main motivation existence and persistence of regional disparities between the same geographical region.

The differences presented by the GDP/capita, recorded between territorial-administrative units may serve as indicators for measuring regional disparities, especially in the general level of economic development, but along with this information should be found and someones about the life level, and a very significant indicator of this is the GINI index.



The Gini coefficient is a measure of inequality of income distribution in a society. The indicator was built by an Italian statistician, Corrado Gini.

The Gini coefficient varies between 0 and 1, 0 means a perfect equality, 1 total inequality. Representing the Gini coefficient of variation is the Lorenz curve, which shows the orderly revenue in ascending order, and the abscissa population broken down by revenue.

The Gini coefficient measures the area between the Lorenz curve and located right distribution of absolute equality, expressed as a percentage of the total area under the curve.

The Gini coefficient is used primarily to measure inequality of income distribution or heritage, but the economy is often combined with other information, such as democracy indicator (located between -2.5 weakest and +2.5 strongest) in order to analyze the impact of implementing the proposed policies.

(Source: Gini, C. variable is mutable (variability and Mutability, 1912; C. Cuppini, Bologna, 156 pages. Gini, C (1909) Concentration and dependency ratios, Rivista di Economic Policy, 87 (1997) 769-789. http://fr.wikipedia.org/wiki/Coefficient_de_Gini)

Public expenditure per capita for the provision of social services can also highlight, the spread between regions of the same State. Differences in geographical location, number of people, demographic, social protection, also the perceived impact of economic shocks - as recent economic and financial crisis - are responsible for the registration of differences between social costs of public services provided by public authorities of administrative-territorial units to the local population collectivities they run.

Currently, between Member States of the European Union there are significant differences with regard to each of the above indicators.

	GDP/cap -euro -	Total general government expenditure % of GDP	Gini coefficient of equivalised disposable income (source: SILC) Number
EU28	26600	48.5	30.5
Bulgaria	5600	38.3	35.4
Romania	7200	35.1	34.0
Poland	10300	42.2	30.7
Czech Rep.	15000	42.0	24.6
Italy	26500	50.5	32.5
UK	31500	45.5	30.2
France	32100	57.1	30.1
Germany	34200	44.3	29.7
Netherlands	38300	46.8	25.1
Denmark	45100	56.7	27.5
Sweden	45500	53.3	24.9

Thus, both compared to the European average of the 28 member states, as well as to developed countries, Romania and Bulgaria occupies the lowest places in terms of economic development and the public expenditure, showing poor state involvement in national economy. In that regards GINI coefficient, it is situated in the two countries at the highest rates.

3. Financial balancing

Financial balancing is mainly aimed at reducing the gap until cancellation of the differences recorded between local budgetary benefit to the same region.

Financial balancing is not intended flattening financial differences between individually household incomes, but the geographical differences in access to public services. Although both issues relate to the function of redistribution of public finances in each country - that highlights national tax progressivity and/or scope of public social protection programs - financial balancing objective is not identical in each country, as individual redistribution and/or space mechanisms varies considerably from state to state.

Fiscal and budgetary policy distinguishe three missions to the financial stability: equity of the public income distribution between local governments of the country; effectiveness of their use to finance public services necessary to implement a sustainable developments; the stability of public finances which ensures macroeconomic equilibrium of the nation.

Fiscal balance is achieved by financial transfers of the budgetary resources between levels of government, such transfers manifested in various forms, depending on budgetary and fiscal system of each country.

Equity refers to the distribution of public revenues an essential for the proper functioning of the public sector at territorial level, respectively equity between local communities residents, according to which all natural or legal persons from a country have access to comparable public services under similar tax conditions.

Due to financial balancing it can be corrected efficacy spreads between different public services distributed in the community, but also it can reduce the mobility of active people, because there is no financial reason to move from one place to another.

Also, by balancing financial it can be guaranteed the territorial administrative units possibility to respond asymmetric economic shocks, which ensures financial stability not only regionally, but nationally.

4. Taxonomy financial balancing

There are several criteria to classify financial balancing methods implemented in democratic countries. Thus, according to the balance transfers orientation, they can be classified as horizontal or vertical, and according to the disparities type that tries to diminish, we can talk about balance and balancing public revenues per capita costs of public services distributed by local authorities.

As regards the distinction between horizontal and vertical balancing, where the first is observed that transfers occur between sub-national public authorities, while balancing upright - that is to cover the financial deficits recorded at the end of a fiscal year in an administrative-territorial unit - the central government transfers funds to the local authorities.

Such balancing mechanisms are applied practically in all democratic states, some opting for the horizontal, others for the vertical and the third category of states implementing both mechanisms. For example, the European Union countries such as Austria, Denmark, Finland, Sweden apply horizontal balance, taking into account the fiscal capacity / contributor to local communities, while countries such as Italy, Greece, Poland, Portugal use vertical balancing mechanisms of sub-national public finances. Some European countries such as Germany, France

and Romania, implements balancing mechanisms both horizontally and vertically. Formulas balancing changes with a frequency of a few years, according to the legal framework on public finances in each country, to adapt their respective mechanisms to the macroeconomic reality and to the evolution of the state administrative organization, the majority of the European Union Member States pursue a sustained trend decentralization[1].

The distribution scheme of public revenues to balance the different categories of financial territorial communities depends on the level and structure of financial resources available to these communities, on the typology of public services delivered and on the balancing formula / formulas imposed by the state.

Unlike balance income, which is mainly focused on reducing differences in financial capacity - which exhibit the authorities ability to collect revenues tax per capita - financial balance by costs seeks to register in all collectivities of a State about the same costs of public services provided by local authorities, possibly even in accordance with the rules applied consistently across the country.

In practice, there is rarely "pure" systems and, today, most countries use all equalization categories.

The revenue sharing is intended to compensate for differences in revenue raising capacity between sub-national governments. Also, there are a wide variety of models and existing equalization schemes in different countries.

Most transfers are of a fixed amount that is to say, the total amount of subsidies is capped, or the total amount paid is determined using tax-sharing formulas. The "marginal rate of equalization" (or "levy equalization", "tax refund" or "replacement rate"), that is to say, the amount of equalization grants a sub-national government if it loses increase its own tax revenue varies considerably between countries.

Balancing the budget with revenue presented in some cases important perverse effects, because it can cause distortions of taxation in areas that receive equalization transfers, by the proportion that is granted and while their management.

Equalization marginal rates are extremely difficult to calculate and their value must be considered carefully. Statutory rates and equalization numbers may vary to a considerable extent the fact that there are interactions between the tax bases and the equalization formulas fail completely or partially certain tax bases. Often, the effective rate is endogenously defined as the total amount to be paid is decided in the first place before it is calculated the equalization rate for each local authority. The marginal rate of equalization must be clearly distinguished from the average long-term reduction of fiscal disparities sub-national governments. These two indicators can vary in considerable proportions.

Equalization revenue is mostly horizontal while the cost is usually vertical.

Cost equalization covers two types of cost difference. The first is the unit cost of providing a service - eg, maintenance of a kilometer of road is more expensive than plain mountain - and the second focuses on the needs - such needs health care for the elderly are more important in a local authority where the population is older. Both cost difference sources are sometimes difficult to distinguish because ultimately they translate both by differences in the per capita cost of providing services. Most countries have implemented cost indicator systems that take into account both the differences in unit costs and differences in needs, distinguishing general "geographical indicators" - which reflect differences in unit costs due topography - and the "socio-economic indicators" which reflect the different needs due to the social structure of sub-national government.

Unlike revenue sharing, it is vertical in most countries, which means that the unit headquarters often sub-national benefit utilities. While most countries use equalization formulas standardized type of costs in several of them that equalization is based on the amount of expenses recorded in the past or current expenses.

While equalization revenue leaves little room for special interests - because is determined on a basis of assessment and equalization rate - the margin of error and interpretation is more important in the equalization of costs: it is necessary choose criteria explaining the differences in costs, determine their weight and collect relevant data.

The dispersion of the population and its density may impact on the unit cost of providing public services. Small municipalities are more expensive to manage because as schools, hospitals and other public facilities show fixed costs. However, services such as security and the fight against fire result in higher spending per head in urban areas.

5. The role of financial equalization to reduce budgetary disparities

Subsequent fiscal equalization disparities are less than the economic disparities measured by regional GDP, which means that public services are distributed more equitably between local authorities that economic heritage.

Redistributive structure of financial equalization between the various categories of local authorities depends on the sources of sub-national revenues, characteristics of decentralized public services and the equalization formula. Equalization revenues typically results in a redistribution of urban to rural areas due to the lower tax-raising capacity of the latter. The

[1] Magali Caumon, Romain Le Borgne, Erwan Hetet, Olivier Wolf et Manuel Zamora, "La réforme de la péréquation:un nouveau souffle pour la réduction des inégalités territoriales ?", Institut national des études territoriales, Centre national de la fonction publique territoriale, Promotion Salvador Allende, Mars 2012.

equalization of costs based on geographical indicators strengthens redistribution towards rural areas. The equalization of costs based on socio-economic needs indicators reduces this redistributive aspect, but in general the urban areas are net contributors to the extent that the highest indicators of tax levy capacity and lowest.

6. Conclusions

Equalization significantly reduces disparities. Most devices used in different countries have an equalizing effect somewhat similar, but in a few countries the disparities are reduced to virtually zero. The horizontal fiscal equalization has an equalizing effect slightly stronger as a percentage of GDP, the vertical equalization.

Their goal is to allow sub-national governments to provide their citizens similar ranges utility for a similar tax burden. Financial equalization is an explicit program of redistribution and, as such, it may conflict with goals such as efficiency of sub-national spending or sub-national tax effort. Financial equalization devices are very specific to different countries and are often an essential part of their institutional framework, so any comparative analysis must be considered very carefully.

Financial equalization is more transparent if it is institutionally separate statistically or other transfer mechanisms.

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THE FREE TRADE AGREEMENTS BETWEEN THE EUROPEAN UNION AND LATIN AMERICA. THE PERUVIAN AND MEXICAN CASE

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Abstract

The European Union has signed a number of free trade agreements with different countries in Latin America because it is aware of the great importance that this region has gained as a destination for its exports and investments. Furthermore, the European Union wishes to reaffirm its ties with countries in the region because it hopes to consolidate its political and economic position as an international player with its presence in those markets.

In this paper we will discuss the free trade agreements that the EU has signed with Mexico and later with Peru, because they are two examples where Latin American countries have achieved significant economic growth and where the trade has generated significant benefits. Additionally they are two major trading partners of the European Union and they have allowed the EU to continue to expand its zone of influence in Latin America.

Keywords: *Free trade agreement, European Union, America Latina, investments, Peru, Mexico.*

Introduction

In the international scenario states can live in economic independence and they do not have to interact with the other members of the international community. In this context the European Union has taken the decision to sign free trade agreements with different countries of Latin America and with this it has the objective to enter into new markets and to obtain a better position. The premise from which we start with the present investigation is the relationship between states that negotiate agreements to interchange goods and services in a liberal way.

Due to globalization a number of changes have taken place with regard to the economic relationships of nations and the liberalization of global trade. Certain expectations have been created with regard to the benefits of the free trade agreements that have been signed by nations, but the process of commercial opening has not always resulted in direct benefits, especially with regard to the poor parts of population. The expectative of economic growth however was one of the major arguments that convinced Mexico in the beginning and later Peru to sign a free trade agreement with the European Union, including political, economic and social aspects. Regardless of the general interest of Latin America and the European Union in the commercial opening of Latin America for trade and investments the changes come along with the free trade agreements constitute a powerful instrument that contributes to the development of the people in Latin America as long as their interest are respected.

The hypothesis that will be followed with this work considers that the signing of the free trade agreements between Latin America and the European Union provides an excellent opportunity to deepen the economic and commercial relationships between both regions. However, it is considered that modifications will have to be discussed and added, especially in Mexico where the free trade agreement has been implemented a longer time ago.

This investigation also wants to: 1) Contribute to the way in which the free trade agreements are adapted to the real needs of the different countries in Latin America and to their adequate implementation. 2) Promote the use of free trade agreements as a mean that allows the population to reach a better level of economic well-being. 3) Rise consciousness about the importance of free commercial interchange between states.

This present investigation uses due to its nature, a multidisciplinary approach which is reflected in the variety of sources used. Also different bibliographical sources have been used.

In the first part of the present investigation the commercial interests of the European Union in Latin America will be discussed.

1. THE COMMERCIAL STRATEGY OF THE EUROPEAN UNION IN LATIN AMERICA

At the moment the interest of the European Union in Latin America has risen because it considers this region a priority partner and for this reason we are going to analyze the economic relations between the EU and Peru and the economic relations between the EU and Mexico (Piñon, 2005: 17).[1] This new focus of the European trade policy has happened because the EU wanted to find new global partners and strengthen its international position for example in comparison with the United States of America or China. Another

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[1] During the Eighties the European Union did not give a lot of importance to Latin America because its main focus was centered on the disintegration of the Socialist block and its policy of neighborhood.

influence was the constant subscription of new free trade agreements of Latin American countries with other countries and the fear of the EU to loose importance and influence in this region. Some authors say that with this new strategy the European Union has started giving more privileges to individual countries and to consider prefer these particular agreements to joint agreements of more than one country or block to block (Ruano, 2013: 619 -644).However, we do not share this vision although the European Union did not reach a block to block agreement with the Andean Community of Nations[2]. It should not be forgotten that this block to block agreement was not concretized because Bolivia and Ecuador decided not to participate regardless of the European efforts to maintain a block negotiation. Another example of the will of the European Union to carry out negotiations from block to block is the Association Agreement that was signed with the Central American Common Market. Taking into account these specific cases we cannot generally say that the European Union does not want to realize wider negotiations with Latin America and that it rushes into specific agreements with particular countries.

Like mentioned above there are several reasons for the EU to negotiate with the Latin American block in general and certain Latin American countries like Peru and Mexico in particular. Among the principle reasons for negotiating we can find: the economic growth of this region, the commercial policy of opening, the claim for entering and getting installed in the international scenario, etc. (Sanahua, 2013: 1-32). Right from the beginning, when there were still block to block negotiations, it was the strategy of the European Union to try to stimulate its relations with Latin America by establishing and presenting itself as an important actor of the international community and this way of acting continued in the individual negotiations with particular countries. However, the economic crisis that affected the EU and the problems that the Eurozone was confronted with have changed the general approach of the EU towards Latin America (Guillén, 2013: 23-41). Instead of merely focusing on a complete region the EU began to accept negotiations with individual countries.

Now we are going to analyze how the EU has conducted its negotiations and how it has reached to sign the free trade agreements with Peru and Mexico.

2. THE NEGOTIATIONS AND SIGNING OF THE FREE AGREEMENT BETWEEN LATINA AMERICA AND THE EU. THE CASES OF PERU AND MEXICO

Now we are going to analyze the antecedents of the free trade agreements between the EU and Peru and the EU and Mexico in order to show two examples of the implementation of free trade agreements in Latin America that have resulted in economic growth.

2.1. The negotiation and signing of the free trade agreement between the EU and Peru

The beginnings of this free trade agreement can be found in the negotiations that took place between the European Union and the Andean Community of Nations (ACN)[3]. With these negotiations an agreement in the following three subjects should be reached: the establishment of a flowing political dialogue, the creation of an area of free trade, investments, etc. It was also tried to reach an intense cooperation between the countries of the Andean Community.

From the commercial point of view this agreement brought many new chances for the countries of the Andean Community simply for the fact of being associated with the European Union and its large market. From the political point of view and in regard to the cooperation between both regions the relations between both regions had been established and improved for a long time. For the European Union this agreement was a great opportunity due to the fact that the European Union wanted to present itself as a major player in the international society and to the fact that the Latin American market presented new challenges and opportunities. But, the special situation of Bolivia and Ecuador had to be considered, a situation that made it necessary to establish a special treaty and to differentiate with respect to these two countries that finally did not participate in the agreement, as we will see later.

[2] The negotiations between the Andean Community of Nations and the European Union were established with the Decision 598 of the Andean Council of Foreign Ministers in an open meeting with the Commission of the Andean Community, that established that the Country Members could negotiate commercial agreements with third countries in a joint way or in block and exceptionally in an individual way. This way it was tried to obtain a major capacity to negotiate in regard to third countries or blocks of countries and to use these agreements as instruments to continue deepening the integration and the levels of economic development between the members of the Andean Community of Nations. Also we must indicate that these negotiations between blocks were affected by the participation of Ecuador and Bolivia in the ALBA-TPC given the fact that this negotiation did not want to develop the cooperation and the political dialogue and that even more it wanted to give more importance to the commercial side and was an excuse to promote a simple free trade agreement. Later, within the framework of the European Union it was established the possibility to establish negotiations only with Peru and Colombia given the fact that within the framework of the Andean Community of Nations no consensus had been reached in topics such as trade, sustainable development and intellectual property.

[3] The Andean Community was founded with the Protocol of Trujillo on the 10 of March 1996 as a substitute of the Andean Pact. The members of the Andean Community at the moment are Bolivia, Colombia, Ecuador and Peru. On the 22 of April 2011, Venezuela left the Andean Community of Nations (ACN) in 2006 but it had to wait five years to leave behind all its obligations and rights linked had the time limit of five years expired which it had to leave behind its obligations and rights linked to of the regional Andean group. In 2006 it also decided to enter into the Common Market of the South (MERCOSUR).

In this context it has to be mentioned that the commercial relations between the EU and the member states of the Andean Community of Nations (among which is Peru) go back to 1990 when the EU established a Generalized System of Preferences called (GSP) – Drugs - with the objective to fight against the production and the traffic of drugs[4] and that was trying to show a compromise of the developed countries in sharing responsibility with the countries in process of development. To approach this transnational problem which does not know frontiers the EU was looking for a method of showing a politics of shared responsibility to confront this problem which is affecting the whole international community.

In 2005 the Generalized System of Preferences Plus (GSPP)[5] was added which was wanted to promote a sustainable development and which had the objective to introduce a new regulatory policy. In regard to this we must say that the custom duty preferences that were given to products coming from member states of the Andean Community of Nations did not include all products and made it necessary that the GSPP was renewed in the year 2009.

Although the GSP and GSPP were criticized due to the temporary character of these customs duty preferences for products from the member states of the Andean Community of Nations it has to be said that the results from this experience were positive. It had become possible that external investments could reach these countries that were trying to benefit from the preferences to introduce their products in the market of the EU.

We have to indicate that the European Parliament and the Council of the European Union approved with the Regulation (EU) No 978/2012 the application of a new generalized system of custom duty preferences. With this regulation generalized custom duty preferences are applied and the Council Regulation (EC) No N° 732/2008 of the Council is abrogated.[6]

The negotiations of the Andean Community of Nations were based on the Decision 598 which declares that the member states could establish commercial agreements with third countries in a common way or as a block. But it was also possible that the member states could negotiate agreements on their own. This way it was tried to obtain a better position for negotiations regarding third countries and blocks of countries and to use these agreements as instruments to continue to deepen the integration and the level of economic development between the members of the Andean Community of Nations. According to the Decision 667 of the Andean Community of Nations (ACN) a general framework was established for negotiations between the trade blocks EU and ACN of the agreement of association between the EU and the ACN[7].

Thanks to the Decision 667 and especially to what is declared in Article 2 of this norm Peru could continue with bilateral negotiations with the EU. This would be helpful in the case that any difficulties should occur in the regular negotiations from trade block to trade block because Peru could continue negotiating individually in the case that for example one of the other ACN members (such as for example Ecuador or Bolivia) would decide to leave the trade block negotiations.

Coming back to the agreement of association that was mentioned before it can be said that the commercial relations resulting from the signing of this agreement brought important changes for Latin America that started to enter into a phase of more economic development and social integration. For the European Union the changes that this agreement brought about for this Latin America block made it more interesting to establish economic relations because the changes showed certain progress in terms of economic, legal and social aspects. It seems that after the signing of agreements with Mexico and Chile had come the moment to give an interesting position to the Nations of Latin America and to face new challenges.

During 2006 a number of meetings took place between the representatives of the Andean Community of Nations and the European Union that led to the fact that on the 14th of July of 2007 the beginning of negotiations about the agreement of association between the European Union and its state member states and the Andean Community of Nations and its member states members started.

However, the negotiation between blocks did not come to an end and did not reach to create a common Andean market. The fact that certain facility had been given to the member states of the ACN so that they could assume their compromise with different time frames, means, and different velocities and depending on their own situation made it complicating and difficult for the blocks to negotiate. Also the Duty Customs Union of the ACN could not consolidate itself within the framework of the ACN since the state members of this organization did not find a common point of agreement in their politics. It also has to be

[4] The European Community was the first one to establish the Generalized System of Preferences in 1971 with the objective to concede unilaterally custom duty preferences for the products of countries which mostly need them.

[5] The GSP Plus was established with the Regulation of the Council of the European Union (EC) No. 980/2005 from the 7 of June 2005.

[6] The new scheme approved by Regulation 978/2012 entered in vigor on the 20th of November 2012 and the custom duty preferences granted with this new order were applicable from the 1st of January 2014. In regard to the actual scheme GSP Plus would only be applicable from the 31st of December 2013, according to the Regulation N° 512/2011.

[7] The decision 667 called general frame for negotiations of the Agreement of Association between the Andean Community and the European Union was adopted on the 8th of June 2007. Later, since a negotiation by blocks was not possible it was allowed that Member States of the ACN could carry out bilateral negotiations with third countries and for this it was necessary to abrogate the Decision 667 with the Decision 738 from the 1st of July 2010.

mentioned that the negotiation between blocks was probably affected by the participation of Ecuador and Bolivia in the Bolivarian Alliance for the Peoples of our America – Peoples´ Trade Treaty (ALBA-TPC)[8]. The ALBA-TPC put more priority on trade topics and less on questions of cooperation and political aspects and could be considered a simple free trade agreement. Finally, in June 2008 the negotiation between blocks failed.

Since it was not possible to reach a common agreement within the block that existed during the negotiations of the Agreement of Association between the EU and the ACN it became necessary to redesign the initial negotiations that had taken place with regard to subjects such as trade sustainable development and intellectual property. These new negotiations took place between the EU and Peru, Colombia and Ecuador. Ecuador later left these negotiations in July 2009.

These new negotiations tried to stay within the regulations of the Article XXIV of GATT and the Article V of GATS that had been established within the framework of the World Trade Organization. This way the negotiations were reestablished in areas such as the rule of origin, the technical barriers of trade, trade and sustainable development, etc. Later, after a new series of negotiations (where the last one had taken place in February 2010 in Brussels) it was officially announced the end of the negotiations in April 2011 and it was established that the agreement would be controlled by the legal procedures of each one of the participating parties.

The Council of the European Union approved the provisional signature and application of the Trade Agreement between Peru and the EU on the 31 of May 2012. Later, on the 26 of June 2012 the agreement was signed and was submitted to the European Parliament and to the Congress of Peru for approval according to the European and Peruvian regulations. Later it was also necessary to get the approval of the national parliaments of the state members of the EU because the individual European states could be affected by the agreement and its regulations in terms of questions regarding the intellectual property, etc.

The European Parliament accepted the trade agreement with majority on the 11th of December 2012 and the Congress of Peru approved it the following day with unanimity.

With regard to the content of the Treaty it can be mentioned that one chapter was designated to sustainable development. Other aspects also were considered such as international regulations in subjects concerning labor conditions and environment. Social aspects have also been considered and a human rights clause has been added with which the treaty can immediately be suspended in case human rights are affected. However, a certain power has been given to diplomatic means and mechanisms that can be established between the parties to solve any upcoming controversy[9].

Now we are going to see some aspects concerning the trade agreement between the EU and Peru. The free trade agreement between the EU and Peru is structured in the following way: Preamble, fourteen titles, fourteen annexes and conjoint declarations. The fourteen titles have the following contents: In the first two titles a number of initial and institutional regulations have been established. In the third title the trade of goods has been regulated, the trade of services, establishments and electronic trade is regarded in the fourth title; you can find subjects such as payments and movement of capital in the fifth title, public contracting in the sixth title and intellectual property in the seventh title. Competition is regulated in the eighth title, trade and sustainable development in the ninth title, the transparency and administrative procedures can be found in the tenth title and the general exceptions in the eleventh title. The solution of controversies is in the twelfth title, the technical assistance and the strengthening of commercial capacities in the thirteenth title and the final regulations can be found in the fourteenth title.

2.2. The negotiations and signing of the free trade agreement between the EU and Mexico

The antecedents of the Free Trade Agreement between the European Union and Mexico can be found in the first Frame Agreement, with economic and trade character that was signed by this country with the European Economic Community (now EU) in 1975. With this agreement, the in those days called European Economic Community, granted to Mexico which at that time was not a member of GATT, the treatment of a most favored nation and this way contributed to the fact that Mexican exports towards Europe were stimulated and created a more favorable environment for the bilateral economic relations. We also have to say that another factor that contributed to the consolidation of this commercial relationship was the second Framework of Agreement of Cooperation which was signed on the 26th of April 1991 and the Joint Solemn Declaration of the 10th of April of 1995 that proposed to widen the relations between both parts with a vision of long-term time limit and that was aiming at reactivating the economic and trade relations that had been affected in the Eighties (González, 2003:139-178)[10]. However, the preliminary

[8] The Bolivian Alliance for the People of our America – People`s Trade Agreement (ALBA-TCP) was established on the 14th of December 2004.

[9] The aspects with regard to a democratic clause, the respect for the human rights and the respect for the state of law that were established in the Agreement of Political Dialogue and Cooperation which was signed in 2003 between the EU and the ACN have been incorporated into the Free Trade Agreement between Peru and the EU.

[10] The diplomatic relations between Mexico and the European Union were established in 1960. However, it was in 1975 when the first Frame Agreement with economic and commercial character was signed between them.

negotiations had to overcome a number of inconveniences that came up from the Mexican authorities since the European institutions planted the need to incorporate a "democratic clause" in the new commercial agreement. The incorporation of this disposition generated a strong initial rejection since it was considered an intervention into internal Mexican affairs and this impasse could only be solved thanks to making the above mentioned clause more flexible and by changing it by eliminating every reference to the expression "internal politics".[11]

Later more negotiations took place and two agreements were signed that had a great impact on the relations between the European Union and Mexico. The Agreement of the Economic Association, Politic Consultation and Cooperation[12] and the Internal Agreement about Trade and Questions related with Trade between the Mexico on one side and the European Community and its state members on the other side.[13] The agreements should lead to an integral association that would be developed with emphasis on the following three subjects: political dialogue between Mexico and the European Union, the creation of a free trade zone and the establishing of an intense cooperation.

Before the global agreement mentioned before was signed an "interim agreement" was negotiated that previously helped to establish certain customs duty liberties. Then with the finalizing of the general global agreement on the 1st of July 2000, the interim agreement was abrogated.

This agreement was a great opportunity for Mexico. From the commercial point of view it opened the market of the European Union for Mexico and provided it with many advantages that are implied with being associated with the European Union considering the size and importance of this market. From the political point of view it brought new perspectives and in terms of cooperation new challenges and chances (Gómez: 2005, 67-75).The European Union on the other hand wanted to get established as an important player in the international community and saw a great change of entering into the Latin American region by negotiating with Mexico. It had always considered Mexico as a valid interlocutor in the Latin American region which would allow the European Union to enter into this region more easily just as it is happening right now. However, the geographical situation of Mexico should not be forgotten. Without any doubt Mexico has always been closely linked to the United States of North America. This connection has even been deepened with the signing of the North American Free Trade Agreement in 1994.

For this reason the European Union tried to enter with the free trade agreement with Mexico into the Mexican market with a similar tariff reduction as foreseen in the North American Free Trade Agreement. On one hand it wanted to have certain "parity with the North American Free Trade Agreement" and it also wanted to protect its own investments. The trade agreement with the European Union represented for Mexico the possibility and the opportunity to diversify its commercial relations with other international players and to change a situation that reflected a high concentration of its commercial relations on the United States of North America. It also meant the increase of influence of Mexico in the world (Green: 2000, 4-5).

With the signing of the free trade agreement there surged a certain concern of Mexico that it would only be used as a platform for the EU to enter into the market of NAFTA. However, there existed some strict norms in this treaty and these norms limited the worries to some extent. In order to benefit from the advantages of the NAFTA agreement the products involved needed a great number of primary resources originally coming from North America. For this reason Europe had to realize that in order to enter into the U.S. market it would have to invest and establish industries in Mexico that would use input from the region of North America and Mexico (World Trade Organization, 2013: 38-52). Although it was hoped that Mexico would become more independent of the commercial relations with the United States of North America after the signing of the free trade agreement with the EU it cannot be negated that the US will continue being the most important trade partner of Mexico at the moment.

With regard to the general content of the free trade agreement between the EU and Mexico (FTA EU-M) we can say that the FTA EU-MX addresses in eleven chapters the following topics: market access, rules of origin, technical norms, sanitary and phytosanitary standards (SPS standards), safeguards, investments and related payments, trade in services, sales in the public sector, competences, intellectual property and the solving of controversies.

[11] The incorporation of the democratic clause in the commercial agreements that are underwritten between the European Union and third countries. The text that almost hindered the commercial negotiations originally was as follows:" The respect for the democratic principles and the fundamental rights, as declared in the Universal Declaration of the Human Rights, inspires the internal and international politics of the parties and constitutes an essential element of the present agreement.

[12] The Agreement of Economic, Political Consultation and Cooperation Association was approved by the Council of Ministers of the European Union on the 14th of February 2000 and by the European Parliament on the 16th of March 2000.

[13] The interim agreement about trade and questions related to trade between the European Union and the United States of Mexico was approved by the Senate of Mexico on the 23rd of April 1998 and by the European Parliament on the 13th of May 1998. The interim agreement referred to entered into effect on the 1st of September 1998.

3. Effects of the free trade agreement between the EU and Latin America

3.1. Effects of the free trade agreement between the EU and Peru

The trade agreement between Peru and the EU has brought a lot of changes and generated the opportunity to participate in a consolidated market such as the European market and not to lose competitiveness in regard to other countries with which the EU has signed a free trade agreement. However, the signing of the trade agreement has a lot of effects and these will be analyzed now:

With the signing of the trade agreement between Peru and the EU it will be easier for Peruvian products to enter into the European market which contains more than 500 million of people. With independence of the other 16 free trade agreements that Peru has signed with other countries so far, the number of potential consumers has the greatest economic impact for Peru so far. However, we should not forget that during the negotiations of the European Commission and Peru the two towers of the Agreement of Association were left aside that made reference to a political dialogue and to a cooperation that should be concreted in a free trade agreement which would permit the liberalization of services, public tenders and investments, etc.

The Treaty gives permanent, reliable and predictable preference access to Peruvian products to the common European market and allows it to introduce into this market a number of goods and services. The new agreement offers Peruvian products more advantages than GSPP[14]. Additionally it will permit a progressive liberalization of the commerce of services.

When the agreement came into vigor (February 2013) it came to a tariff reduction of 99,3,3% which meant a reduction of 100% for the not agricultural products and 75,9% for the agricultural products given the importance and sensibility of this topic in this sector within the European Union.

On the other hand, the EU has the opportunity to export manufactured goods and products to the Peruvian market and to invest capital which allows the European providers to continue selling their products and compensate the decreasing of their sales in the European market during the economic crisis by which Europe has been affected.[15] Considering the situation at the moment the EU has been able to take benefits from the free trade agreement since its investors had the possibility to invest in an interesting destination with great potential and chances. For example, the banking system with origin in Europe (especially Spanish) has established itself in Latin America and especially in Peru and has completed a successful year with great results and in a certain way this has helped to compensate the lacking dynamics of the European market.

With regard to the regulations of the agreement it can be mentioned that the exports have increased and more products are offered now. The products that are offered have become more diversified. The majority of exports from Peru into the EU market are agricultural products[16]. This has contributed to the fact that the conditions of life for thousands of Peruvian families have improved and they have seen that this new export destination can improve their conditions and will result in the fact that extreme states of poverty will be left behind that this country had been confronted with in the past. However, the export of gas and oil has risen as well on a constant level since 2010.

The commercial agreement between the EU and Peru will contribute to improve the level of life of the Peruvian citizens since they will be able to sell their products in the European Union more easily. This way, for example we can say that between 2008 and 2012 the trade balance between the European Union and Peru have been favorable for the last country mentioned before and it can be suspected that in the future due to the liberalization of custom duties that this treaty presents it will continue increasing.

To assure a continuing growth it might be important to establish a system that promotes the creation of cooperatives and mechanisms that facilitate the access to credits and financing for the Peruvian people so that they can obtain a better capacity to respond to the demand for products that come from the market in Europe and that they can develop their skills and capacity in management and business administration. For example, in Peru there are cooperatives for savings and credits. They are businesses of joint property and are managed in an autonomous way and it is their objective to attend the

[14] The agricultural products have a progressive and partial liberalization between 85 and 90 % of the products as well in Peru as in the EU. On the other hand the industrial products and Peruvian fish are free and can enter into the European market since the getting into vigor of the treaty.

[15] We should consider that the President of the United States wants to increase the exports of small and medium sized companies from the U.S. to the Latin American market because these exports mean about four millions of employments for citizens of the United States. Also, he is trying to conquest the market of services. It might be that the European Union has become aware of this new politics of the U.S.A. towards this region and that due to the constant progress has decided to follow the model of the U.S. that has proven to be successful. Before the free trade agreement was signed between the EU and Peru, the second one implemented a free trade agreement with the United States on the 1st of February 2009. Vid. Presidencial Proclamation 8341 – To Implement The United States-Peru Trade Promotion Agreement and for other Purposes.

[16] The EU has kept its subventions for the agricultural producers due to their great importance in the EU, but obviously this practices generates an unfair competence. Also in the area of lacteal products there is a certain advantage given to the milk in powder coming from the EU in comparison with the fresh milk which cannot compete with this range of prices.

needs of their members and partners[17]. We think that the cooperatives are a powerful instrument that can help the Peruvian producers to organize and finance themselves and their activities and to have this way an alternative to the traditional financial system.

It has to be considered that the Micro and Small Businesses (MSB)[18] might also be affected by the free trade agreement between the EU and Peru since the Peruvian industries see themselves replaced by the European companies. This way, for example the Peruvian paper and leather industry that offer a great quality and are of great importance for the Peruvian market could be affected and it could take place a substitution of Peruvian products for European products[19].

Peru needs to improve its business connections and has to strengthen its production circles internally to gain productivity and competitiveness and this way a better distribution of the riches can be achieved that enter into the country. At the same time Peru should strengthen its relations with Bolivia and Ecuador (both members of the Andean Community of Nations which did not come to finalize the negotiations with the European Union and for which reason the negotiations of the Agreement of Association between blocks stopped) because after this process a number of tensions affected in a certain way the process of integration of the Andean region. The process of integration, however, is a process that Peru should not leave aside because of the commercial contacts that it implies and the better position in terms of negotiations that its cooperation would mean in the international scenario (General Secretary of the Andean Community, 2013: 1- 41).

There is a great advantage of the trade agreement. It can count on clear norms, especially with regard to the trade with goods, services and investments. By avoiding insecurity concerns can be abolished that can hinder investments in Peru[20]. The fact that the necessary mechanisms have been established to solve any commercial controversy that can arise with the application of the agreements also is also a great incentive for investments in the country. However, some doubts have risen with respect to the importance that has been given to a political solution between the parties or the recommendation that a group of experts could give when the labor laws are not respected.

Regarding the direct foreign investments in Peru, it can be said that 51,6 % come from the European Union and the United Kingdom. The main sectors are the following: trade, communication, energy, finance, industry, mining, petroleum, services, transport, agriculture, construction, fishing, etc. The sector of communication is the most dynamic one at the moment and capital has been canalized there from Spain, U.K. and Holland.

With improving the grade of industrialization and modernization of the Peruvian companies it will be easier for these companies to be able to enter into the European market. At the same time the European companies should be able to gain experience in a new market with great potential. By getting to know the different tastes and preferences of the Latin American consumers the European companies could use Peru as a platform for future investments in the region. In addition there exists a great opportunity to establish

[17] More information about the cooperatives in Peru can be found in "Texto Único Ordenado de la Ley General de Cooperativas" which was approved by the "Decreto Supremo No. 074-90-TR" from the 14 of December 1990.

[18] According to the recommendation of the European Commission from the 6th of May 2003, based on the Charter of the Small Company emitted from the Council of Europe from Santa Maria da Feira in June 2000, which has gone into vigor on the 1st of January 2005, a small company is an economic union with juridical or physical personality which has less than 10 employees and which annual volume of business or general annual balance does not go further than 2 million of euros, a charging of less than exactly two millions of euros and a balance of 2 million or less euros. Vid. European Commission Recommendation 2003/361/CE, 6 of March 2003 about the definition of micro businesses, small and medium-sized businesses. Within the European Union it was also adopted a "Small Business Act" which is a non-binding instrument for the Member States of the EU to commit themselves to take actions to help and support small businesses. The SBA suggests the following strategy of action: education and formation to promote spirit of entrepreneurship, agilization and reduction of costs for the creation of businesses. Another objective is to facilitate legislation, give adequate training adapted to the needs of small companies and to improve the relationship between administration and businesses by using new technologies. Also the opportunities of the internal market shall be improved, tax and financing, promotion for the new technologies of small companies, support for the globalization of small companies in the new economy. Also the potential and effectivity effectiveness of the representation of the interests of the small company on a national level and on the level of the European Union shall be improved. Vid. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Com (2008)394 final "Small Business Act" of 26 June 2008. On the other hand the micro company has been regulated in Peru with the "Texto Único Ordenado" of the "Ley de Promoción de la Competitividad, Formalización y Desarrollo de la Micro y Pequeña Empresa" and the "Acceso al Empleo Decente, Ley MYPE (Decreto Supremo No.007-2008-TR)". In this regulation it is defined that a MASC is an economic union constituted by a natural or juridical, founded with any type of organization or management structure and considered in the vigent legislation. It has to have as an object the development of activities of extraction, transformation, production, commercialization of goods or the providing of services and it should combine two characteristics: the number of employees should not be more than 10 and the amount of maximum sales per year should be till 150 UIT (Tax Unit).

[19] European Commission (2009) Evaluation about the impact about the sustainability of the trade between the EU and the Andean countries. In: http://trade.ec.europa.eu/ doclib/docs/2010/ april/ tradoc_146016.pdf

[20] However, considering the initial fear about investing in this country, it has to be mentioned that Peru has developed a normative framework to protect investments from abroad and has shown a great interest with regard to the international legal order. So, for example, in the Constitution it has to be pointed out the article 70 (that guarantees the invulnerability of the private property). The article 58 (that regulates the private initiative within the framework of a market of social economy). The article 59 (that guarantees the liberty of the companies by the State). The article 62 (that guarantees the liberty of contracting). And other regulations. We should also mention the following norms as a guarantee for the investments: The "Ley Marco" for the growth of the private investment. The Constitutive Agreement of the Multilateral Investment Guarantee Agency (MIGA) of the World Bank. The ICSID Convention of the International Centre for Settlement of Investment Disputes (ICSID), among other dispositions.

certain cooperation between Peruvian and European companies.

There exists a certain risk for the Peruvian companies in case that they are not capable of getting modernized fast enough or that they do not adapt to the new circumstances as required. But the Peruvian companies are also characterized by a great creativity. Also, in Peru the salaries are very low which can be a factor to attract European companies that are trying to get established in this country. However, it is always important that the labor laws are respected, as well as the environmental laws and that the civil society is consulted and not left aside (especially with respect to the Native people) because a situation of social exclusion could affect important sectors of society (people that live in extreme poverty, Native people, women, etc.)

3.1. Effects of the free trade agreement between the EU and Mexico

One of the main effects of the signing of the FTA EU-MX has been the increase of exports of Mexican products to the European market. Among the most important clients of Mexico in the EU can be mentioned countries such as Spain, Germany, the United Kingdom Holland and France and as a total the EU market is made up of 28 countries at the moment and offers access to a number of about 500 million potential consumers which is a great chance and challenge for producers from outside the EU.

European investments have been made in Mexico and they have contributed to the economic growth of the country. The main sectors that the European investments went into were: services (professional, real estate, banking, tourism, hotels, etc.), trade, construction, transport and communications, agriculture, mining, etc. There also entered a great number of direct foreign investments into Mexico, especially from countries such as Belgium (37.7%), Holland (7.6%), Japan (4.4%), Germany (3.6%), United Kingdom (3.3%) and the rest (11.4%).

The FTA EU-MX should be considered as an instrument that permits Mexico to diversify its markets and to reduce the commercial dependence of the United States of North America that has been increased with the NAFTA. As mentioned above the NAFTA is the most important trade agreement that Mexico has signed but with the FTA EU MX it is tried to improve the cooperation and collaboration between Mexican and European. The European Union on the other hand is trying to enter into the Mexican market with its open access that it offers to the United States of North America and Canada.

With the dispositions of the FTA EU-MX, it was regulated that Mexico should enjoy a one hundred per cent tax relief on its industrial products when they entered into the market of the European Union and as the final date was put 2003. Beginning from 2007, the industrial products coming from the European Union and entering into Mexico do the same. But, many of these products come from Mexican branches of European companies. So for example, the exports of Mexican automotive products (that represent more than 17 % of the exports) have assumed an important role within the Mexican exports to market of the European Union. This makes us think that the Mexican industrial exports strengthen the European industry that is being repowered with the industrial products that enter from its Mexican branches into the market of the EU.

It should be mentioned that with the FTA EU-MX certain advantages were granted to the European Union that had not been granted to any other partner with a free trade agreement signed by Mexico at the moment. So, for example it was established that within 10 years starting from the point when the FTA comes into effect a total liberalization of the trade in services would take place.

Considering the situation of Mexico before the FTA EU-MX came into effect in 1999 the exports from Mexico to the European Union had an amount of 4949 million of euros, while the imports of Mexico from the European Union ascended to an amount of 10585. Later after the signing of the free trade agreement the Mexican imports from the EU had risen and reached for example in 2013 an amount of 28000 million of euros and the exports to the market of the European Union had an amount of 19000 million of euros.

However, some of the reasons for this number could be the good performance of the European economy for many years (before the crisis), the stability of Germany (as a motor of the European economy) and the incorporation of the new state members of the European Union. All these factors could have influenced this increase and the increase of the commercial activity does not necessary mean that the Mexican companies have improved their competitiveness or that the Mexican companies have grown.

The fact that many Mexican imports are semi-elaborated could mean that Mexico is used as a fabric of transformation that uses products to later export them again. On the other hand the products that have been imported tend to be products where no transformation has taken place and they include machines and material of transport, chemical products and basic manufactured goods.

With regard to direct investments the FTA EU-MX had the following effects. In order to approve an investment or to grant an incentive for the investment no special requirements were made. State interventions were limited in general and free flow of capital was established. It was also possible to claim the state in case of indirect expropriation. It was the objective to attract capital and technology and thus to strengthen the Mexican industrial sector. But the FTA-EU-MX also established the possibility to take means that prevent the flow of capital when there existed certain risks (for example exchange, monetary or

balance of payments risks.) In case that a risks surged the partner of the agreement would have to be informed and a plan for elimination developed. In general we have to indicate that these dispositions are common in all free trade agreements.

In the following part of the investigation we will analyze the need to introduce changes to the free trade agreements.

4. Possible modifications of the free trade agreements

The free trade agreement between the EU and Peru recently came into vigor in 2013 so the effects of the free trade agreement are currently being observed and it is too early to start thinking of modifications of the free trade agreement. Once the treaty has been well implemented there will come a moment to revise and to reconsider the benefits, effects, problems and other aspects of the agreement between Peru and the EU.

The free trade agreement between Mexico and the EU however has been in vigor since 2000 and for this reason and the fact that circumstances in economy, politics and finance have changed it is reasonable that modifications of this free trade agreement are considered and made according to the wishes and suggestions of Mexico and the EU.

In fact the representatives of the European Union and of Mexico already have had meetings to discuss possible modifications that would permit modernizing the agreement. The European Union would like to modernize the FTA because it wants to achieve that the European companies have better possibilities to benefit from the constitutional reforms that have happened in Mexico in the service, telecommunication and energy sector. Mexico on the other hand would have an interest in obtaining the complete liberalization of the agricultural and fishing products.

After analyzing the situation and considering different approaches and possible solutions the European Commission will elaborate a report and possible modifications or a reform proposal will be suggested. With this report a final decision will be prepared and taken. The European Union will address the chapter of financial services and will realize certain changes. It will also include a chapter which is concerning sustainable development and which will establish clear and binding commitments. The authorities of Mexico on the other hand would like to start the negotiations in 2015 to update the FTA EU-MX that was signed in 2000. They consider that Mexico has not benefited enough from the free trade agreement. They think that foreign direct investments have not created new jobs for Mexican people and that it was merely used to buy companies rather than to build new ones and to create new jobs. They would also want to improve the development of small and medium-sized Mexican companies.

By carrying out this revision the FTA EU-MX is also looking for the adaption of the transatlantic negotiation that is taking place between the European Union and the three states parts of the NAFTA. At this time the European Union and Canada have signed the Comprehensive Economic and Trade Agreement (CETA) that tries to improve access of European services (finance, telecommunication and transport) to the Canadian market. And the European Union and the United States of North America are negotiating the Transatlantic Trade and Investment Partnership (TTIP).

The negotiations of these three state members of NAFTA (Mexico, United States of North America and Canada) all have the objective to strengthen their commercial relations with the European Union and to improve the conditions for trade. At the same time they have to consider and to respect their own markets and their partners and the commitments assumed by them in the NAFTA agreement. So considering these changes and tendencies it might be the perfect moment to revise the FTA EU-MX. With the experiences obtained in the last years it could be an excellent opportunity now to modernize it and to adapt it in a better way to the requirements of Mexico and the European Union. Also new areas of interest of both parties might be found and new synergies could arise.

Conclusion

The free trade agreement between the European Union and Mexico or Peru does not automatically generate a greater flow of trade or commercial activities. It just provides new opportunities and at the same time new challenges for the Latin American companies, especially the small and medium-sized ones.

In order to benefit from the advantages of the free trade agreements it is necessary for Latin America to develop strategies that will strengthen its competitiveness with regard to the competence from Europe and third countries. Latin America will have to gain more experience and invest in innovation, education, infrastructure and development to be able to obtain a stronger position against products coming from outside of the region and to promote its own products going abroad. The new industrial sector has to be strengthened and Mexican and Peruvian entrepreneurs have to receive more support in order to compete with the producers of other countries. It is also necessary that the small and medium-sized companies from Peru and Mexico participate more in the productive chains of foreign companies that have invested in the region and that they are taken into account for production cycles. This way a greater number of people will be able to benefit. But especially in the beginning the states will have to give access to resources and means so that Mexican and Peruvian companies can become more competitive.

It is important that Mexico and the European Union adapt and modify the free trade agreement according to the real needs of the Mexican community

and that more benefits for Latin America and its economy can be generated. In this dialogue it is fundamental to give attention to the interests and concerns of the civil community and that the free trade agreement leads to the creation and development of new poles of development for Mexico and Latin America so that its people can benefit more from these agreements.

Peru and Mexico should not lose the opportunity to interact in such an important market. However, they should not concentrate on only being an exporter of primary material (mainly combustibles and mining products). They should try to invest and to improve the sectors that need to be more developed. Obviously the success of the products of a country does not only depend on the product but also on the market it is entering into and the institution and companies of these countries. For this reason subjects such as competence have to be considered by the parties of the free trade agreement just as well as the industrial and technological development of the country where the products are coming from.

On the other hand the European Union has found two strong partners in the Latin American region that continue to grow constantly and that have taken the opportunity to establish a cooperation between them and the European Union. The EU, Mexico and Peru should benefit from this ties and all parties should continue to promote trade, innovation, transfer of technology, etc.

Additionally this agreement presents an excellent opportunity to promote European values such as the protection of the fundamental rights, sustainable growth, respect for the environment, etc. These subjects are important aspects of the European Community and should be promoted and be made an important part of the free trade agreements.

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COOPERATION VS. COMPETITION IN CENTRAL ASIA

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Abstract

The present study highlights the cooperation-competition ratio in the Central Asia region aiming at maintaining a force balance between Russia and China – as main state actors of the Shanghai Cooperation Organization (SCO), and avoiding the dominance of a state over the other member states of the Organization.

Our paper attempts to identify the theoretical arguments that might render a better insight in this organization as a framework meant to mutually balance influence between Russia and China, with the purpose of reciprocally monitoring and limiting their power in a region considered the core of SCO – from a geographical point of view and from the point of view of the two powers' interest.

On the other hand, we should take into account that promoting multipolarity in the global politics is a common interest of China and Russia; both countries started to exclude, to various extents, the Western powers' interests in Central Asia.

Keywords: *regional cooperation and competition, mutual balance, multipolarity, Central Asia, Shanghai Cooperation Organization.*

1. Introduction

In the specialized literature concerning the analysis of the Shanghai Cooperation Organization, studies can be divided according to the identified goals and internal mechanisms based on which the organization is governed. Therefore, the Shanghai Cooperation Organization was described either as the symbol for detente in the relations between Russia and China or as a form of cooperation, aiming at both maintaining equilibrium of power between Russia and China in the region and avoiding the dominance of one country over the others; it was frequently referred to as an anti-American alliance. There are mainly four perspectives upon the Shanghai Cooperation Organization: it represents an expression of regional collaboration aiming at countering terrorism (and subsequently extremism and separatism, which generate the "three forces of the evil" stated in its documents), a mechanism used to restore (normalize) the Sino-Russian relations, counterbalance the United States and determine mutual balance between Russia and China.

None of these theses typify an exhaustive approach of the emergence and further development of the SCO. The main reasons concern the lack of a systematic approach of the organization, the lack of more precise information regarding its activities and also precarious consistency of proofs advanced to sustain one of the theses.

2. SCO, an expression of...

...regional cooperation against terror

One of the perspectives regarding the Shanghai Cooperation Organization conceives that the goal and motivation behind its foundation are to provide a framework for the regional cooperation against terrorism in Central Asia. From this point of view, the central pillar in the development of the Shanghai Cooperation Organization consists of the necessity to forestall the intensification of terrorist activities that threaten the regional stability and security. For example, Richard Weitz highlights the common view that Russia, China and the other four member states from Central Asia share regarding the Islamic terrorist - separatist groups – these are currently considered one of the most serious security threat, carrying the potential to destabilize the entire region of Central Asia[1]. The same point of view is shared also by Subodh Atal[2], who vividly depicted the fear of Chinese leaders of a possible Islamic rise in the region Xinjiang in the North-East of China, whereas Russia is rather disturbed by the challenges posed by the Chechen separatists. Moreover, the governments of the other four SCO member states from Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan) face, at different levels, the problems posed by Islamic separatist groups.

Furthermore, the Russian expert Alexander Lukin[3] shows that the region of Central Asia became "aware" of the threats rendered by the international terrorism of the late '90s, before the terrorist attacks

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[1] Richard Weitz, *Terrorism in Eurasia: Enhancing the Multilateral Response*, China and Eurasia Forum Quarterly, Volume 4, No. 2, 2006, accessed January 14, 2008. http://www.silkroadstudies.org/new/docs/CEF/Quarterly/May_2006/Weitz.pdf.

[2] Subodh Atal, *The new great game*, The National Interest, Fall 2005, accessed April, 9, 2008. http://findarticles.com/p/articles/mi_m2751/is_81/ai_n15753423/pg_5

[3] Alexander Lukin, *The Shanghai Cooperation Organization: What Next?*, Russia in Global Affairs, Nr. 2, July-September 2007, accessed May 17, 2008. http://eng.globalaffairs.ru/numbers/20/1135.html

from 09.11.2001, and thus the countries cooperate with the view of enhancing mutual solutions of counteracting Islamic terrorism and separatism, this being considered the main cooperation domain in the field of regional security[4].

Eugene Rumer[5] states that the interest of Russia in SCO lays in the „obvious «maliciousness» of Islamic radicalism", and that for the countries in Central Asia it is „clear the advantage of having two close allies in their own fight against Islamic supporters in the United Nations (UN) Security Council – Russia and China".

...restoring (normalizing) the Sino-Russian relations

Several analysts support the idea that SCO was founded in order to facilitate the normalization of the Sino-Russian relations. From this point of view, SCO can be considered the Central-Asian version of the Organization for Security and Co-operation in Europe (OSCE) and a symbol of detente between the main players of the organization. For example, this is the view of N. Norling and N. Swanstrőm, who conceived that "Shanghai Cooperation Organization was very successful in creating a climate of trust between member states by directly involving them in the process of preventing conflicts"[6]. Furthermore, the two experts added that strengthening the trust generated substantial and efficient effects. They also emphasized the lack of effective military joint actions in order to conclude that the cooperation did not exceed the normalization framework and that the immediate success of SCO was due to the modification of the common norms, shared interests and "progressive approach" [7] that led to arms reduction in the region. Nevertheless, they mentioned and elaborated on the economic collaboration between 1998 and 1999, which also had a series of positive consequences, but not reliant enough to tackle the arising conflicts, to fight against the militant organizations or to approach the disputes over the borders. For this reason, the intensification and institutionalization of cooperation, under the aegis of Shanghai Cooperation Organization, was strongly required.

In the same manner, Richard Weitz demonstrated that the founding of SCO represented an institutionalized expression of the Russian and Chinese common interests in managing the insecurity from Central Asia, a need focused on "strengthening trust by imposing restrictions upon military deployment".

...Counter-balancing the United States of America

This approach can be found in the work of Sun Zhuangzhi, who considers that „Russia and the Central-Asian countries would want to join China in a balance of power concerning the USA, and this would directly serve the interests of the Organisation"[8].

In the same manner, Subodh Atal mentions that the defense policy that China pursues aims at „reaching the geopolitical goals through multilateral dialogue and cooperation, preventing this way the emergence of American unipolarity"[9]. If this thesis proved to be valid, SCO would bear the most profound implications, not only for the regional and international security, as it would represent the beginning of a new multipolar order, but also for its impact upon the theory regarding the balance of power, whose expectations seem to be argued against by the last two decades of unipolarity.

...mutual balancing between Russia and China

From this point of view, Shanghai Cooperation Organization should be considered a framework in which the mutual balance of influence between Russia and China develops. In other words, Russia and China created a security organization with the view of monitoring and mutually limiting their power and influence, in order to avoid the possibility of a country to become more dominant than the other.

This view over SCO is, for instance, also promoted by the foreign policy expert Subodh Atal. As a supporter of the regional cooperation against terrorism thesis, he noticed that certain voices from Russia manifested anxiety when it came to the possibility that the power and superiority of China would increase, insofar as to predict the likelihood of transforming Russia into a vassal[10]. Moreover, it warns about the fact that Russia initiated proceedings to introduce India within SCO as an observer, aiming at balancing the Chinese influence, whereas China at its turn insisted that Pakistan would be included in the

[4] Some events are already well-known: the war of Russia against the Chechen separatists; the civil war in Tajikistan supported by the radical Islamic opposition; the terrorist activities of extremist groups advocating for the autonomy of Xinjiang region and the violent clashes burst between the Tibetans and Chinese law enforcement authorities; radical Islamist migration in Kazakstan, coming from neighbouring countries; the attempt to murder the Uzbek president Islam Karimov; the problems generated by the radical groups in Kyrgyzstan etc.

[5] Eugene B. Rumer, *China, Russia and the Balance of Power in Central Asia*, Strategic Forum, No. 223, Institute for National Strategic Studies, Washington DC, November 2006, accessed December 18, 2007. http://www.ndu.edu/inss/Strforum/SF223/SF223.pdf.

[6] Nicklas Norling, Niklas Swanström, *The Shanghai Cooperation Organization, trade, and the roles of Iran, India and Pakistan*, Central Asian Survey, 26(3), September 2007, accessed March 26, 2008. http://www.silkroadstudies.org/new/docs/publications/2007/CAS-SCO.pdf.

[7] The progressive approach can be explained by the fact that the SCO member states concentrated on a limited number of problems, and as these were tackled and dealt with, the author starts referring to the compatibility of the norms/values these countries have, given the fact that they are rather weak and fear an external intervention

[8] Sun Zhuangzhi, *New and Old Regionalism: The Shanghai Cooperation Organization. and Sino-Central Asian Relations*, The Review of International Affairs, Vol. 3, No. 4, June 2004.

[9] Subodh Atal, *Op.cit.*

[10] Idem

organization in order to prevent the formation of a Russia-India alliance.

Moreover, Eugene Boris Rumer appreciates further on that this competition for regional influence and dominance between Beijing and Moscow is actually the symbol of Shanghai Cooperation Organization. Especially for China, SCO consists of a tool to replace Russia from its role of main player in Central Asia[11].

Nevertheless, we believe that each of the previously described theses is characterized by different grades of generality, generating contradictions due to the following reasons.

First of all, as far as the regional cooperation against terrorism is concerned, its plausibility diminishes if we take into consideration the fact that the United States of America, despite their wish to be offered the status of observer within the Organization, were not invited, whilst countries such as Iran, Pakistan, India and Mongol obtained it[12]. This might represent rather an insolence, as the USA, Russia, China and the central-Asian member states of SCO already agreed on the necessity of fighting against international terrorism. Moreover, as the former American Secretary of Defense, Donald Rumsfeld, remarked, it is rather intriguing that Iran, a country well-known for the support provided to international terrorism, was invited as the main observer within an organization whose paramount goal is to eradicate terrorism.

Secondly, regarding the thesis of detente, this has undoubtedly a descriptive character, taking into consideration the sustained efforts made by China and Russia in order to solve the border dispute and to reduce the military tensions from the border line. The detente began during the '80s and intensified between 1989 and 1996. The objectives established – facilitating the process of drawing the borders, reducing the troops and strengthening power – were mainly accomplished the moment Shanghai 5 was created, in 1996. Hence, a treaty regarding the troop reduction was signed in 1997, and the border dispute was almost entirely solved by the year 1999 (except for Tajikistan, for which an additional agreement was signed in 2002). Thus, the theory of detente is valid when describing the normalization of the Sino-Russian relations, but it does not offer a plausible explanation of the reason why the SCO was founded and how it facilitated the whole process of detente.

Thirdly, a few objections were elaborated on the subject of balancing the United States. For example, based on several empirical data, Alexander Lukin[13] stated that „it is groundless to consider the SCO a hostile anti-American group" because in fact all the SCO member states are very interested in having an intensive economic cooperation with the United States, since they have to adapt to an economic system ruled by the United States, if they strive to develop from an economic point of view. Therefore, the creation of an anti-American alliance would contradict their economic interests. Nevertheless, a classical concept of the realism is that a problem countries face is the trade-off between the prevalence either of economic or security objectives. Moreover, it is perfectly true that more benefits can be dragged from a strategy of *bandwagoning*[14] with the unipolarity of the USA than its conterbalancing, even though the *bandwagoning* can also record side effects, putting the state at the risk of becoming a victim of the hegemon state. Another critique was advanced by Alexander Lukin, having as the main argument the content of the official documents of Shanghai Cooperation Organization. In the Declaration of Shanghai Cooperation Organization, art. 2, letter e), it is mentioned that "OCS is not intended against other states or international organizations". This argument though, does not stand given the fact that anti-American attitude can be read between the lines of the Declaration of SCO. Last but not least, the approach of the SCO as a tool for regional balancing is jeopardized by the fact that Russia provides People's Liberation Army with high performing weapons. This comes in contradiction with the fact that the two state actors are trying to maintain latent the influence and power of one over the other. Moreover, the regional balancing is in direct contradiction with the perspective of detente, the Sino-Russian relations having improved and restored a great deal compared to the period of the Cold War.

3. A possible theoretical approach

Formalizing the close relations and creating Shanghai Cooperation Organization proves the theory of structural realism, according to which the international system is anarchic[15] - an environment where there is no sovereign to hold power over the use of violence[16]. An essential characteristic of "life" in an anarchic system is that states tend to pay a great

[11] Eugene B. Rumer, *Op.cit.*
[12] Alexander Lukin, *Op.cit.*
[13] Idem
[14] More extensively in Stephen M. Walt, *Alliances; Balancing and Bandwagoning*, accessed March 13, 2015. http://www.ou.edu/uschina/texts/WaltAlliances.pdf.
[15] Anarchy represents a problem for the main actors of international politics – the states – because anarchy allows the most powerful to exploit and dominate the weakest due to the lack of an arbitrator or a global entity having the power to prevent this situation. This means that states have to rely on their own capabilities with the view of providing their own political independence and physical survival.
[16] Kenneth Waltz, *Teoria politicii internaţionale*, Iaşi, Ed. Polirom, 2006, 167-179.

deal of attention to their relative capabilities[17], because these capabilities are considered to be their key to survival – not only from a physical point of view, but also from the political perspective of maintaining the state autonomy and political independence. Given the fact that states are protected from the abuse of more powerful states based on their relative capabilities, international politics tend to become a competition for acquiring and strengthening relative power and influence. States try to improve their entire range of capabilities, in particular their economic and military power, because the use of military power by other states against them can be disastrous.

Beside all these, structural realism sustains that, in an anarchy states fear a concentration of capabilities, this being able to threaten their own position of relative power[18]. Hence, it can be concluded that counter-balancing the others' power is a predictable strategy pursued by states in general and especially by the most powerful ones, due to the fact they have a chance to defend themselves in case one of them rises over the others.

In addition to the balance of power theory, the realists believe that states can also engage in main strategies of *bandwagoning* (alignment), maintaining the current *status quo*, maximizing the revisionist power[19]. Nevertheless, balancing in the case of unipolarity is much more complicated than in the case of bipolarity or multipolarity due to the great difference between first line states and second line states, which actually make the balancing possible, but which also hit some additional "barriers". Several realists consider that the barriers of the balancing in a unipolar system make this option totally impossible[20]. Others consider that balancing is still a viable option in an international unipolar system, but not in the traditional shape that implies investing in the army, war alliances and technology transfer[21].

Balancing can have different degrees of intensity. The form with the least intense level is called *buck-passing* (passing the responsibilities), which involves the preference of a state to see another state being severely counterbalanced, but at the same time, to hope that a third state would assume the risk to do it[22]. The halfway between a *hard* balancing and *buck-passing* is the *soft* balancing. The best theory of the *soft* balancing concept belongs to Robert Pape[23]. According to him, *soft* balancing aims at opposing a leading state without involving a direct approach. On the other hand, by using *soft* balancing, the states intend to place obstacles in the way of the superior state or coalition by increasing the costs of maintaining the *status quo* through employing four methods: imposing a ban on using their territory, diplomatic movements, creation of exclusive economic alliances, providing solutions through diplomatic collaboration. Thus, the three forms of balancing can be seen as being situated on a scale, with their place determined by their intensity.

In short, we believe that the key to the emergence and evolution of Shanghai Cooperation Organization stands in a mechanism of balancing, as a response to the United States unipolarity. The theory of structural realism concedes this expectation. In the current international system, the major power from the second line has to engage in the process of counterbalancing the United States due to a change in the distribution of power that took place at the beginning of the '90s in favor of the USA, on the background of the USSR collapse, permitting the emergence of a unipolar system. Therefore, given the fact that *hard* balancing is both hard to accomplish and very risky in a unipolar world, it is more likely that states would choose a *soft* form of balancing, at least at the beginning.

4. Conclusions

In conclusion, there are three major moments in the evolution and development of SCO. First of all, the organization (Shanghai 5) was created in 1996, in the context of the USA/NATO intervention in Bosnia, NATO decision from 1995 to expand and also the consolidation of the relations between USA, Taiwan and Japan in 1996. The second milestone of the organization was found in 2001, following the war from Kosovo, the war against terror promoted by the USA in Afghanistan and the retreat of the USA from ABM Treaty. Last but not least, SCO was consolidated and it received a military dimension after the war against Iraq in 2003 and the Iranian nuclear crisis from 2006-2007. In short, the flux of events indicates the fact that SCO can be considered a reaction determined

[17] According to Waltz, the relative capabilities of a state are defined as an aggregate system compound of the size of the territory, population, military power, economic power, resources possessed, political competence and stability.

[18] The improvement of the relative position of a state is a desirable result, although states are much more concerned of a decline. This concern is due to the fact that the deterioration of the international position triggers, in the worst case scenario, a disaster and, in the best case scenario, less maneuvering space.

[19] The four main strategies, balancing, *bandwagoning*, maintaining the *status* quo and maximization of power are large categories that carry several dimensions of variations.

[20] Jeffrey W. Taliaferro, *Security Seeking under Anarchy Defensive Realism Revisited*, International Security, Volume 25, 2000/2001, accessed February 26, 2010. http://www.people.ex.ac.uk/sjenkins/Pages/undergrads/2036acro/taliaferro.pdf.

[21] Kajsa Ji Noe Oest *and* Peter Toft, *The Shanghai Cooperation Organization – a Threat or Opportunity for Europe?*, Institut for Statskundskab Københavns Universitet, Nisa, 2007, accessed June 28, 2008. http://www.sam.sdu.dk/politics/nisa/papers/oest_toft.doc.

[22] Peter Toft, John J. Mearsheimer: *An Offensive Realist Between Geopolitics & Power*, Institut for Statskundskab Københavns Universitet, Nisa, 2007, accessed May 18, 2008. http://www.ucb.br/relinter/download/AP_2003_01.pdf

[23] Robert Pape, *Soft Balancing against the United States*, International Security, Vol. 30, 2005, accessed September 21, 2009. http://belfercenter.ksg.harvard.edu/files/1019-is-30-1_final_02-pape.pdf.

by the actions of exerting and expanding the American international power and influence. More precisely, measures were adopted the moment when the United States actions affected the neighboring area of SCO member states. This cannot be interpreted as if the expansion of American influence and power were the only spring of the development of SCO, but it certainly proved to be of great importance.

On the other hand, Russia became rapidly aware of the rise of China as a key state in Central Asia, context in which the creation of SCO becoming of great use. For China, Shanghai Cooperation Organization is a real tool used for expanding the political influence in the region of Central Asia, given the fact that it had already been created a large platform of interactions with the central-Asian republics. For Russia, this platform was useful as an instrument of monitoring the actions of China and preventing the Chinese dominance. An indicator for the reluctance of Russia to rely very much on China is the fact that Moscow designed the plan of the pipeline from Far East, preferring Japan to the detriment of China, the consequence being the share of its economic dependence.

Bobo Lo, maybe the most seasoned expert in Sino-Russian relations, suggested at the end of an extensive study[24] that he dedicated to this issue: „The strategic partnership between the two countries is a complex one, characterized by ambivalence and ambiguities, in which the reality is far from the appearances." Furthermore, Lo writes that this strategic partnership is an opportunist engagement, an axis of convenience. Other authors rushed into wondering whether we deal with strong and real relations or with a „marriage of interest" [25]. The Sino-Russian relations, especially the manner in which they developed lately, deserve a more thoroughly examination from a geopolitical and geostrategic point of view.

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[25] Hélène Carrère d'Encausse, *U.R.S.S. a murit, trăiască Rusia!,* București, Ed. Artemis, 2010, 119.

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TO BE IS NOT-TO-BE: NIHILISM, IDEOLOGY AND THE QUESTION OF BEING IN HEIDEGGER'S POLITICAL PHILOSOPHY. PART I: BEING AND TIME

Mihai NOVAC*

Abstract

Heidegger's political preoccupations came more explicitly to light after his provisional flirtation with and subsequent rejection of Nazi ideology. Knowingly, his initial interest was far more ontological in nature. On the other hand, that doesn't mean that his Being and Time period was not rich in substantial subjacent political presuppositions and implications. The main focus of my present endeavor lies precisely therewith: basically this is an attempt at a non-esoteric conceptual reconstruction of Heidegger's philosophical path with a special interest in its political presuppositions and, maybe more importantly, implications. Its guiding thread is the relation between the question of Being (Seinsfrage), the so called Dasein (with special emphasis on the Being-towards-death/Sein zum Tode) and his notion of authenticity (Eigentlichkeit as being one's own). As such, what we are dealing with here is some sort of Heideggerian political existential analysis. Thereby I will try to provide (i) a sufficient thematization of the subjacent political stratum of his thought in Being and Time, ii) an account of his flirtation with and, especially, rejection of Nazi ideology as part of (iii) a more general critical analysis of ideological modernity as essentially conducive to nihilism (the so called forgetfulness-of-Being, in its political sense, approximately Heidegger's version of alienation). In conclusion I will try to argue for an individualistic interpretation of Heidegger's political philosophy, one which is essentially opposed to Nazi ideology (as well as to any political ideology whatsoever for that matter). This is the first part of the aforementioned endeavor, corresponding to Heidegger's Being and Time period.

Keywords: *Being (Sein), being (entity/Seiende), Nihilism, Dasein, authenticity (Eigentlichkeit), ideology.*

1. Introduction

The concept of nihilism offers a good starting point in understanding Heidegger's political philosophy. As a *formal* characterization of the corresponding phenomenon, Nietzsche's following insights suffice for now:

"2

What does nihilism mean? That the highest values devaluate themselves. The aim is lacking; *why?* finds no answer.

3

Radical nihilism is the conviction of an absolute untenability of existence when it comes to the highest values one recognizes; plus the realization that we lack the least right to posit a beyond or an in-itself of things that might be *divine* or morality incarnate. This realization is a consequence of the cultivation of *truthfulness*- thus itself a consequence of the faith in morality."[1]

As such, the basic idea behind nihilism would be that there is no *ground*, no necessarily and universally valid principle to any of our ontological, epistemological or moral claims. Noticeably, generally speaking, we could say that there are two main facets of nihilism: the first, metaphysical, the second, moral (the latter usually deriving from the former).

i) With respect to the metaphysical one, the basic claim would be that there is no principle or eternal being, underlying the perpetually changing flux of human experience. Moreover, things themselves, to which we *naturally* ascribe a more or less distinct and stable identity, are not at all as such, but only, provisorily, *appear* to be so (usually due to an inherent identity-seeking propensity of human consciousness), however actually being placed in a permanent state of flux governed by a completely chaotic bundle of impulses. In a nutshell: chaos is the basic feature of the world.

ii) Consequently, if *becoming is all there is*, thereby no eternal ground, no truth subjacent to existence as a whole, then it would appear that, in the words of Ivan Karamazov, *everything is permitted*: in the absence of God there is no immutable standard for good and evil, therefore all moral claims being historically relative and having more to do with ideology, i.e. *the self-righteousness of power*, than with a truly universal human ethics.

I will not provide here a substantial account of the emergence of nihilism in European culture. I have done that elsewhere.[2] Generally and traditionally, nihilism has been criticized for its anomic potentiality: it has been said that when/if adhering to the *general public*, i.e. becoming an actual Weltanschauung-possibility, nihilism would effect (a) the renunciation, on part of the individual, to any *higher aspiration* in

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[1] Friedrich Nietzsche, *The Will to Power*, trans. Walter Kaufmann & R.J. Hollingdale (New York : Vintage Books), 1967, pp. 9.

[2] Mihai Novac, „European Culture between Ideology and Metaphysical Voluntarism" in *European Journal of Science and Theology*, Vol. 9, Iulian Rusu (Ed.) (Iaşi: Ecozone Publishing), pp. 45-54.

favor of some sort of *Carpe diem! hedonism* embedded in a (b) Hobbesian general political Lifeworld. Knowingly, the history of the 20th century certainly does not fall short of providing substantial arguments in this respect, with the World Wars being the most notorious, however most certainly not the only, examples thereof. More to the point, as Nietzsche had already warned, 19th century positivistic optimism itself would be undermined by nihilism: if *God becomes dead* than, however secularized, truth and the entire axiological infrastructure resting on it falls along with it. A great deal of both Continental and Anglo-Saxon philosophy, in the first half of the 20th century, could be understood as an, explicit or implicit, attempt at coping with this crisis. Heidegger's philosophy itself could be interpreted as one particular endeavor in this respect, partly capitalizing on Husserl's phenomenology, on the one hand, and Nietzsche's and Kirkegaard's existential philosophies, on the other. Heidegger, however, set about from a new and rather revolutionary angle: to him, the *source and core* of the crisis, was neither epistemological, nor axiological in nature, but rather ontological. In short, its basic feature would consist in the so called *oblivion* or *fogetfulness of Being* (*Vergessenheit des Seins*) stemming from a confusion which is structurally embedded in the entire European culture and Lifeworld: the (mis)interpretation of Being (*Sein*) as entity (*Seiende*), i.e. in *lay terms*, of existence as object. This is his basic initial distinction in *Being and Time* and will consequently draw our attention for the *time-being*.

First, *entity*. For our initial purposes, suffices to say that, for Heidegger, *entity* stands for *any-thing that is*, i.e. corporal beings occupying space in the world: trees, cars, hammers and, of course, humans (in their strictly physical capacity). Provisorily, the Cartesian notion of *res extensa* would be an approximation in this respect.

Secondly (and more complicatedly), *Being*. Generally with Heidegger, I think there are three *reciprocally supervenient* meanings of the notion of Being:

i) the formal-naive connotation: the very *act of being*, i.e. of holding a more or less determinate place in the realm of the real;

ii) the *interdeterminative* connotation: the *relational background*, as I have mentioned elsewhere[3], to which a thing belongs, namely "in which (without our explicit knowing) the respective thing is embedded and which *makes it be precisely that which it is*. As such, what a thing *is*, is determined by the world to which it belongs, namely by the way it, with its specific role and function relates to other things, themselves provided with their own specific roles and functions, *in nuce* by its *Being-connection*. Any particular thing is made possible by a preexisting world which, as long as it is understood, the thing opens. Thus, the entity becomes apparent in its Being, and phenomenology, precisely as long as it is capable of bringing to light (*Aufweisung*) and legitimating (*Ausweisung*) its connection to the Being, becomes (…) ontology."[4]

iii) the existential connotation: what we (but not Heidegger) could call self-awareness, i.e. not *just being*, but being conscious thereof. In this respect, Heidegger restricts the use of the term *existence* to human's (Dasein's) mode of being, as Dasein is the only entity which *does not solely be*, but specifically maintains a constant relation to itself, i.e. permanently understands itself with respect to its own possibilities of being. As the original Latin meaning of *existentia* implies, by existing, Dasein is not just identical with itself, but is, at the same time, outside-itself, i.e. *stands forth to* and thereby *steps out of* itself. In rather Kantian terms, we could say that Dasein is both *transcendental* and (self)*transcendent*. Consequently, for Heidegger, at least during his *Being and Time* era, Dasein is the very *gate to* and *of* Being[5]. More on this later on.

As such, as stated earlier, the question of Being, i.e. *What is Being?*, correlatively *What does it mean to be?*, constitutes both the basic problem of philosophy, in the narrow sense, and the horizon of human existence, in the wide sense – basically, for Heidegger, any conceivable form of human existence (individual *lived-life*, artistic manifestation, cultural configuration etc.) represents, consciously or not, the articulation of a particular understanding of the act of being, a more or less specific answer to the question of Being if you will. And, for some reasons which we will discuss later on, this question has *fallen into forgetfulness*, has ceased to be asked, or better put *performed* and, consequently, we have lived for a very long time[6] lacking an actual preoccupation with Being – bluntly, we have lived without actually knowing it: nihilism is the consequence of this phenomenon.

In other words, according to Heidegger, the founding fathers of the European Lifeworld, i.e. those thinkers that grounded the framework of our existence as Europeans have articulated and passed down a distorted and restrictive understanding of Being, i.e. one that didn't allow the reiteration of the question of Being (which normally should be reenacted with every new cultural configuration, or individual destiny). The very categories and language of our thought and human interaction are, according to Heidegger, tributary to this traditional misinterpretation of Being which followed an ever degenerative path up to the (post)modern age – therefrom, our alienation from our

[3] Mihai Novac, "Esse in Anima: The Phenomenological Ontology of C.G. Jung" in *Applied Social Science: Science and Theology*, Michele Marsonet & Georgeta Rață (Ed.) (Newcastle : Cambridge Scholars), 2013, pp. 79-87.

[4] Idem

[5] That is, of Dasein to Being, and of Being to the world.

[6] After Plato actually.

lives and Being, namely nihilism. That is why Heidegger states that the history of European thought and culture is in fact the history of the *withdrawal of Being* (form the world).

To Heidegger, the sources of this historic distortion are to be found with the very origins of our thought, namely the ancient Greek thought and more particularly Plato. In short, the *oblivion of Being* conducive to nihilism is the gradually sublimated product of the Platonic definition of Being as *immutable presence*, i.e. as perpetually identical and unchanging. In other words, according to Heidegger, Plato's answer to the question of Being was so powerful and (apparently) *natural* that it was taken as definitive, as the only possible one, and consequently the question as such has been forgotten. However, Heidegger claims this was wrong as (i) Plato's definition itself is unsatisfactory and, more importantly, (ii) the question of Being is more important than its answer, as the former is the very driving force of human existence, both individually and culturally.

On the other hand, for Heidegger, just as for Nietzsche, nihilism is not necessarily a strictly negative, but rather an ambivalent phenomenon: on its negative side, it is true that it is conducive to the forgetfulness and negation of Being, culturally, socially and politically manifested through an *overinstrumentalization* of the world, nature and, ultimately, Dasein itself, but on its positive side, it also brings about a potential cleansing of Dasein's *existential horizon* of its deep-rooted misinterpretation of Being, thereby enabling the potential recuperation of our primordial, *abysmal-interrogative* if you will, relation to it (manifested, for example, in the thought of Parmenides and a few of the other pre-Platonic Greek philosophers). In short, for Heidegger, nihilism is the last stage of a sickness which has to be left to run its course as it brings about the death (or rather *suicide*) of an already much too distorted and crooked organism – in this case, apparently, precisely *that which kills us, makes us stronger*. More on this, later on.

As such, a very unfortunate way of reacting to nihilism would be, according to Heidegger, to see it as a recent deviation from an authentic and beneficial tradition which would then, supposedly, have to reinstated (as, for example, the conservatives, Dostoyevsky, Tolstoy and, ultimately, Husserl himself had done). As previously mentioned, the adequate way of relating to nihilism would be to understand it as a direct expression of the essence of Western tradition, thereby enabling or, actually, imposing its entire rejection and subsequent restatement of the question of Being which has been all this time precluded by it.

Knowingly, Heidegger's first (famous) confrontation with the problem of nihilism took place in his 1927 *Being and Time*, which could be generally seen as an attempt at determining the meaning of Being by an analysis of the human being (*Dasein*) in terms of temporality, that is, an understanding of the relation between Being and time by examining the way in which they coexist in (or rather *as*) Dasein. As we have seen before, the question of Being constitutes, for Heidegger, the source and ground of all *ontologies*, i.e. ways and realms of being (and Being) and, as such, of the entire human understanding and existence. Therefore, by forgetting the question, human being actually loses its ground[7] (*Grund*) and, consequently, its freedom (as Heidegger will show in his 1930 lecture on *The Essence of Human Freedom*). As a consequence thereof, human being becomes reduced to a post-modern version of what Nietzsche called in his *Thus Spoke Zarathustra*, *the last man* (*der letzte Mensch*), the antithetical alternative of the *Übermensch*, a mere *calculating animal* governed solely by pleasure seeking and self-preservation and living the gregarious and collectively predetermined life of the *hive*.

However, how did the question of Being come to be forgotten? Generally, we could say that Heidegger gives, along his work, three, progressively fundamental, answers to this question, which I have called, (i) the cultural, (ii) the existential and (iii) the ontological. As yet, we have not discussed all the concepts necessary for an in-depth analysis of the three; however, we have enough for a quick summative preview. A propaedeutic observation relating to the first two *layers* of the forgetfulness of Being: Being came to be forgotten in a very unusual way, that is precisely by being generally taken as self-evident – in other words, precisely because everyone thinks to know, from the very beginning, what *being/Being* means, nobody bothers asking anymore. That is because almost everybody understands this question as *What does it mean for something, or rather, some-thing to be?*, Being is from the very start, from the very initial preconscious formulation of the question, understood as belonging to and being defined by *Thingness* (*Dinglichkeit*). On the other hand, this is not necessarily a self-evident equivalence, i.e. the proposition stating the identity between Being and Thingness is not apodictic. Hence, before stating it, one should examine, first, its source and, then, its comprehensiveness, i.e. whether Thingness is all there is to Being, if you will.

As previously stated, according to Heidegger, the sources of this *reification* of Being displayed by our (post)modern world are threefold: (i) cultural, thereby involving some specific aspect of European culture, (ii) existential, thereby involving some aspect of Dasein and (iii) ontological, thereby involving some peculiarity of Being as such.

This is a personal summative reconstruction of Heidegger's view on the matter. As with any reconstruction, this is bound to involve a certain

[7] Which in fact, as we will see later on, ultimately reveals itself as an abyss (*Abgrund*).

degree of rearrangement and reformulation of Heidegger's arguments. However, while doing so, I think I have remained true to the spirit of his work.

As I have already pointed out, in his understanding, the (i) cultural or intellectual origins of the reification of Being can be traced back to Plato as he originally articulated and handed down a distorted, i.e. reciprocally exclusive, understanding of the relation between Being and time. More explicitly, with his notion of Idea (*ἰδέα*) Plato introduced a definition of being as perpetual presence, which by its unchanging and transcendent character stood in complete opposition to the temporal realm. According to this definition *everything that really is*, has to remain so, i.e. *precisely the way it is*, throughout eternity. Consequently, everything that at some point or another *ceases to be the way it once was*, i.e. disappears, fades or changes, displays a certain degree of participation to the opposing side of Being, i.e. *nothingness* and thereby belongs to Being only in a secondary, provisory and *apparent* manner. As such, from this perspective, physical entities occupied an intermediary realm between Being and nothingness: in opposition to the latter, they *were for some time*, in opposition to the former, *only for some time*. In a nutshell, starting with Plato, the dichotomy between Being and time became the grounding distinction of all European thought.

However, from this perspective, within the temporal realm, some entities remained identical for a longer time than others, this meaning that they participated to Being to a higher degree, than the others did. Thereby emerged a subjacent hierarchy of entities, depending on their degree of participation to Being, displayed in their perdurance (i.e. the amount of time they occupied) – Aristotle's system of categories and its latter scholastic version, the Great Chain of Being, are among its most influential forms. Within this hierarchy, human beings themselves occupied a place which was mostly inferior to other physical entities – as it was obvious that many of the latter endured a much longer time than humans did. As such, in order to overcome its transitory character and adhere to the higher positions of this ontological hierarchy, human consciousness progressively sought to emulate physical objects, i.e. tried to *make itself in their image*. Modern positivism, socially engendered by the industrial ideologies (be it capitalist, be it communist or be it national socialist), is, in Heidegger's view, the apex of this historical tendency towards the reification of consciousness which brought about the alienation of Dasein from its specific way of *Being* and, thereby, nihilism. In a nutshell, an improper understanding of Being led to an improper self-understanding of Dasein itself: paradoxically, in its attempt to avoid nothingness, Dasein has lost itself. However, according to Heidegger, we shouldn't hold Plato solely responsible for this fact, as it was not by coincidence that precisely his reifying view was preferred over the other, more *abysmal* ones (as displayed by Parmenides, Heraclitus or the Greek tragedians).

And this brings us up to the (ii) existential source of the forgetfulness of Being. Basically Heidegger, at least in his *Being and Time* era, tried to understand the forgetfulness of Being as a consequence of the flight of Dasein from the face of death, specifically felt as *Angst*. As such, individual Dasein, faced with the perspective of its own, future but imminent, demise, seeks refuge in a collective and impersonal identity (*das Man* – the *They*/*One*) which would, supposedly, grant it the possibility of an *eternal endurance* (as the community doesn't die, only the individual does). Moreover, in the (post)modern world, as a result of the previously mentioned process of reification, this collective identity is built by analogy to the objectual world. Consequently, on the level of the One, Dasein loses both its personal and its existential characters. Considering that more than half of *Being and Time* is dedicated to this *collectivist self-mystification* of Dasein, we will take our time with it.

First of all, noticeably, when referring to human beings, Heidegger avoids the use of traditional terms such as subject, ego, consciousness, self-awareness and so on, preferring some peculiar notions of his own making[8] such as *Dasein*, in his *Being and Time* period, or *mortals*, in his later works. Without going into much detail, this is because, on the one hand, he considered the subject-object dichotomy along with all its derivative terminology (consciousness, awareness, subjectivity and so on) to be already tainted with the aforementioned reification process and, on the other, he thought to have found another, more fundamental trait of human existence than the *ego cogito*: the *Da-sein*, i.e. the very act of *finding oneself to be already here*, i.e. in a *world*. Consequently, to Heidegger, the *being-in-the-world* (*in-der-Welt-Sein*) constitutes the primordial and irreducible experience of human existence and not the *self-thinking away from the world* as Descartes' notion of *ego* implies. In other words, to Heidegger, these traditional notions already *subimply* an *original divisiveness* between the so called consciousness, on the one hand, the world, on the other, which, in our basic experience of Being, is nowhere to be found. More generally speaking, what we are dealing with in Heidegger's case is, as I have mentioned elsewhere, "that double movement specific to phenomenology, i.e. of removal of *consciousness* from under the exclusive claim of the *subject*, on the one hand, of the *world* from under that of the *object*, on the other, and of placing them in an ontological relation of concrescence in which the two terms, *consciousness* and *world*, constitute reciprocal a priori preconditions of possibility."[9]

[8] At least in this sense.
[9] Idem 3.

For all these reasons Heidegger prefers the term Dasein which he, most notoriously (and obscurely) characterizes as "ahead-of-itself-Being-already-in (the world) as Being-alongside entities which we encounter (within-the-world)." [10] However obscure, this is his most famous and comprehensive definition of Dasein[11] and we will work on it. On its terms, there are three basic existential features (*Existentials*) of Dasein: existentiality (*Existentialität*) - *ahead-of-itself*, facticity (*Faktizität*) - *Being-already-in the world* and falling (*Verfallen*) - *Being-alongside entities which we encounter within-the-world*.

I think the best way of understanding existentiality is, as I have already done, to refer to the very etymology of the term, in Latin *existere* meaning quite literally *standing out*. But *standing out of what* and *to whom*? Quite simply put, *out of itself* and *to itself*. In other words, to Heidegger, Dasein is the only entity which, as different from all the others, manifests its act of being not just by *inertly filling up space*, if you will, but also by *constantly relating to itself*, that is, its way of Being is not so much ontic as *onto-logical* (i.e. has knowledge thereof) and thereby gains access to, what we could call, the *realm of the possible*, as different from the mere ontic entities which are constrained to remain within the boundaries of the *actual*. Without going into much detail, this implies two basic things: (a) that Dasein is originally divided with respect to itself (*nothingness is at the heart of Dasein's Being*, if you will) and (b) that Dasein has no determinate *given* nature or essence by which it is, but, quite simply, *is*. Heidegger expresses this by saying that Dasein *is not*, but *has to be* (*hat zu sein*). Moreover, as we will see later on when discussing falling, not even individuality is a given feature of Dasein, but on the contrary, it has to be gained and, as such, it can always be lost.

As such, existentiality corresponds to the fact that Dasein *stands out of itself by being ahead-of-itself*. This is what Heidegger calls *projection* (*Entwurf*) which is the basic existential governing Dasein's existentiality. How does it work? Basically, the answer would be that Dasein, by existing outside of itself in the realm of the possible, always understands itself with respect to the array of possibilities, i.e. *existential scenarios* or more concretely life paths, which present themselves. In this process, it understands these possibilities (or, better put, itself through these possibilities) by projecting itself along them, i.e. by anticipating its own becoming if following one or another of these existential scenarios. And I think *anticipation* is the best word for describing this, as this is precisely where (or better put, when) this process takes place: in the future! Consequently, in his view, the future is not some expected present state, that is, some *present which hasn't come yet*, but the transcendental source of Dasein's present self-understanding. To use a non-Heideggerian terminology, if self-awareness means self-reflection, then the future is *the place from which Dasein reflects upon itself in order to become aware of itself*. Heidegger partly refers to the German etymology of the term in order to justify his interpretation: the German word for future is *Zukunft*, that is *zu-Kunft*, literally *coming to*, suggesting that the future, properly understood, is *the place from which Dasein comes towards itself*. As such, in Heidegger's view, which is radically different from most of the previous present-oriented philosophies[12], Dasein is a specifically futural entity: "Dasein is its past in the way of its own Being, which, to put it roughly, 'historizes' out of its future on each occasion."[13]

II Now for the second basic existential, *facticity*. We have previously seen that, according to Heidegger, Dasein understands itself through the various possibilities which present themselves to it. Where do these possibilities come from? Simply put, from the *world* to which the respective Dasein belongs, or, to put it in a more Heideggerian language, into which it is *thrown* (*geworfen*). This, again, would amount to three basic things: (a) that Dasein, as existing, is not the source of the possibilities through which it understands itself; (b) that these possibilities are not mere theoretical potentialities, but actual shapes Dasein's existence is bound to take and which consequently matter to it (or better put him/her); (c) that not all possibilities are *compossible*, that is, Dasein cannot realize all of them together and consequently has to choose among them.

One of the several relevant passages in this respect is the following: "As existent, it (*Dasein*) never comes back behind its thrownness in such a way that it might first release this 'that-it-is-and-has-to-be' from its Being-its-Self and lead it into the 'there'. (…) The Self, which as such has to lay the basis for itself, can *never get* that basis into its power; and yet, as existing, it must take over Being-a-basis. To be its own thrown basis is that potentiality-for-Being which is the issue for care."[14] Simply put, Dasein has the possibility to choose neither the circumstances of its birth (its *Da* if you will), nor its death (i.e. the fact that it will, eventually, at some point, die) but only to opt for one or another of the limited array of alternatives which present themselves between these two points. Birth and death are the cornerstones of Dasein's freedom, if you will, and, ontologically speaking, one of the ways in which nothingness belongs to Dasein's Being. The other instance in which nothingness becomes part of

[10] Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (Oxford : Basil Blackwell), 1962, pp. 293/par. 249.
[11] As *Care*.
[12] With the possible exception of Nietzsche.
[13] Idem 10 pp. 41/par. 20.
[14] Idem Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (Oxford : Basil Blackwell), 1962, pp. 330-331/par. 284-285.

its Being presents itself in the context of choosing: by exercising its freedom, Dasein has to choose among several alternatives and consequently, with every actual choice it makes, Dasein rejects, *un-makes* all its alternative counterparts.

"In being a basis – that is, in existing as thrown – Dasen constantly lags behind its possibilities. It is never existent *before* its basis, but only *from* it and *as this basis*. Thus 'Being-a-basis' means never to have power over one's ownmost Being from the ground up. This 'not' belongs to the existential meaning of thrownness. It itself, being a basis, is a nullity of itself.(…) Freedom, however, is only in the choice of one possibility – that is, in tolerating one's not having chosen the others and one's not being able to choose them."[15] Heidegger wraps all this up in the concept of *ontological guilt* (*Schuld*) which constitutes Dasein's primordial and ubiquitous *burden*. Before getting to the third existential, I would ask you to keep in mind the fact that, in Heideggers view, Dasein's *freedom as choice* stems from the permeability of its Being to nothingness and can only manifest itself as such, i.e. as *nullification of the un-chosen alternatives*, if you will. Anticipatively, I should say that only by facing death does Dasein become actually capable of choosing and thereby what we would call an individual.

III And now, for *falling* (*Verfallen*). As mentioned earlier, in Heidegger's view, and contrary to many of the traditional thinkers', Dasein does not necessarily exist as an individual: it is neither born as such, nor does it necessarily become one along its existence; in fact, on his terms, most of us don't ever become one and, moreover, all of those few who do, are always susceptible of losing this status. In short, for Heidegger, individuality is a human capacity which must be gained and maintained through constant effort if it is to be preserved. Then *where* and *as what* does Dasein exist as long as it is not an individual? Quite predictably, within the previously mentioned object-like collective identity called *the One* (das *Man*; frequently also translated as '*the they'*). Synthetically, we could say, in a non-Heideggerian language, that the One (*"they"*) represents the collective impersonal soil (thereby implying both inherited instinctual and socially-constructed behavioral and semantic patterns) of any individual ontogenesis, one which, however, many do not ever leave. We shouldn't hold Heidegger to be an elitist – he doesn't necessarily regard the One/"they" in a derogatory way. Quite the contrary, he considers it one of the essential preconditions of any Dasein ontogenesis (be it individualistic or not) and one of the main environments for the emergence and development of its relation to Being. Anything related to the *semantic structure of the world* (language, rational thought, affective patterns, practical skills and so on) is acquired by Dasein through its existence on this level. Heidegger just claims that, at some point, Dasein's exaggerated belonging to it precludes its potential individual becoming.[16] The One's way of being mainly becomes manifest on the level of the so called *everydayness* (*Alltäglichkeit*) which could be seen as some sort of socio-cultural matrix comprising both the average model of humanity as projected by the culture in cause and the normative expectations (moral and practical) derived therefrom. The proper way of handling a hammer, the occasions on which it is proper to offer flowers, imperatives such as *One should not throw up in public!* are, I think, good examples thereof. *Who shouldn't throw up in public? Everybody but no one in particular* – this is precisely the meaning Heidegger ascribes to the *One-Self*. To put it in his words: "Everyone is the other, and no one is himself. The 'they', which supplies the answer to the question of the 'who' of everyday Dasein, is the 'nobody' to whom every Dasein has already surrendered itself in Being-among-one-another [Untereinandersein]."[17]

As mentioned earlier, a substantial part of Dasein's everydayness consists in its practical skills and activities. Without any risk of overstating, we could say that, in Heidegger's view, on the level of everydayness, the world itself is a giant structure of interconnected meanings, functions and uses which predetermine the identity of any given entity: a hammer, for example, has as destination (*Wohin*) the hammering of nails in order to build houses and shelters for Dasein. In order to properly accomplish this task it has a certain instrumental structure (i.e. shape, weight, resistance and so on) which it otherwise wouldn't have had. On the other hand, it also has an origin (*Woher*) which connects it in a specific way to other things: it has a handle, made out of wood, found in trees, growing in forests. There are some particular nuances but, generally speaking, we could say that nature is progressively assimilated into the *pragmatic meaningful structure* Dasein calls *the world*, as the basic provider of raw material. However interesting, I will not follow here the problem of Dasein's relation to nature, as my present interest lies elsewhere.

As such, the world, on the level of Dasein's everydayness, is a systematic bundle of pragmatic relations and practices. How does Dasein relate to itself, i.e. *exist*, along such a practice? As anyone who was ever involved in any kind of determinate practical activity I think would agree, Dasein relates to itself along such a practice precisely by *losing its sight of itself* and concentrating it almost entirely on the task *at hand* – while practically engaged, *Dasein exists along the present task* (thereby ignoring its past identity, or its future becoming and so on). Consequently, on the level of everydayness, Dasein exists in complete forgetfulness of itself (and the future) and total

[15] Idem.

[16] Conceptually we could see it as some sort of Heideggerian crossbreed between Nietzsche's *existential horizon*, Dilthey's *Weltanschauung* and, maybe, Mannheim's *ideology* (in its maximal sense).

[17] Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (Oxford : Basil Blackwell), 1962, pp.166/par.128.

receptivity to the practices at-hand (and the present). We could say that on this level, Dasein's existence is disseminated among the various practical contexts that make up its daily routine. This, again, is a normal component of Dasein's existence, but one that, if exaggerated, causes Dasein to lose *its grip on itself*, if you will, to become inauthentic (*uneigentlich*). Observation: the German term *Eigentlichkeit* is usually translated as *authenticity*. However, even if its semantic sphere most certainly includes this connotation (i.e. *genuineness*), its primordial, etymological meaning would amount to something like *being-one's-own*. This is also Heidegger's original way of using this concept.

As such, why and in what way does Dasein become inauthentic when exaggeratedly belonging to the One's everydayness? Basically, the answer would be that within this existential sphere things are *already given as such*, i.e. they are more or less univocally and customarily pre-determined (with respect to the existence of any personal Dasein). Hammers are to be handled *in such and such* a way and in no other, flowers are to be offered on *such and such* occasions and in *such and such* ways and in no other, throwing up in public is to be avoided because that isn't the proper way one behaves in public and so on. Again, in Heideggers view, there is nothing wrong with this kind of collective procedural norms and practices as such. The problem arises when they fully take over Dasein's existential sphere and that is because by their predetermined and compulsory character they constrain Dasein's existence and very self-awareness to *the realm of the actual* which is the domain of non-Dasein entities, that is of inert objects, Dasein thereby losing its specific character as a *being of the possible*. In short, under the spell of the One, Dasein's Self *disowns itself*, particularly, it becomes unable to choose.

On the other hand, this is not viewed by Heidegger as an *unnatural* process but, *au contraire*, as I have already alluded earlier on, as the result of one of Dasein's most natural tendencies: that of avoiding its own finitude. In other words, precisely by naturally fleeing away from the existential angst induced by the perspective of its own, future and unavoidable, death, Dasein takes refuge in this collective and impersonal form of identity which, supposedly, grants it some sort of immortality but at the cost of its, shall we say, *personhood*. Moreover, its relation to time is correspondingly modified: in this state, Dasein loses track of its future, as the future is the *time of death*, and concentrates exclusively on the present, as the time of its actual existence. Consequently, it reinterprets time as a perpetual present, i.e. the past as a *present that is no longer*, the present as a *presently present present* and the future as a *present that is to come*. According to Heidegger, the entire history of European thought and culture, at least since Plato, is based on such an interpretation of time: the very notion of objective infinite time as developed within the mathematical sciences of nature and progressively extended over the entire world of Dasein is one of the most fundamental expressions of this process. As we will see later on, in his view, all modern industrial ideologies are, in fact, alternative avatars of this reification by which Dasein reinterprets itself as an object, precisely in order to escape its finitude. In a nutshell, we could say that, *by avoiding death, Dasein loses its life.*

Synthetically, the flight from death causes Dasein to restrain from projecting, which leads it to lose its existentiality. We could also say that given the angst caused by throwness, Dasein reacts by letting its falling take precedence over its existentiality. That is what inauthenticity basically amounts to.

That would be Dasein's permanent problem, one which however, reached its climax in the modern age, according to Heidegger. Now for the antidote. Quite obviously, if this entire alienating process is triggered by Dasein's avoidance of its own finitude, that is, of its death, any eventual solution should start from there. Basically, in Heidegger's view, Dasein's acknowledgement of its own finitude and subsequent confrontation with the existential angst caused by it, pulls Dasein out from under the spell of the One's everydayness and places it in direct relation to itself. Most significantly, by becoming aware that *death awaits it*, Dasein stops acting as if it had *all the time in the world*, that is, all the time needed to successively realize all the alternative life paths presented to it and starts actually choosing among them. To put it *temporally*, its present becomes the image of its intended future. The affective driving force behind this *existential becoming* of Dasein is the very angst it once tried to avoid: by acknowledging its participation to nothingness Dasein becomes now ready and able to exercise its freedom as nullification of the *unchosen alternatives*.

"Death is Dasein's ownmost possibility. Being towards this possibility discloses to Dasein its ownmost potentiality-for-Being in which its very Being is the issue. Here it can become manifest to Dasein that in this distinctive possibility of its own self, it has been wrenched away from the 'they'. (…) The ownmost possibility is non-relational. Anticipation allows Dasein to understand that the potentiality-for-being, in which its ownmost Being is an issue, must be taken over by Dasein alone. Death does not just 'belong' to one's own Dasein in an undifferentiated way; death lays claim to it as an individual Dasein. The non-relational character of death, as understood in anticipation, individualizes Dasein down to itself. This individualizing is a way in which the 'there' is disclosed for existence. It makes manifest that all Being-alongside the things with which we concern ourselves, and all Being-with

others, will fail us when our ownmost potentiality-for-Being is the issue."[18]

Basically, Heidegger highlights four, *equiprimordial*, features of death:

i) its futurity – death is always a problem for the future, never for the present (as once it comes Dasein is no longer). Therefore death is, for each Dasein, a potential, never an actual, reality.

ii) its inexorability – despite its essentially potential character, death is unavoidable, i.e. it is a *necessary potentiality*, if you will.

iii) its *ownness* – each Dasein owes at least one death to Being, that is *its own*. By that, Heidegger concludes on the *non-relational* character of death and, consequently, of any form of existence potentially (but necessarily) ended by it. In other words, in front of death, Dasein cannot be *represented*, i.e. no one else can take the place of any Dasein in front of its own death.

iv) its ubiquity – potentially speaking, death can strike at any moment, in principle, there is no specifically *scheduled* time for its arrival and, as such, each actual moment of being is, for Dasein, a potential moment of *unbeing*.

Heidegger wraps al this up in the concept of *being-towards-death* (*Sein zum Tode*) the conscious acknowledgement of which puts Dasein in touch with its own specific and personal existence. In other words, Dasein has to constantly live its life under the shadow of death if it is to shape its existence in the image of its own project (*Entwurf*) for itself, i.e. become its own authentic (*eigentlich*) Self. Thereby, Dasein stops wasting its time in the perpetual dissemination of everydayness and makes use of each and every moment in the articulation of the existential project it has designed for itself: each present moment becomes a *moment of vision* (*Augenblick*) of its future and *personally intended* becoming. *In nuce*, in the state of authenticity, the future Dasein (instead of the present One/"they") dictates to the present Dasein what to do.

Does the authenticity of Dasein allow for any form of coexistence? I think the answer is 'yes' and one of the key remarks in this respect is to be found in subchapter 26 in *Being and Time* entitled "The Dasein-with of Others and Everyday Being-with":

"With regard to its positive modes, solicitude[19] has two extreme possibilities. It can, as it were, take away 'care' from the Other and put itself in his position in concern: it can leap in (*einspringen*) for him. This kind of solicitude takes over for the Other that with which he is to concern himself. The Other is thus thrown out of his position; he steps back so that afterwards, when the matter has been attended to, he can either take it over as something finished and at his disposal, or disburden himself of it completely. In such solicitude the Other can become one who is dominated and dependent, even if this domination is a tacit one and remains hidden from him. This kind of solicitude, which leaps in and takes away 'care', is to a large extend determinative for Being with one another, and pertains for the most part to our concern with the ready-to-hand.[20]

In contrast to this, there is also the possibility of a kind of solicitude which does not so much leap in for the Other as leap ahead of him (*ihm vorausspringt*) in his existential potentiality-for-Being, not in order to take away his 'care' but rather to give it back to him authentically as such for the first time. This kind of solicitude pertains essentially to authentic care – that is, to the existence of the Other, not to a 'what' with which he is concerned; it helps the Other to become transparent to himself in his care and to become free for it."[21]

This is maybe the closest Heidegger has ever got to Kant's *categorical imperative*. Basically, what he claims here is that Dasein can relate to the Other in two alternative fundamental ways: as an inert (object-like) entity or as an existential being (i.e. endowed with what we would call self-awareness). In the former alternative, the Other is denied his/her *ownness* (that is, more or less, its *autonomy*), in the latter, quite the contrary, by help of Dasein, the Other is *potentiated* in his/her *ownness*.

More explicitly, in both cases, Dasein *meets the Other* as an object of care (*Sorge*). Why care? In short, because as long as the Other affects, in one way or another, Dasein's existence to the point of being noticed by it (in one way or another), than the Other must matter to Dasein (again, in one way or another). However, it depends on Dasein to decide on the kind of care the Other is entitled to. In Heidegger's terms, it is up to Dasein to choose the (sub)existentials of care by which to relate to the Other: either as an object of *preoccupation/concern* (*Besorgen*), which is the realm of the instrumental *inert* entities, or as an object of solicitude (*Fürsorge*), which is the realm of Dasein-like, i.e. existential entities. Most clearly, in the former alternative, the Other is denied its existentiality, its Being if you will, and treated as a tool. As the previous passage would suggest, this does not necessarily imply abusiveness on the part of Dasein, which is however even more *concerning* as even some of the positive, shall we say *helpful*, ways of Dasein's relating to the Other can lead to the latter's *disownment*. Why? Basically because in *caring* for the Other, Dasein may be tempted in helping him/her by taking upon itself the Other's *burden*, i.e. his/her existence if you will, fact which is inauthentic because, (a) it is impossible (as no Dasein can represent the Other in front of his/her own death and, consequently, in front of his/her own

[18] Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (Oxford : Basil Blackwell), 1962, pp.308/par. 263.

[19] Solicitude (*Fürsorge*) is the basic (sub)existential of 'care' responsible for Dasein's relationship with the Other, as different from *Concern/Preoccupation* (*Besorgen*) which guides Dasein's relation to all instrumental entities.

[20] I.e. instrumental entities.

[21] Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (Oxford : Basil Blackwell), 1962, pp. 158-159/par. 122.

existence as well) and (b) because it treats the Other as an inert, *handleable* entity. In short, this form of disownment amounts to Dasein's complacency in the Other's impotency which causes the Other to try to surrender its existence to Dasein (which is impossible and self-denying). Most extremely, Dasein can act with respect to the Other as if being willing and able to take upon itself the Other's *Being-towards-death* fact which is impossible, and denies the Other's own existentiality, more concretely precludes the Other's confrontation with the Angst induced by the perspective of his/her *own* future but unavoidable death (and thereby his/her individualization). As we will see later on, this is the basic motive behind Heidegger's hostility towards the modern political ideologies.

Alternatively, Dasein can *care* for the Other by helping him/her *transparentize* him-/herself for his/her own Being-towards-death and, implicitly, for his/her existentiality and free will. As such, without going into much detail, the key to an authentic *Being-with* (*Mitsein*) lies, for Heidegger, in the acknowledgement of the non-relational character of the *Being-towards-death* of each Dasein: by not avoiding it (and correspondingly not accepting the Other's willingness to avoid it), Dasein takes hold of its own projective nature, if you will, consequently of its existentiality and, at the same time, lets the Other free to do so on its own account. Moreover, the only way Dasein can help the Other on this path to individualization is by serving as an example of conscious assumption of the Being-towards-death (probably, not unlike Socrates did for Plato). As mentioned earlier, this pulls out Dasein's relation to the Other from under the spell of the One and lets the Other be as he/she chooses. The whole of this achievement of authenticity is what Heidegger calls *resoluteness* (*Entschlossenheit*):

"In the light of the 'for-the-sake-of-which' of one's self-chosen potentiality-for-Being, resolute Dasein frees itself for its world. Dasein's resoluteness towards itself is what first makes it possible to let the Others who are with it 'be' in their ownmost potentiality-for-Being, and to co-disclose this potentiality in the solicitude which leaps forth and liberates. When Dasein is resolute, it can become the 'conscience' of the Others. Only by authentically Being-their-Selves in resoluteness can people authentically be with one another – not by ambiguous and jealous stipulations and talkative fraternizing in the 'they'(/One) and in what 'they'(/One) want to undertake."[22]

On the other hand, that would be, from a Heideggerian standpoint, precisely what modern ideologies do not do, i.e. letting both Dasein and the Other become their own individual selves. Basically, the reason for that is threefold:

i) Notwithstanding their doctrinary particularities, modern ideologies always construct a collective (and impersonal) ideological subject, that is some sort of *ideological One*, which regulates the existentiality of each and every individual Dasein adhering to it. In other words, Dasein's belonging to the ideological community is conditioned by its, more or less, total compliance with the core values and behavioral patterns on which the ideological community was built. By this, Dasein lets the ideological One dictate it its array of Being-potentialities which is, quite obviously, inauthentic.

ii) As Marx rightfully noted, *ideologies are the product of the relations of production* which are, by their very nature, instrumental and reifying. Consequently, any ideological One, including that of Marxism, would try to make Dasein in the image of the objects and relations which make up its instrumental world and, consequently, treat it as such, i.e. see its Being-potentialities as being defined by the class interests captured by the ideology in cause. In Marxian words, but from a Heideggerian perspective, precisely because class consciousness is the expression of the mode of production, it is not to be obeyed by any Dasein seeking self-individualization. This is a conclusion which can be most clearly drawn on the basis of Heidegger's thought from this period and one which will be harshly dealt with by his more *Marxian* students (as for example Sartre or Herbert Marcuse did in his *Heideggerian Marxism*).

iii) In perfect keeping with the aforementioned aspects, modern ideology avoids angst (which is the only way Dasein can achieve authenticity) by distracting, or rather, displacing Dasein's attention from *its own* mortality to the so called *quality of life*, particularly to some sort of utopian promise of biological immortality which, however tacit, all modern technological ideologies hold very dear. However, by falling prey to this false illusion of immortality, Dasein loses its will to choose on its own: it feels no compulsion to do so, given that its promised immortality would grant it the possibility of successively living all the alternative life-paths among which, in its mortal state, it would have to choose. In short, by living up to any technological ideology, Dasein exchanges *its own* mortality for a *disowned* immortality. This is an aspect which separates all modern technological ideologies from the traditional religions, given that, in the latter, however differently and intricately solved, mortality is an ever recurrent issue.

All this entitles us, I think, to view Heidegger's political position in his *Being and Time* era as some sort of *ruralist* individualistic anarchism. As with most views of this sort, it is much easier to determine what they oppose, rather than what they stand for politically. At any rate, it is rather obvious that the Heidegger from this period opposes:

i) collectivism (along with any form of *communal hegemony* over the individual self);

[22] Martin Heidegger, *Being and Time*, trans. John Macquarrie & Edward Robinson (Oxford : Basil Blackwell), 1962, pp. 344-345/par. 293.

ii) *technologism* (that is, not technology as such, but the uncritical belief that technology could and should be called upon to solve any human problem);

iii) *urbanism* (that is the belief that the city, with its specific culture and way of life constitutes the natural environment for the accomplishment of humanity – fact which sets Heidegger in opposition to both *burgeois* and proletarian alternatives);

iv) traditionalism (that is the unreflected reverence for the past as the holder of a necessarily beneficial tradition which, if lost, would have to be reinstated – which sets Heidegger in opposition to conservatism);

v) rationalist liberalism (and particularly its contemporary *metaphysical* emulation, i.e. positivism);

vi) Catholic clericalism (and its political expression, i.e. Christian democracy), along with any form of *politicized* religion;

I think all this sufficiently supports Heidegger's interpretation as an individualistic anarchist. As for the *ruralist* aspect of his position, although it will become more apparent in his later works (as his 1934 *Why Do I Stay in The Provinces?*), I think it is safe to say that it is tacitly but all-pervasively present in his *Being and Time* era as well. In short, what I mean by it is that Heidegger seems to have been more favorable, or at least less hostile, to the rural environment with its specific way of life, as it seemed to him to enable a more authentic relation to Being than the modern urban world ever could. However, we shouldn't try by this to view Heidegger as some sort of German version of Tolstoy, as he doesn't favor the rural world by virtue of some traditional collective wisdom which it would supposedly hold. Heidegger's appreciation for the rural world is of a different, maybe even opposed, nature: he favors it because it apparently holds a better outlook for the potential individualization of Dasein. The reason for that is twofold: first, because, seemingly, the rural world has remained less permeable to the reification process which, as we have seen, is very much responsible for the progressive oblivion of Being culminating in the modern industrial world and, second, because by its still non-secularized character, the rural world retains, to some extent, the perspective of individual mortality (a recurring issue in any version of Christianity and, possibly, religion in general) which potentially enables Dasein's confrontation with the angst conducive to its authenticity. *In nuce*, it is not so much that the question of Being is better answered in the rural world, but that it is better asked.

Now, for the summary: I have determined Heidegger's interpretation of modern nihilism as an all-pervasive historical, political and existential trend towards the oblivion of Being stemming from the very core premise of European Lifeworld - the confusion between Being and entity, in lay terms, the definition of Dasein (human being) as object. Following Heidegger, I have traced back the sources of this phenomenon to three basic interrelated factors: (i) the cultural, i.e. Plato's definition of Being as (perpetual) presence, (ii) the existential, i.e. the flight of Dasein from the face of death and (iii) the ontological, involving some aspect of Being as such (which I have intentionally left out of our discussions so far).

I have then concentrated on a basic analysis of Dasein in terms of existentiality, thereby trying to lay bare the *internal mechanics* of Dasein's (self-)reification. Thereupon, I have come to the conclusion that its basic form of manifestation consists in some sort of self-renunciation on part of Dasein to *its own* personal mortal existence in favor of a collective, allegedly immortal but impersonal, object-like identity Heidegger calls the One/'they' (*das Man*). Followingly, I have tried to elaborate Heideger's solution to this problem as consisting in the conscious assumption on part of Dasein of its own finitude, particularly in its lucid confrontation with its own mortality, which is the only way Dasein can achieve the will to choose. Along with Heidegger, I have called this achieved state of *ownness* authenticity (*Eigentlichkeit*). In this context, I have provided a positive answer to the question whether Dasein's authenticity is compatible with its coexistence with the Other, by trying to show that and how any authentic (that is non-reifying) inter-personal relation is based on the mutual acknowledgement of the finite character of human existence. On this basis, I have tried to sketch out a general Heideggerian critique of modern political ideologies as essentially inauthentic. The three basic reasons thereof are that (i) by their collectivism, modern ideologies preclude Dasein's potential individualization, (ii) by their *reifying instrumentalism*, they deny Dasein's existentiality, treating it as a tool and (iii) by their *immortalism* they avoid Dasein's confrontation with its own mortality, thereby lacking it of its incentive to choose. In this context, I have determined Heidegger's political position (in the *Being and Time* era) as some sort of *individualistic rural anarchism* fact which, if true, would make Heidegger's view essentially incompatible with any collectivist ideology. How could a thinking that was so individualistic have fallen victim, even if temporarily, to such an extremely collectivistic ideology as Nazism is disconcerting and troubling. However, that, along with the third (that is the ontological) reason for the oblivion of Being, will make the object of our discussion in the latter part of this endeavor.

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CONFLICT AND COOPERATION IN THE EU'S FOREIGN POLICY: THE QUEST FOR POST-LISBON COHERENCE

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Abstract

The appointment of a double-hatted High Representative of the Union for Foreign Affairs and Security Policy (HR) and the creation of the European External Action Service (EEAS) were two of the main innovations brought by the Lisbon Treaty to the European Union's external policies. While the appointment of the HR was purely political, the creation of the EEAS entailed a deep restructuring of the EU foreign policy apparatus, unveiling the fierce competition between institutions in the post-Lisbon framework. According to their mandates, the High Representative and the External Action Service should increase coherence in the European Union's external action, thus answering to ongoing criticisms about the lack of a „single voice". This is nevertheless counter intuitive to classical studies of international cooperation which usually predict that an increasing number of actors decreases the likelyhood of cooperation or the efficiency of outcomes.

Based on the critical analysis of EU documents and the academic literature, as well as semi-structured interviews with EU officials in Brussels, this paper makes the case for studying the EU external policies as a fertile ground for both conflict and cooperation between institutions, and argues that the EU's ability to use its instruments for post-conflict stabilisation in a coherent manner in the post-Lisbon era should be a relevant test for its foreign policy. By focusing mainly on the contribution that the High Representative and the EEAS bring to the European Union's involvement in Kosovo, the study explores the concept of coherence, understood as the synergy between EU policies and the activity of the institutions which implement them. Finally, the study will analyse the emergence of an EU "comprehensive approach" to post-conflict stabilisation derived from the experience in the Western Balkans.

Keywords: *coherence, EU foreign policy, post-conflict stabilisation, Western Balkans, High Representative, European External Action Service, Kosovo*.

1. Introduction

The appointment of a new High Representative of the Union for Foreign Affairs and Security Policy and the creation of the European External Action Service were the main institutional changes introduced by the Lisbon Treaty in the foreign policy realm. The former is at the same time Vice-President of the Commission, while the latter helps him/her with implementing the mandate and coordinating the different strands of EU external action better. Although these changes targeted precisely the coherence of the EU's external relations, they were only the latest in a series of initiatives marking the increased institutionalisation of the EU's foreign policy. The study of post-Lisbon coherence in the EU's external action allows a closer look at what is behind the Union's "magnetic power of attraction", that is, at how EU instruments and policies with an external dimension are coordinated in order to enhance dialogue with third countries, apply conditionality and foster transformation in candidate and potential candidate countries. This paper makes the case for studying the EU external policies as a fertile ground for both conflict and cooperation between institutions, and argues that the EU's ability to use its instruments for post-conflict stabilisation in a coherent manner in the post-Lisbon era should be a relevant test for its foreign policy. Based on the critical analysis of EU documents and the relevant academic literature, as well as semi-structured interviews with EU officials in Brussels, it aims to explore some of the challenges that the EU is facing in Kosovo, where enlargement and pre-accession instruments are complemented by proper foreign and security policy initiatives underpinning peace-building and state-building.

The works on EU coherence are plentiful, illustrating both the legal and the political science perspective. Legal scholars focus on the analysis of coherence as a constitutional principle in EU law enshrined in the Treaties, creating an obligation for EU institutional actors to implement a coherent European foreign policy[1]. It is in this context that three main dimensions of coherence have been defined – horizontal, vertical and institutional – with some

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[1] Christophe Hillion, "Tous pour un, un pour tous! Coherence in the External Relations of the European Union". In *Developments in EU External Relations Law*, edited by Marise Cremona, 10-36. Oxford: Oxford University Press, 2008; Christophe Hillion, "Cohérence et action extérieure de l'Union Européenne", EUI Working Paper LAW 2012/14, (2012), accessed February 1, 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224392/evidence-christophe-hillion-working-papers.pdf

variations among authors[2]. On the other hand, empirical studies analyse the existing institutional arrangements and their potential for creating (in)coherence[3] or use case-studies in order to explore the specifics of the three dimensions of coherence[4]. Few of them question whether coherence is an actual concern or just an academic invention[5].

This study analyses the challenges related to horizontal coherence in the EU's external action, more precisely, how the enlargement and pre-accession, and foreign/security policy objectives respectively could be coordinated in order to create synergy in the case of the EU's promotion of the rule of law in Kosovo.

2. Content

I. The principle of coherence

The explanatory framework of this study is centered on the concept of coherence, as understood in an EU context. I examine the academic debates on how to ensure greater coherence of EU external action in general, while also looking at the specific treaty provisions in this regard. I will thus try to answer the following question: How does conflict and cooperation among institutional actors influence the coherence of EU external action? The study analyses the transformation of the EU foreign and security policy apparatus following the entry into force of the Lisbon Treaty and its impact on the coherence of the Union's involvement in Kosovo, with a focus on the policy output, that is, on *horizontal* coherence.

To begin with, the Treaty on the European Union, as amended by the Lisbon Treaty, states that the Union "shall ensure consistency between the different areas of its external action and between these and its other policies"[6] (art. 21.3). Moreover, "The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect"[7]. This provision is reiterated regarding the foreign and security policy of the EU, as "the Council and the High Representative of the Union for Foreign Affairs and Security Policy shall ensure the unity, consistency and effectiveness of action by the Union"[8] (art. 26). At the same time, "The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area"[9] (art. 24.3). Hence, cooperation and loyalty are the other significant concepts which complement consistency in EU external action.

The fulfilling of the EU's objectives requires cooperation between institutions and among member states, respectively. Article 4 states that „Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"[10], whereas article 13 (2) shows that „Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation"[11]. Last but not least, the Treaty on the Functioning of the EU too, as amended by the Lisbon Treaty, contains a provision stating that „The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers"[12] (art. 7).

The word "consistency" is used throughout the Treaty on EU and the Treaty on the Functioning of the EU in the English version, while in other languages it was translated as coherence (*cohérence* in French,

[2] See, for example, Christian Tietje,"The Concept of Coherence in the Treaty on European Union and the Common Foreign and Security Policy", European Foreign Aflairs Review 2 (1997):211-233; Simon Nuttal, "Consistency and the CFSP: a categorization and its consequences", Working Paper 2001/03, LSE European Foreign Policy Unit Network, (2001), accessed February 5, 2015, http://www.lse.ac.uk/internationalRelations/centresandunits/EFPU/EFPUpdfs/EFPUworkingpaper2001-1.pdf; Missiroli, Antonio."Introduction – The terms of the debate". In *Coherence for Security Policy: Debates-Cases-Assessments*, edited by Antonio Missiroli, 1-16. Occasional Paper no. 27, Paris: Institute for Security Studies - Western European Union, 2001, accessed February 3, 2015, http://www.iss.europa.eu/uploads/media/occ027.pdf; Carmen Gebhard, "Coherence". In *International Relations and the European Union*, 2nd edition, edited by Christopher Hill and Michael Smith. Oxford: Oxford University Press, 2011.

[3] See Simon Duke, "Consistency as an Issue in EU External Activities", Working Paper 99/W/06, European Institute of Public Administration, Maastricht, (2006), accessed January 1, 2015, http://aei.pitt.edu/542/1/99w06.pdf; Clara Portela and Kolja Raube. "(In-) Coherence in EU Foreign Policy: Exploring Sources and Remedies". Paper presented at the European Studies Association Biannual Convention, Los Angeles, April 2009, accessed February 12, 2015, http://aei.pitt.edu/33122/1/portela._clara_%282%29.pdf.

[4] See Ana E. Juncos, *EU Foreign and Security Policy in Bosnia. The politics of coherence and effectiveness.* Manchester and New York: Manchester University Press, 2013.

[5] A good example is Miguel Angel Medina Abellán, The coherence of the European foreign policy: a real barrier or an academic term?, Working Paper 27, Observatori de Politica Exterior, Barcelona Institut Universitari d'Estudis Europeus, (2002), accessed February 5, 2015, http://www.recercat.cat/bitstream/handle/2072/204352/N.%2027.pdf?sequence=1.

[6] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal of the European Union C326*, (26.10.2012), accessed March 3, 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid.

coherencia in Spanish, *kohärenz* in German, *coerenţă* in Romanian, etc.)[13]. Consistency and coherence thus seem to be equivalent. Ana Juncos argues that, since both terms refer to "harmony" or "harmonious connexion of several parts", "in the normal sense there is no substantive difference between these two terms" and could thus be "used interchangeably"[14]. From a political point of view, both terms are used to express similar types of concerns, which refer to the ability of the EU to speak with one voice in international affairs, by displaying unity of action. From this perspective, the difference in translation in the various EU official languages in not significant, as the message is the same.

But a closer look at the literature of the field indicates that there could be an important difference between the two concepts: while consistency refers to the lack of contradictions, thus having a negative and static sense, coherence entails positive interactions which could create synergies between policies or institutions. In other words, coherence allows for mutual reinforcement between policies or the functioning of institutions. Moreover, it is possible to distinguish between different degrees of coherence, while consistency does not allow for this distinction (something *is* consistent or *not*)[15]. Last but not least, whereas consistency is a necessary condition for a policy, it is not sufficient as well; hence, if consistency is a minimal requirement, coherence designates a higher standard of coordination and synergy in EU external action[16]. As a result, coherence could be defined as "the lack of contradictions between policies, institutions or instruments, plus a variable degree of synergy as a result of policies, institutions and instruments working together in order to achieve a common objective"[17].

Due to the complexity of the EU system, a rich body of literature was created in order to identify various types of coherence, focusing on its internal and external dimensions, as well as on the relation between the member states and the Union and between and within the latter's institutions. Ever since the Maastricht Treaty was adopted, scholars have begun analysing the sources of potential incoherence in the EU's external action in parallel with the novel requirements for consistency, more so as the Union began defining its distinct identity on the international scene. Whilst a certain consensus regarding the existence of three general types of coherence has emerged, there are significant variations among authors. Originally, Christian Tietje identified two types of coherence in EU foreign policy, as institutionalised by the Maastricht Treaty. In his view, the two were vertical (in the relation between the Member States and the Union) and horizontal (between the foreign relations affairs of the EC and the CFSP) coherence[18]. He was also among the first scholars to explain the difference between consistency and coherence and pointed out the translation issue in the various official languages of the treaty[19]. The main argument of his work was that the Maastricht Treaty and the CFSP could be seen as a coherent system governing the development towards "an ever closer union among the peoples of Europe"[20]. Coherence was not necessarily something new, as it had featured in the Single European Act (1987), but with the Maastricht Treaty the requirement for coherence became a constitutional principle[21]. Horizontal coherence was, in his view, governed by only one leading principle, that of a single institutional framework, which actually created an obligation to optimize the Union's functioning and symbolized the close connection between the supranational and intergovernmental structures governing the European Union[22]. Vertical coherence was underpinned by the obligation of loyal and faithful cooperation between the member states and the EC, but this obligation referred to EU institutions as well, as all these actors have to cooperate in order to promote the overall goals of the Community[23].

Few years later, Simon Nuttal buit on Tietje's approach and provided a new categorization of what he termed "consistency": horizontal (between the different EU policies), institutional (between the two different bureaucratic apparatuses, intergovernmental and Community) and vertical (between EU policy and national policies)[24]. At the same time, he showed that after the Single European Act, successive EU treaties failed to define bureaucratic boundaries, which meant that consistency issues had to be tackled through an evolving co-operative practice, like in the case of the relation between the High Representative for CFSP and the Council Secretariat in the aftermath of the Amsterdam Treaty[25]. While issues of institutional consistency are easier to solve, as his example showed, those pertaining to horizontal or vertical consistency require a thorough debate on the nature of the EU's foreign policy and its identity as an international

[13] Juncos, *EU Foreign and Security Policy in Bosnia*, 45.
[14] Ibid., 46.
[15] Missiroli, "Introduction", 4.
[16] Juncos, *EU Foreign and Security Policy in Bosnia*, 46.
[17] Ibid.
[18] Tietje, "The Concept of Coherence...", 224.
[19] Ibid., 212.
[20] Ibid.
[21] Ibid., 214.
[22] Ibid., 231-232.
[23] Ibid., 233.
[24] Nuttal, "Consistency and the CFSP...", 3-4.
[25] Ibid., 7.

actor[26]. In fact, this was highlighted by other scholars too, who argued that the discussion about coherence in an EU context is complicated by the fact that finding solutions to existing issues might necessitate some kind of hierarchisation among EU bodies and institutions, thus making it more of a political than legal debate[27].

Other scholars, however, questioned whether the coherence of EU foreign policy was a real problem or just an academic debate. Miguel Angel Medina Abellán provides a historical study of coherence, from the beginning of the so-called European Political Cooperation to the Maastricht Treaty establishing the CFSP, in order to show that coherence has always been a concern, only to become even more important after the Cold War due to the international context[28]. Nevertheless, in his view, there was little improvement on this issue in the Treaty of Amsterdam, but the Treaty of Nice brought substantive modifications[29]. While acknowledging Nuttal's categorisation of institutional, vertical and horizontal consistency, he takes an in-depth look at what is to be coherent in an EU context, reaching a sobering conclusion. His analysis revealed that although coherence as a principle needs to apply to the EU foreign policy, the legal means to enforce it are absent in the second pillar, which implies that "the stipulations contained in Title V must therefore considered as legally binding, but not enforceable"[30]. What is more, even if decision-making procedures in CFSP affect its coherence, other elements such as the latter's objectives and results, as well as the ways in which the instruments of EC and CFSP are combined and the outcomes of the EU's international performance overall represent issues which are more significant than the actual interplay between institutions[31]. And from this perspective, it is not the institutional strcture of the EU that will determine the success of the EU's external performance, but the political will of its member states[32]. In other words, it is the topic of vertical coherence that should actualy dominate the debates in the literature.

More recently, Carmen Gebhard has identified four types of coherence: horizontal (inter-pillar), vertical, internal and external. Her main argument is that the fact that the governance of EU policy is spread across two pillars puts horizontal coherence at the centre of any investigation of the EU's external profile[33]. Moreover, the fact that ESDP has become a de *facto* fourth pillar triggered new challenges, including the reorganization of Council structures, which in turn influenced reforms inside the Commission[34]. Consequently, achieving horizontal coherence is inherently connected with the compatibility, interoperability and credibility of the EU as a bilateral or multilateral partner, and with what she terms "external coherence"[35]. This fourth dimension of coherence is treated more like a technical matter, being ensured by the European External Action Service through an internal coordination process.

The view adopted in this paper is that the "institutional" and "horizontal" types of coherence are very difficult to separate in practice. The removal of the pillar structure by the Treaty of Lisbon aimed precisely to streamline the functioning of the Union, increase its coherence and favour the emergence of a "comprehensive approach" to external action. However, it is difficult to avoid contradictions or overlaps and to create synergies between policies as the EU institutions jealously guard their prerogatives. The next section will analyse the reconfiguration of the EU's foreign, security and defence policy apparatus in the post-Lisbon framework and the main policy consequences of these institutional transformations.

II. The quest for post-Lisbon coherence – HR & EEAS

The Lisbon Treaty, which entered into force in 2009, provided for the appointment of a High Representative of the European Union for Foreign Affairs and Security Policy (HR), who shall *"conduct the Union's common foreign and security policy"* and "*contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council"*[36] (art. 18.2). The same provisions apply for the Common Security and Defence Policy[37] as well. Basically, the new High Representative's mandate encompasses the old ones of the Commissioner for External Relations and of the former High Representative for CFSP, together with the responsabilities of a Vice-President of the Commission and the permanent presidency of the Foreign Affairs Council.

[26] Ibid., 10.
[27] Missiroli, "Introduction", 5.
[28] Miguel Angel Medina Abellán, "The coherence of the European foreign policy...", 4-6.
[29] Ibid., 7-8.
[30] Ibid., 12.
[31] Ibid., 17.
[32] Ibid.
[33] Carmen Gebhard, "Coherence", 107.
[34] Ibid., 108.
[35] Ibid., 109.
[36] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal of the European Union C326*, (26.10.2012), accessed March 3, 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN.
[37] The European Security and Defence Policy was renamed the Common Security and Defence Policy (CSDP) by the Lisbon Treaty in 2009. I will hereinafter use the term CSDP.

The very complex nature of this new post was meant to enable the High Representative to ensure the coherence of the EU's external action, more precisely, the use of all its elements – from trade to diplomacy, and development cooperation to the security policy also entailing operational capabilities for crisis management. The triple-hatted High Representative's mandate and responsibiliy for coherence in the EU's external relations are detailed in articles 18.4 (referring to the three main duties) and 21.3 (stating the supportive role played by the HR in operationalising the cooperation between the Council and the Commission in ensuring the consistency of the EU's external action)[38]. Based on these arangements, the HR has a role to play in all types of coherence[39], as identified in various classifications in the academic literature.

As Chairperson of the Foreign Affairs Council dealing with CFSP, but also trade and development, the HR can contribute mainly to horizontal coherence. As Vice-President of the Commission in charge of external relations, the HR has the duty to coordinate the Union's external action, including by working together with the other Commissioners entrusted with portfolios having a relevant external dimension (Trade, Development, Humanitarian Aid, Neighbourhood Policy and Enlargement). Again, this contributes to horizontal coherence, understood as maximising synergies between different external policies and the external aspects of other (internal) policies. The "double hat" also embodies the inter-institutional dimension of coherence - the one between the Council and the Commission – to be put into practice through the HR's participation in the College meetings and the chairing of the Foreign Affairs Council, as well as by attending the European Council meetings[40]. Vertical coherence is less within the HR's remit, depending not only on Council meetings but also on the bilateral relations between the HR/VP and member states, which are actually supposed to act based on the principles of sincere cooperation and loyalty, especially for the CFSP[41]. All in all, while the legal preconditions and institutional arrangements for enhancing coherence were there, the HR/VP mainly represented the political level. The coordination effort had to be doubled at the administrative level, where it was entrusted to the European External Action Service.

The Lisbon Treaty envisaged the creation of a European External Action Service in order to help the High Representative perform their mandate. The EEAS is referred to in article 27(3) of the Treaty on the European Union, stating that *"In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission"*[42]. But the Council Decision no. 427 of 26 July 2010 establishing the organisation and functioning of the European External Action Service, reached after a prolonged negotiation process spearheaded by the HR during the first half of 2010, did not state any specific objectives for the new body. Hence, according to the Council Decision of 2010, the EEAS is supposed to:

- support the HR/VP to fulfil the triple-hatted mandate: conduct the Common Foreign and Security Policy, preside over the Foreign Affairs Council and being Vice-President (VP) of the Commission;
- assist the President of the European Council, the President of the Commission and the Commission in the exercise of their respective functions in the area of external relations;
- support the diplomatic services of the Member States, the General Secretariat of the Council and the Commission, and other institutions and bodies of the Union, in particular the European Parliament and cooperating with them[43].

The Council thus provided only a general list of tasks, which added to the fact that the role of the EEAS was defined in vague terms anyway, also due to the lack of an overarching EU foreign policy strategy[44]. However, these tasks seemed to underpin a desire for coherence in the EU's external relations and throughout 2010 the making of the EEAS triggered a massive restructuring of the EU's foreign policy apparatus. In the end, the actual format of the new body merely reflected the agreement reached by the

[38] Consolidated versions…

[39] Anne-Claire Marangoni, "One Hat Too Many for the High Representative – Vice President? The Coherence of EU's External Policies after Lisbon", *EU External Affairs Review* (July 2012), 8, accessed February 16, 2015,http://www.global-europe.org/articles_pdf/500137-review-issue02_marangoni_july2012.pdf.

[40] Ibid.

[41] Ibid., 9.

[42] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal of the European Union C326*, (26.10.2012), accessed March 3, 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN.

[43] Council of the European Union. Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service, 2010/427/EU, *Official Journal of the European Union* L 201, (3.08.2010), pp. 30-40, accessed December 20, 2014, http://www.eeas.europa.eu/background/docs/eeas_decision_en.pdf .

[44] European Court of Auditors, "The establishment of the European External Action Service", Special Report no. 11 (2014), 8, accessed February 12, 2015, http://www.eca.europa.eu/Lists/ECADocuments/SR14_11/SR14_11_EN.pdf

EU institutions involved in the negotiation process and not necessarily the necessities of a functional diplomatic body. Finally, when inaugurated in January 2011, the EEAS was staffed through bloc transfers of officials from the Commission and the former General Secretariat of the Council, and through the secondement of national diplomats. But such transfers were made not on the basis of the respective departments' expected contribution to the fulfilment of EEAS objectives, but on the basis of "their activities and their administrative position within the Commission or the General Secretariat of the Council", which resulted in practical difficulties for the EEAS to coordinate some actions of the Commission with impact on foreign policy[45].

As part of the same effort to ensure coherence in the EU's external action, the crisis management structures within the General Secretariat of the Council were transferred to the EEAS as a distinct unit placed under the direct authority of the High Representative – the Crisis Management Planning Directorate (CMPD), the EU Military Staff (EUMS) and the Civilian Planning and Conduct Capability (CPCC). The High Representative became the highest authority governing the CSDP structures, which also include the Political and Security Committee (a preparatory body for the Council which assesses the need for launching missions, among other responsibilities) and the two structures which provide it with advice - the EU Military Committee (EUMC) and the Committee for Civilian Aspects of Crisis Management (CIVCOM), as well as the Politico-Military Group, chaired by a representative of the High Representative.

But the focus on the reform of the CSDP structures, as well as the external political context in which the EEAS started working, marked by the Arab Spring (most notably the developments in Egypt and Libya), took priority over bolder foreign policy initiatives expected from the new body[46]. The necessity to respond to international events also favoured an *ad hoc* approach over the elaboration of a autonomous strategy for foreign policy. At the same time, it is true that only some member states supported after 2003 the idea of adopting a new security strategy or seriously reviewing the one adopted after the war in Iraq. The latter was perceived by external observers more as a foreign policy strategy than a "grand strategy" articulating comprehensive security goals on the long term. Nevertheless, both member states and EU institutions expected a more proactive approach from the EEAS even though they were not necessarily forthcoming in accomodating the new body during its initial phase. The HR set some priorities later in 2011 and making the EEAS work was one of them[47]. At the same time, despite its growing pains, the EEAS proved flexible enough to take on new responsibilities as circumstances changed, supporting the HR as she became the key facilitator in the Kosovo/Serbia talks and in the international negotiations on Iran's nuclear programme. These were later praised as the main highlights of Catherine Ashton's mandate as High Representative (2009-2014).

To sum up, by fusing existing institutions into the new High Representative and the EEAS coordination between institutions is actually transferred to new institutions[48]. This should facilitate coherence between EU policies due to the emerging hierarchical executive and administrative structures – the High Representative is Vice-President of the Commission and Chairperson of the Council and heads the EEAS, which consists of both the former CFSP/CSDP branches of the Council Secretariat and the DG RELEX of the Commission[49]. In helping the High Representative fulfilling her mandate, the EEAS is supposed to cooperate closely with the Commission and the Member States, thus ensuring horizontal and vertical coherence respectively, both at the Brussels headquarters and in delegations. As the Commission holds responsibility for some external relations areas (such as development, trade, enlargement, humanitarian assistance and the external aspects of internal policies), it has to coordinate its activity with that of the EEAS. Despite formal working agreements having been established between the two, this coordination takes place rather through informal channels and networks supported by ex-Commission staff transferred through the EEAS[50], a practice that is not sustainable on the long term.

Another institutional development refers to the transformation of the Commission's former delegations in third countries and permanent representations to international organizations into full-fledged EU embassies abroad, coordinated by the EEAS. By being in the first line of EU external representation in third countries, they have to cooperate closely with the national embassies of the member states or represent the latter's interests when there are no such embassies. It is in this context that the extent to which the EU member states are willing to implement and support a unitary foreign policy coordinated in Brussels by what is desired to be a genuine EU Ministry of Foreign Affairs becomes clear. Unproductive rivalry should be avoided, as well as the temptation to maintain these EU embassies as purely bureaucratic and decorative organisms, without any real contribution to the design and implementation of the EU's foreign policy.

[45] Ibid., 9.
[46] Ibid.
[47] Ibid., 12.
[48] Clara Portela and Kolja Raube, ""(In-)Coherence in EU Foreign Policy...", 9.
[49] Ibid.
[50] European Court of Auditors, "The establishment of the European External Action Service", 20.

As in the case of the traditional embassies, the EU's ones have to perform the classical duty of providing information to the central headquarters (in Brussels), thus becoming the HR's "eyes and ears" abroad. A network of 139 missions representing the EU in 163 third countries and at international organisations ensures a truly global coverage in terms of geographical and thematic issues[51], but their functioning under both the EEAS and Commission umbrellas remains a challenge. Nevertheless, by being branded (and organised) as Union embassies (not just the Commission's delegations anymore), the efforts of enhancing coherence should be positively perceived by external actors, while the Commission and the EEAS will continue to deal with the difficulties of internal coordination on the ground.

In the context of creating the new EU embassies, the HR initially envisaged to eliminate the EU Special Representatives in various countries or regions, since their Heads of Missions could have taken on their responsibilities. The appointment of the EU Special Representative in Afghanistan as the Head of the EU's embassy in Kabul in April 2010 was thought to set a trend bound to become the general rule in the future[52]. As this transformation has not happen in all cases in the post-Lisbon context, the current status of the EU Special Representatives is an "anomaly"[53]. Having been originally created by the Council and linked to specific crises in an era when there was no EEAS and only the Commission had delegations around the world, the Special Representatives had little connection with the latter and they mainly communicated with the Member States through the Political and Security Committee (PSC)[54]. The Lisbon Treaty partially changed this by putting them under the authority of the High Representative but without fully integrating them in the EEAS. By stating that "*the Council may, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, appoint a special representative with a mandate in relation to particular policy issues (...) who shall carry out his mandate under the authority of the High Representative*"[55] (art. 33 TEU), the treaty enabled the HR to use the EUSRs' potential contribution to diplomacy and civilian crisis management as she considered best for the EU's foreign and security policy. This is quite interesting since placing the EUSRs under the exclusive and direct authority of the High Representative meant depriving the member states – which used to appoint the EUSRs – of a useful and flexible instrument for providing foreign policy guidelines. On the other hand, as the EUSRs have not been fully integrated in the EEAS, this "autonomy" fuels "competence conflicts" with the latter, resulting in a potential lack of coherence in the EU's external action in general or crisis management efforts in particular, for example[56].

In 2013, when the first review of the EEAS was undertaken, there were 12 EUSRs, including 8 based in Brussels and 4 based in specific countries, with a combined staff of over 200 political advisors and administrative support; the EEAS argued for their full integration among its ranks, while also retaining a close link to Member States via the PSC[57]. At the same time, the Service pleaded for enhanced flexibility that would allow it to recruit "short-term senior figures (special representatives, co-ordinators or EU envoys) to undertake specific missions as the need arises"[58]. In this context, if maintained, the office of EU Special Representative will cover a broader geographical area and will only be justified where a regional approach is needed – like in the Caucasus, Central Asia or the Middle East and North Africa – including for performing diplomatic "shuttles" in various negotiation contexts which could benefit from a lower level of representation than that of the HR herself.

All in all, the restructuring of the EU foreign and security apparatus by means of the Lisbon Treaty registered a certain degree of success as far as institutional matters were concerned. Beyond the creation of the triple-hatted HR and the EEAS, the complexity of which partially explain their imperfect functioning so far, worth mentioning are the transfer of responsibility from the six-month presidency of the Council to the HR for CSFP and the transformation of former EU Commission delegations into EU embassies around the world, with a strong potential for playing an important political role in negotiations, conflict prevention and crisis management in third countries. As far as coherence in practice is concerned, the case-study on EU involvement in Kosovo will shed some light on how the reorganization of the foreign policy apparatus after Lisbon influenced the Union's performance in post-conflict stabilisation.

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[51] European Union External Action Service, "EEAS Review", (2013), 3, accessed February 1, 2015, http://eeas.europa.eu/library/publications/2013/3/2013_eeas_review_en.pdf

[52] Andrew Rettman, "Afghanistan envoy flies the flag for new EU states", *EUobserver*, February 24, 2010, accessed December 12, 2014, http://euobserver.com/foreign/29540.

[53] European Union External Action Service, "EEAS Review", 4.

[54] Ibid.

[55] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal of the European Union C326*, (26.10.2012), accessed March 3, 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN.

[56] Tolksdorf, Dominik. "The Role of EU Special Representatives in the post-Lisbon foreign policy system: a rennaissance?", Institute for European Studies Vrije Universiteit Brussels, Policy brief issue 02/2012, (2012), 2, accessed February 1, 2015, http://www.ies.be/policy-brief/role-eu-special-representatives-post-lisbon-foreign-policy-system-renaissance.

[57] European Union External Action Service, "EEAS Review", 5.

[58] Ibid.

III. Rule of law-driven post-conflict stabilisation in Kosovo and the emergence of a post-Lisbon comprehensive approach

To a certain extent, the EU's involvement in Kosovo seems to repeat the scenario in Bosnia and Herzegovina: without playing a major role in the 1999 war and the subsequent political and security arrangements, the EU has gradually positioned itself to the forefront of the international community's stabilisation and conflict resolution efforts. In fact, the EU's involvement in Kosovo provides "a text book example covering all aspects of external assistance as well as security and defence policies"[59].

Kosovo was included in 2003 on the Thessaloniki Agenda confirming the European perspective of the Western Balkan countries, as well as in the Stabilisation and Association Process, as "the overall framework for the European course of the Western Balkan countries, all the way to their accession"[60]. It is in this context that the EU established the European Partnership with Serbia and Montenegro including Kosovo as defined by UNSC Resolution 1244/1999, with a separate plan for addressing the priorities regarding Kosovo[61]. Both the main and complementary priorities, among which the rule of law featured prominently, were meant to help create "a stable future for a secure, democratic and multi-ethnic Kosovo"[62]. The European Partnership was revised in 2006[63] and again in 2008, after the introduction of the Instrument for Pre-Accession (IPA) as the unique framework for providing financial assistance to pre-accession countries. The new document contained 38 priorities in the field of rule of law, grouped under seven headings: the judicial system, anti-corruption policy, money laundering, drugs, police, fighting organised crime and terrorism, and visas, border control, asylum and migration[64]. The envisaged reforms had to be implemented on the long term, with substantive EU technical and financial assistance.

The importance of supporting the rule of law in third countries was emphasized early on by the 2003 European Security Strategy, which showed that "spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights" were the best means of "strengthening the international order"[65]. This not only reveals the self-assumed mission of the EU as an international actor, but also the philosophy behind the EU's peace-building and post-conflict stabilisation endeavours. The EU tries, just as other international organisations and individual Western governments involved in state-building and peace-building, to implement such efforts according to a model of the state that they consider it best supports (domestic and international) peace, that is, a state grounded in democracy, the rule of law and a market-oriented economy. The challenge is, of course, not to limit state-building to the physical creation of institutions, but to foster real change, by supporting endogenous processes favouring the emergence of self-sustaining peaceful institutions[66].

After Kosovo unilaterally declared independence in February 2008, it was recognised by most of EU members including Great Britain, Germany or France. However, five member states[67] refused to do it. Even so, in December 2008 the EU launched the integrated rule of law mission EULEX as part of the efforts to stabilize Kosovo, and gave it an executive mandate enabling it to perform functions of police, customs and judicial systems. Because of the five EU member states not recognizing Kosovo's independence, EULEX had to do its work based on a "status neutral" approach, which entailed significant difficulties in practice. More or less, EULEX was entrusted with building a state that not all EU members recognized.

In the previous rule of law missions, such as EUJUST Themis in Georgia and EUJUST LEX-Iraq, the EU activity focused on criminal justice and reform

[59] Martina Spernbauer, "EULEX Kosovo – Mandate, structure and implementation: Essential clarifications for an unprecedented EU mission", CLEER Working Papers 2010/5, Center for the Law of EU External Relations, T.M.C Asser Institute, The Hague, (2010), 3, accesed January 10, 2015, http://www.asser.nl/upload/documents/7302010_24440CLEER%20WP%202010-5%20-%20SPERNBAUER.pdf.

[60] Council of the European Union, Council Regulation (EC) No. 533/2004 of 22 March 2004 on the establishments of European partnerships in the framework of the stabilisation and association process, *Official Journal of the European* Union L86, (24.03.2004), accessed February 12, 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0533&from=EN

[61] Council of the European Union, Council decision of 14 June 2004 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 (2004/520/EC), *Official Journal of the European Union* L227, (26.06.2004), accessed February 1, 2015, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004D0520:EN:HTML.

[62] Ibid.

[63] A distinct European Partnership with Montenegro was adopted in 2007, following its peaceful secession from Serbia.

[64] Council of the European Union, Council decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing decision 2006/56/EC (2008/513/EC), *Official Journal of the European Union* L80, (19.03.2008), accessed January 25, 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008D0213&from=EN.

[65] Council of the European Union, "A Secure Europe in a Better World - European Security Strategy, Brussels, 12 December 2003, 10, accessed February 10, 2015, http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf.

[66] OECD, "Supporting Statebuilding in Situations of Conflict and Fragility", Policy Guidance, DAC Guidelines and Reference Series, Paris: Organisation for Economic Co-operation and Development (2011), accessed January 20, 2015, http://www.oecd-ilibrary.org/development/supporting-statebuilding-in-situations-of-conflict-and-fragility_9789264074989-en.

[67] The five member states are: Spain, Romania, Slovakia, Cyprus and Greece.

of the criminal justice system[68]. With EULEX Kosovo, the concept of rule of law was operationalised more widely and translated into stability, law and order, criminal justice and security in a post-conflict context (ibid.), thus underpinning peace-building. However, the real focus on rule of law promotion in Kosovo seems to be on the latter two – criminal justice and security – with EULEX supporting rule of law dynamics based on the core functions of judiciary, corrections and customs, as UNMIK before it did[69].

As the EU endowed the CSDP with capabilities in the field of justice, police, rule of law and security sector reform, existing Community instruments or internal policies were developed in order to complement them, as is the case with those pertaining to the external dimension of the Area of Freedom, Security and Justice. Activities under the latter refer to the fight against terrorism and organised crime, managing illegal immigration and the failure or malfunctioning of law enforcement institutions, as well as to fostering the rule of law in third countries and regional cooperation, thus requiring „close coordination between the Council and the Commission to guarantee coherence in the EU's external activities"[70]. These developments are in line with the emerging of a different understanding of security in the post-Cold War era. By admitting that the boundaries between "external" and "internal" security threats have become blurred, the EU started promoting a multi-faceted approach which entails the use of the full range of instruments at its disposal, including political, diplomatic, economic, development, military, civilian (policing, judiciary, border assistance, etc.), and the external dimensions of internal instruments such as energy policy – as complementary aspects of a coordinated response to crisis, post-crisis and post-conflict situations around the world[71]. In an embryonic stage, this idea of the "comprehensive approach" was included in the 2003 Security Strategy which acknowledged the paradigm shift in terms of security occurred in the decade after the Cold War and more so after 9/11: "In contrast to the massive visible threat in the Cold War, none of the new [global security] threats is purely military; nor can any be tackled by purely military means. Each requires a mixture of instruments"[72]. The EU with its wide range of instruments for external assistance seemed well placed to try to tackle crises in a holistic manner and to stabilise fragile states emerging from conflicts. But as these instruments were spread across the three pillars and the degree of political interest in intervening varied a lot, the EU did not always make a significant or coherent contribution in this regard. The Lisbon Treaty aimed to streamline the functioning of an enlarged Union and also provide better coordination, efficiency and coherence among CFSP/CSDP and Community instruments[73]. Moreover, as part of the CSDP reform, it acknowledged post-conflict stabilisation as a specific task of EU missions deployed abroad[74]. This added to the substantial reform of the foreign policy apparatus, as detailed in the previous section. At present, EU-driven peacebuilding "makes inroads into different policy areas such as CSDP, development cooperation, the external dimension of the Area of Freedom, Security and Justice (AFSJ), EU enlargement policy, and the European Neighbourhood Policy (ENP)"[75].

For example, in the case of African states CSDP missions and development aid were meant to address specific challenges, while in the Western Balkans the pre-accession framework and stabilisation CSDP missions were combined in order to bring the countries there closer to EU standards. The comprehensive approach was thus not necessarily something new, but the framework for implementing it through a coherent use of all available EU instruments and incentives was improved by the Lisbon Treaty. In other words, both the philosophy and the necessary means were there, but the EU had to make it happen through political will, adequate functioning of its institutions and most of all, through a long term strategic approach to a coherent external action. At the same time, Carmen Gebhard is right to point out that implementing the comprehensive approach is often considered as a predominantly technocratic challenge, which requires institutional actors to work together in sync to provide for what is falsely assumed as a set and static political agenda[76]. In fact, the EU's ability to put the comprehensive approach into practice is affected by "substantial political struggles both between Member

[68] Richard Zajac Sannerholm, "Rule of Law Promotion after Conflict. Experimenting on the Kosovo Laboratory". In *Rule of Law Dynamics in an Era of International and Transnational Governance*, edited by Michael Zurn, Andre Nolkaemper and Randal Peerenboom, 259. (Cambridge: Cambridge University Press, 2012).

[69] Ibid., 277.

[70] European Commission. Communication from the Commission "A Strategy on the External Dimension of the Area of Freedom, Security and Justice", Brussels, (12.10.2005), 7, accessed January 6, 2015, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0491&from=EN

[71] Linda Barry, "European Security in the 21st Century: The EU's Comprehensive Approach", Institute of International and European Affairs Publications, (17 July 2012), 1, accessed February 28, 2015, http://www.iiea.com/publications/european-security-in-the-21st-century-the-eus-comprehensive-approach.

[72] Council of the European Union. "A Secure Europe in a Better World - European Security Strategy, Brussels, 12 December 2003, 7, accessed February 10, 2015, http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf.

[73] Linda Barry, "European Security…", 3.

[74] According to the new Petersberg tasks catalogue.

[75] Steven Blockmans and Martina Spernbauer. "Legal Obstacles to Comprehensive EU External Security Action", *European Foreign Affairs Review* 18 (2013): 8.

[76] Carmen Gebhard, "Introduction: A European Approach to Comprehensive Security?", *European Foreign Affairs Review* Special Issue 18 (2013): 6.

States, but also between major institutional actors, which should be taken as a critical context for any discussions about coherence and comprehensiveness across different policy areas and different phases of the conflict response cycle"[77]. This is nowhere more evident than in the case of Kosovo, where the stance of the five non-recognizing member states complicates most EU initiatives there. Although vertical coherence is beyond the scope of this paper, it is worth noting that this reality should not be either overplayed or underestimated. Despite not recognizing Kosovo as a state, the five EU members generally support its progress in getting closer to EU standards and share the common EU objective of promoting the rule of law there, while requiring the observance of certain wording and rituals according to their official position[78]. At the same time, security concerns are shared by all member states, the impact of which is mostly visible in the visa dialogue and the determination to keep EULEX on the ground as long as necessary.

IV. The current state of play - what challenges for coherence in Kosovo?

The number of instruments used for implementing EU policies in order to consolidate the rule of law in Kosovo has gradually increased over time and the post-Lisbon arrangements had a significant impact on the institutional framework underpinning these policies. The coherent use of the said policies and instruments for rule of law promotion in particular and post-conflict stabilisation in general represents an important test for the European Union from a legal, political, public policy and administrative perspective. While endogenous factors in Kosovo obviously create a special case, this is not the first time the EU acts as a state-builder and assumes executive roles, as Bosnia's case demonstrates too. In both cases the EU employs a myriad of foreign and security policy tools, alongside "traditional" enlargement-related tools. What distinguishes the Kosovo case, among other things, are the following two elements: on the one hand, what the literature has labelled "state-building without recognition" and on the other hand the hostile attitude of the local population/society towards the European project (and Europeanization attempts)[79].

The deployment of EULEX, an integrated rule of law mission targeting the police, judiciary and customs and the biggest civilian EU mission to date, the efforts to mediate between Belgrade and Pristina, the Visa Dialogue, the activity of the EU Special Representative, the Structured Dialogue on Rule of Law, the financial assistance through IPA and IPA II are all instruments of the multifaceted EU involvement in Kosovo. Also, these instruments illustrate a particular approach by the EU which emphasizes the existence of the rule of law as a *sine qua non* condition for Kosovo to eventually become a member of the EU. This is part of the so-called "new approach to enlargement" arguing for "fundamentals first", which means that the rule of law was put at the centre of enlargement policy after Romania's and Bulgaria's accession to the Union. More concretely, this approach provides that "the chapters judiciary and fundamental rights and justice, freedom and security will be tackled early in the negotiations to allow maximum time to establish the necessary legislation, institutions, and solid track records of implementation before the negotiations are closed"[80]. According to the 2012 Enlargement Strategy, the key challenges facing most of the countries in the Western Balkans were: establishing a judicial system that is independent, impartial and accountable and capable of ensuring fair trials, fighting corruption and organised crime, public administration reform, implementing fundamental rights and ensuring the freedom of expression[81]. While strengthening the rule of law and public administration is viewed as "essential for enlargement countries to come closer to the EU and eventually to fully assume the obligations of membership" (ibid., 4), it also serves as the means, among others, by which the EU tries to insulate its member states from external security threats such as instability, illegal immigration and organised crime stemming from state fragility in its vicinity.

The Commission works with the Government of Kosovo in the framework of pre-accession, promoting the rule of law through a technical process based on chapters 23 and 24 of the aquis and the Copenhagen criteria. It also runs the Stabilisation and Assciation Process, which deals with rule of law issues on a technical level. Within the Commssion, DG Enlargement runs the general negotiations, while DG Home is in charge of the dialogue on visa issues, thus holding the big "carrot" of visa liberalisation. The two have to coordinate closely in view of the annual progress reports and while their objective is the same, they sometimes disagree regarding the speed of the process[82]. This is mainly because DG Enlargement needs to deliver tangible results in the pre-accession process, while DG Home needs to be strict and

[77] Ibid.

[78] According to the personal communications with several Council delegates, Brussels, October 2014.

[79] Dimitris Papadimitriou and Petar Petrov, "State-building without recognition. A critical retrospection of the European Union's strategy in Kosovo (1999-2010)", in *European Integration and Transformation in the Western Balkans. Europeanization or business as usual?*, edited by Arolda Elbasani, 121-137, London and New York: Routledge, 2013, 122.

[80] European Commission. Communication from the Commission to the Council and the European Parliament "Enlargement Strategy and Main Challenges 2012-2013", Brussels, (10 October 2012), accessed December 4, 2014, http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/strategy_paper_2012_en.pdf, 4.

[81] Ibid., 4-6.

[82] European Commission official, DG Home, Brussels, personal communication no. 7 (9.10.2014).

prioritise the interests of the member states. The latter keep a close watch on the political and technical processes of Kosovo's approximation to EU standards and make decisions based on the Commission's recommendations. Moreover, due to the sensitivity of such issues as migration, the member states are directly interested in Kosovo's progress and in maintaining a firm control on the speed of the process of visa liberalisation, for example. That is why DG Home officials in charge of the Kosovo file regularly brief the member states representatives in COWEB (the Council Working Group on the Western Balkans) on the developments in the visa negotiations, the purpose being that of assuring them that no new migration routes are opened by liberalising the visa regime too soon[83].

The European External Action Service provides the political expertise for the EU's relation with Kosovo, acts as the supervisor of EULEX and mediates, alongside the High Representative, the dialogue between Pristina and Belgrade, with its political and technical components. Starting in 2011, the governments in Belgrade and Pristina engaged in negotiations in view of a normalisation of their relations under the auspices of the EU[84]. Final status issues aside, the talks had to concentrate on the "practical coexistence" of Serbia and Kosovo and the highly political issue of the "parallel structures" run by Serbia in northern Kosovo. In April 2013 a groundbreaking agreement was reached, establishing a power-sharing arrangement in the Serbian-dominated Northern Kosovo (Mitrovica) run by authorities which had been supported by Belgrade after 2008. This was the result of both EU diplomatic efforts and the two capitals' interest in advancing their relationship with the EU[85]. This was a "game changer" in the EU's involvement in Kosovo and was later acknowledged among the main accomplishments of the High Representative Catherine Ashton's mandate, as well as a great success for the EEAS.

EULEX is, due to its executive mandate, the "master of ceremonies"[86] and to a certain extent the most influential EU actor in Kosovo. It is managed by the Civilian Planning and Conduct Capability (CPCC) based in Brussels and thus forms part of the EEAS, being financed from the EU's Common Foreign and Security Policy (CFSP) budget. Launched in December 2008, its aim has been to help the Kosovo authorities to strengthen the rule of law, specifically in the police, judiciary and customs areas. Under the Stabilisation and Association agreement - initialled in May 2014 - Kosovo has to meet certain obligations regarding the rule of law, the judiciary, public administration, electoral reform and the Assembly, human and fundamental rights, protection of minorities, trade and internal market issues[87]. With EULEX helping Kosovo improve its performance with the first two and by tackling serious and organized crime, together with fighting corruption and entrenching the rule of law, the mission enhances the link between CSDP (the civilian component) and the external dimension of the Area of Freedom Security and Justice, which share the objective of "protecting the EU's safe internal space from an «unsafe» external environment"[88]. According to the EEAS, EULEX "forms part of a broader effort undertaken by the EU to promote peace and stability in the Western Balkans and to support the Kosovo authorities as they undertake necessary reforms, in line with their and the region's overall European perspective. EULEX skills and expertise are also being used to support the key objectives in the visa liberalisation process, the Stabilization and Association Process Dialogue and the Belgrade-Pristina dialogue"[89].

In other words, this could be horizontal coherence at its best. The EULEX mission was reconfigured in 2012 and its personnel downsized by 25%, in order to "reflect increasing capacities of the Kosovo authorities"[90]. But the main challenges for

[83] Ibid.

[84] The possibility of such negotiations arose in 2010 and was materialized through a UNSC Resolution introduced by the EU member states. When the talks began, the Belgian EU rotating presidency initially took charge, as Catherine Ashton had just assumed office. Later on, the seasoned diplomat Robert Cooper took charge of the talks on behalf of the HR in 2011 and early 2012. Catherine Ashton herself became involved in the mediation process in the autumn of 2012, in time for the political part of the dialogue, focusing on the issue of Northern Kosovo. In a short article published in EUobserver, Robert Cooper presents some of the characteristics of that process, leading to the Brussels agreement of April 2013. Robert Cooper, "An unfair critique of Ashton", *EUobserver*, December 12, 2014, accessed March 1, 2015, https://euobserver .com/opinion/126893.

[85] Stefan Lehne, "Serbia-Kosovo Deal Should Boost the EU's Western Balkans Policy", *Carnegie Europe*, April 13, 2013, accessed February 1, 2015, http://carnegieeurope.eu/2013/04/23/serbia-kosovo-agreement-should-reenergize-eu-s-western-balkans-policy/g0q8.

[86] European Commission official, DG Enlargement, Brussels, personal communication no. 3, (7.10.2014).

[87] European Commission, Commission Staff Working Document "Kosovo 2013 Progress Report Accompanying the document Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2013-2014", Brussels, (16 October 2013), accessed January 3, 2015, http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/ks_rapport_2013.pdf.

[88] Gregory Mounier, "European Police Missions: From Security Sector Reform to Externalization of Internal Security Beyond the Borders", *ETC HUMSEC Journal*, 1 (2007), 48, accessed December 5, 2014, http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?id=110394&lng=en.

[89] European Union External Action Service, EULEX Kosovo EU Rule of Law Mission in Kosovo Factsheet, (February 2014), accessed December 2, 2014, http://eeas.europa.eu/csdp/missions-and-operations/eulex-kosovo/pdf/factsheet_eulex_kosovo_en.pdf.

[90] European Commission, "Communication from the Commission to the European Parliament and the Council on a Feasibility Study for a Stabilisation and Association Agreement between the European Union and Kosovo", Brussels, (10 October 2012), accessed December 4, 2014, http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/ks_feasibility_2012_en.pdf.

EULEX Kosovo in the current phasing-out stage[91] are not only to transfer responsibility to the Kosovo authorities, but also to facilitate the transfer of capacity-building activities to the projects financed by IPA, a transition which sometimes causes friction between the EEAS and the Commission[92]. There are several reasons for this. On the one hand, IPA-funded projects can be used for supporting the monitoring, mentoring and advising activities of EULEX as it phases out its executive mandate, but the financial regulations in this regard do not allow for fast and flexible responses needed by the specific activity of EULEX[93]. Moreover, EULEX does not have an in-built exit strategy and its mandate is renewed every two years, while the Commission's involvement in Kosovo is open-ended and focused on the long term. The Commission and the EEAS have agreed in principle that the former will continue to pursue through Commission-funded projects the objectives of CSDP missions as they close down, but they still need to figure out the practical arrangements for this[94].

The EU Special Representative in Kosovo was established in 2008 in order to try to ensure intra-EU political coordination and guidance[95]. After EULEX was launched, the EUSR was entrusted with the mandate to provide political advice to EULEX as well, and to generally increase the coordination between the EU Office and the rule of law mission in Kosovo. The Court of Auditors' 2012 Report on the EU assistance to Kosovo noted that "until recently the EUSR has not made a substantial contribution to strengthening coordination between EUO and EULEX", but "the combining in 2012 of the roles of EU SR and Head of EUO is likely to significantly improve coordination"[96]. As both EUSR and Head of the EU delegation in Kosovo, the incumbent has direct contact with the political situation on the ground, on which it reports to the EEAS. At the same time, it has to provide political guidance to EULEX, without being part of a formal chain of command. One main issue at stake in the EUSR's activity is to emphasize a unique message of the EU and to align political priorities and financial assistance, since the EU Office became fully responsible for IPA assistance in Kosovo.

A recent addition in this already crowded scene was the Structured Dialogue on the Rule of Law initiated in 2012 by the former Neighbourhood and Enlargement Commissioner Stefan Fule, who conceived it as a high level dialogue involving himself, Commissioner for Home Affairs Cecilia Malmström for the EU and the Ministers of Justice, Internal Affairs and for European Integration respectively for the Kosovo side. The Dialogue was designed to help Kosovo address the challenges in the field of the rule of law, by initially focusing on the judiciary, the fight against organised crime and corruption. By launching it in the context of the gradual transition from EULEX to the Kosovo authorities, Commissioner Fule wanted the new forum to "play an increasingly important role in confirming priorities and ensuring the necessary close coordination between the key actors"[97]. The forum met again in 2013 and 2014, alongside other established formats such as The Joint Rule of Law Coordination Board co-chaired by EULEX, EUSR and Kosovo Ministry of Justice, the Visa Liberalisation Dialogue and, to a smaller extent, the Stabilisation and Association Process Dialogue. At the same time, it became more and more difficult to organise regular meetings involving so many high-level officials[98].

With so many initiatives in Brussels and Pristina targeting the rule of law promotion in Kosovo, at least two issues become prominent: coordinating them and creating synergies between relevant EU policies on the one hand and entrenching the rule of law in Kosovo without overstretching the local capacity to absorb assistance on the other hand. Neither of them allows for simple solutions.

3. Conclusion

The duty of coherence obliges the European institutions to use the Union's different competences and instruments in a mutually reinforcing way by having regard to the complete set of objectives listed in Article 21TEU of the 'general provisions on the Union's external action'. When tangible results are lacking, there are three types of measures the EU can undertake for enhancing coherence – legal remedies, institutional reform and political initiatives[99]. The adoption of the Lisbon Treaty was just another attempt in a long line of initiatives meant to help the EU overcome turf wars, inefficiency and incoherence in its foreign policy endeavours. By touching sensitive issues like the identity of the EU on the international scene and an eventual hierarchisation among its

[91] EULEX's mandate was extended until 14 June 2014 and then again until 14 June 2016. http://www.eulex-kosovo.eu/en/info/whatisEulex.php.

[92] EEAS official, Brussels, personal communication no. 2, (6.10.2014).

[93] European Court of Auditors, "European Union Asistance to Kosovo related to the Rule of Law", Special Report no. 18 (2012), accessed February 12, 2015,http://www.eca.europa.eu/Lists/ECADocuments/SR12_18/SR12_18_EN.PDF, 35.

[94] Ibid.

[95] Council Joint Action 2008/123/CFSP of 4 February 2008 appointing a European Union Special Representative in Kosovo, *Official Journal* L 42, (16.2.2008), 88, February 1, 2015, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:042:0088:0091:EN:PDF.

[96] European Court of Auditors, "European Union Asistance to Kosovo …", 28.

[97] Structured Dialogue on the Rule of Law with Kosovo Brussels, 30 May 2012 – Conclusions, para. 7, accessed March 1, 2015, http://ec.europa.eu/commission_2010-2014/fule/docs/news/20120530_rold_conclussions_30_may.pdf

[98] EEAS official, Brussels, personal communication no. 2, (6.10.2014).

[99] Carmen Gebhard, "Coherence", 113.

institutions, as well as the finality of the integration process, the study of horizontal coherence provides an excellent opportunity for analyzing conflict and cooperation instances in the EU's external action. In the case of Kosovo, due to both the existing stakes and great number of actors involved, rule of law promotion as a cross-over policy entailing both CFSP and non-CFSP areas of activity could become a real test for institutional and horizontal coherence in the post-Lisbon era.

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SOVEREIGNTY – FROM CLASSICAL TO SHARED AND BEYOND. THE CASE OF THE EU FISCAL POLICY

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Abstract:

Tax policy in the European Union is a goal difficult to achieve in the context of a community that brings together 28 European countries.

This assertion is based on the complexity and the many stages of the European integration process which resulted in the emergence of a supranational structure that does not fit neither into the patterns of federal state, nor of intergovernmental organizations.

Under these circumstances, the fiscal sovereignty the European Union enjoys is quite an atypical one, far form the classical version of sovereignty, which implies very few competences transferred to the European level and many more in the hands of the member states.

The European Union is caught between the need to take further actions in the field of taxation in order to reach fiscal integration and the reluctance of the member states to offer further attributions to the supranational construction regarding fiscal matters.

Keywords: *European Union, sovereignty, fiscal policy, shared competences.*

Introduction

The complexity of issues that led to the debalance of the national states, after two world wars facilitated the appearance of the European Union, a remarkable construction which is not exactly federal, or intergovernmental.

A multitude of factors contributed to its development. However, one of them is still a delicate issue for the supranational structure, the sovereignty.

This paper aims at analyzing the fiscal policy of the European Union from the perspective of the sovereignty concept.

The first part of the article will briefly present the most important aspect of the theory of classical sovereignty, with the states as central actors.

The second part will present the concept of shared sovereignty and how the states manage to cooperate with it.

The last part present the situation of the fiscal policy and what is transferred from national level to the European one.

The hypothesis of this study is to emphasis that, in the case of the EU fiscal policy, the whole idea of sovereignty should be redefined as relative sovereignty.

The classical sovereignty

Sovereignty is a complex concept that can be analyzed from multiple perspectives. Thus, from the perspective of public international law, it is an essential attribute of the state and includes national external sovereignty, as binding will for the whole society.[1]

External sovereignty is absolute, perpetual and individual, as was characterized by Jean Bodin, in „Les six livres de la Republique", published in 1576. Therefore, this attribute ensures total independence of any state from any supranational authority.

But Jean Bodin consider sovereignty as an attribute of the monarch, who enjoys it under a divine right. In this regard, sovereignty is „supreme and absolute power of the sovereign monarch."[2]

The sovereignty as absolute power does not accept any replacing legal authority.[3]

This first attempt to define the concept of sovereignty equate the will of the monarch and the general will. Therefore, at this stage, the monarch's struggle for power takes the form of absolute sovereignty.

From this perspective, sovereignty has become a cover for arbitrary actions of the monarch, its discretionary power representing the rule. The two above mentioned issues were the causes of the necessity to redefine the concept of sovereignty.

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[1] Muraru, I., Tănăsescu, E.S., *Constituția României. Comentariu pe articole*, Ed. C.H. Beck, București, 2008, p. 19.

[2] Iancu, G., *Drept constituțional și instituții politice*, Ed. C.H. Beck, București, 2010, p. 366.

[3] Isenbauert, M., EC *Laws and the sovereignty of the member states in direct taxation*, IBFD, Doctoral series, Volume 19, 2008, p. 21.

Social movements carried out by the bourgeoisie in the eighteenth century sought to limit the power of the monarch and increase its involvement in the economic life of the society.

Thus, with the French Revolution of 1789, it appears the notion of „sovereignty of the people."

„The monarch can not govern despotically, since sovereignty belongs to the people and as such, it even has the right of resistance to oppression." The theory according to which sovereignty belongs to the people came to replace the theory that sovereignty belongs to the monarch.[4]

Sovereignty which belongs to the people is best explained by the theory of social contract theory developed by Jean Jacques Rousseau.

Social contract theory makes the transition from so-called natural state to the social state. In the first state, the natural one, people have complete freedom, while in the second state, the social one, people are willing to give up full freedom in exchange for ensuring social order.

Therefore, from this point of view, sovereignty is the sum of attributes that each individual gives up in favor of the State.

Part of citizens' rights are opposable to the State, while other rights are transferred to the State for ensuring the general interest of the whole society.

„According to Rousseau, sovereignty is inalienable and indivisible. (…)

Sovereignty is only the exercise of the general will and can never be alienated, and the sovereign (the people), whom is only a collective being, can only be represented through himself. Power can be transmitted, but the will cannot. (...)

The same causes for which sovereignty is inalienable make it indivisible as well."[5]

This definition is the starting point of the French classical theory, according to which citizens form a collective that transfers attributes of sovereignty to the State, the latter having the mission to carry out the general will of the collective.

In contrast, the German school considered the state as being the nation organized according to a specific form of government in a certain area, with the public power as holder of sovereignty.

This theory has been heavily criticized by Hans Kelsen, who tried developing a purely legal theories. He defined the state as a legislative order and a personification of legal rules. In this context, sovereignty is the attribute of the state, which is the rule of law.

In his conception „sovereignty is not a perceptible or a objectively discernible quality of a real object, but on the contrary the condition upon which depends the supreme normative order which, in its validity, is not deducted from any other higher order". From this point of view, the state seems not to have sole responsibility for solving problems, existing aspects that fall under the influence of international law.

Barthelemi believes that the state operates through two categories of legal acts, namely:

a) legal acts of unilateral nature, based on state authority, such as the lawmaking process, and the governance, i.e. all those acts which the State exercises in the form of functions;

b) management instruments (contracts) that the state performs as a private individual, as a legal entity (moral person).

According to the theory developed by Leon Duguit, citizens' conduct must be determined by social norms endowed with binding force. In his view, the very fact that humans are in a society generates the need for creation of a law or a social rule.

The state, by virtue of its sovereignty, is entitled to apply the rules, using the coercive force when needed. From this points of view, Leon Duguit considered necessary to replace the traditional concept of sovereignty with that of „public service".

Analyzing the classical theories of sovereignty, we conclude that sovereignty is characterized by the fact that it is a legal power and supreme power.

Therefore, the state legally exercises sovereignty, which complies with the requirements and expectations of the governed ones, being accepted by them in this way. However, the state exercises sovereignty without a higher will or a higher authority than the will of the state.

If classical theories of sovereignty established supremacy of state sovereignty, what happens to this attribute in the context of EU Members?

In the eighteenth century the Peace of Westphalia marked the transition from empire to independent states, being recognized the principle of state sovereignty.

For a long time the concept of sovereignty developed having as a starting point the system of national states. However, the challenges have emerged after the Second World War, with the formation of supranational institutions and organizations. From this perspective, sovereignty changed the trajectory of its evolution when the European Union emerged.

Through the Treaty of Paris, signed by France, Belgium, Italy, the Netherlands, Luxembourg and Germany, was established the European Coal and Steel Community. This document led to the formation of a supranational body, the High Authority, which function as an executive in the domain of coal and steel.

So in this context it is difficult to speak of sovereignty in the version established by the Peace of Westphalia.

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[4] Uglean, G., *Drept constituțional și instituții politice*, Ediția a IV-a revăzută și adăugită,Vol. 1, Editura Fundația România de Mâine, București, 2007, p. 79.

[5] Iancu, G., *Op. cit.*, pag. 367 și urm.

If we consider that the signatory states on the basis of their sovereign wills signed the Treaty of Paris, we could say that the principle of national sovereignty has not changed after its entrance into force. However, the mere existence of a supranational authority which enjoys even a minimal decision-making power in a given economic area, refutes this claim.

In addition, globalization brings new challenges to the classical concept of sovereignty, Member States no longer being able to exercise it in all fields.[6]

Under these conditions, the concept of sovereignty in its classic sense should be redesigned to better adapt to the current reality. Thus, for example, Alfred Verdross, considered one of the founders of international constitutionalism, supports the idea that sovereignty is more suitable approach as a set of skills that can be transferred to the supranational level.

Alfred Verdross believes that sovereignty is defined only in terms of international public law[7], as that set of attributes that provide a state with the independence from other states, but not against the rules of public international law.

Also, Korowicz proposes giving up the idea of „absolute sovereignty" and accepting that of a „relative sovereignty." [8] This new type of sovereignty is more suitable to real situations, which in different forms limits sovereignty.

In this regard, Korowicz shows that sovereignty can be limited simply by concluding international treaties, because they result in restricting the freedom of action of the state.

If states limit their sovereignty, then it should also be considered the birth of international sovereignty via the transfer that occurs between states and international institutions.

Although this transfer appears to be feasible only through the conclusion of international treaties, at a simple analysis of the UN Charter - one of the most important international organizations - we see that it mentions the right of self-determination of peoples, not states. This „suggests that the peoples of the world are the ultimate source of international authority."[9]

These two theories, one that calls for a global state with rules that apply to all national states and the other advocating for the supremacy of international law over national law, it is added a third theory, based on some realistic findings about the inequality of military and economic power of states, argues that the notion of sovereignty loses all meaning.

Thus M.A. Kaplan[10] believes that currently, the international stage is characterized by the fact that it is dominated by a few powerful states, being a bipolar system, in which the idea of state sovereignty loses any meaning or its importance is greatly reduced by limiting it to only a few issues. So if sovereignty does not lose total meaning, it is diluted significantly, losing the specific consistency of the „wesphalian sovereignty".

2. Shared sovereignty

Although the European construction still takes the form of a union of independent states, it may conclude international treaties and agreements obliging Member States, reducing their capacity al international level.

The fact that the European Union enjoys its own legal order established by treaties, entitles us to consider absolutely necessary to redefine sovereignty to match current reality.

The Rome Treaty, following the Paris Treaty, strengthened a number of supranational institutions that arose with the entry into force of the Treaty of Paris - the European Commission, Council of Ministers, the European Parliament and the European Court of Justice.

Therefore, it had been created a supranational decision-making system similar to that of in the Member States, in which the European Commission acts as an executive, the Council of Ministers is the legislative of the community, the Parliament has a consultative role and the Court of Justice comes to resolve conflicts between Member States.

Although the decision-making power of these institutions remains low, there is a new kind of sovereignty shared between Member States and the European Communities.

This new type of sovereignty has evolved along with the European Union, the Maastricht Treaty being the legal document introducing the title „European Union" for the newly formed supranational European organization.

From the perspective of shared sovereignty, three important aspects should be considered at this stage: the emergence of the three pillars of the European Union (European Communities, Common Security and Defense Policy and the pillar of Justice and Home Affairs), European citizenship, the principle of subsidiarity and the emergence of the Euro. All these aspects come to give content to the concept of national sovereignty, being its attributes.

Any independent state, by virtue of its national sovereignty, is entitled to take action in areas related to foreign policy, national security and defense, rights and freedoms of citizens and national currency.

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[6] Piris, J.C., *The constitution for Europe – A Legal Analysis*, *Cambridge University Press*, 2005, p. 194.

[7] See Verdross, A., *Le fundement du droit international*, în Recueil des Cours [de l'] Académie de Droit International, 1927, t. 1, p. 247-324.

[8] See Korowicz, M.S., *Organisations Internationales et Souverainete des Etats Membres*, Editions Pedone, 1961.

[9] Nagan, W.P., Haddad, A.M., *Sovereignty in Theory and Practice*, 13 San Diego Int'l L.J. 429 (2012), http://scholarship. law.ufl.edu/ facultypub/293, p. 461.

[10] See Kaplan, M.A., *How sovereign is Hobbes's Sovereign?* în King, P. (ed.), Thomas Hobbes. Critical Assessments, Vol. 3, London, Routlege, 1993, p. 742-758.

The subsidiarity principle was enshrined in Article 5 of the Treaty establishing the European Community. This article provides:

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.

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.

In areas which do not fall within its exclusive competence, the Community must act in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action can not be sufficiently achieved by the Member States and therefore having the scale or effects of the proposed action, be better achieved at Community level. [11]

Therefore, it is becoming increasingly difficult to accept only the existence of classical sovereignty, limited to national states.

The impact of the next treaties of the Union Europe was not as strong as the one made by the Maastricht Treaty regarding the development of European institutions and the principle of shared sovereignty. These treaties were designed rather to support the EU enlargement.

However, the Lisbon Treaty comes with an extension of decision-making power of the European institutions, in order to make more efficient the integration process.

On one hand, the Lisbon Treaty gives the EU a legal personality, on the other hand the qualified majority voting is extended to new areas. Therefore, the political power of supranational institutions increases considerably.

It is also important to note that the Lisbon Treaty meant the establishment of the EU Charter of Fundamental Rights, a document that provides a series of rights for citizens. Disputes relating to the application and interpretation of the Charter fall under the jurisdiction of the European Court, which means that it is above the national jurisdictions.

The concept of sovereignty has not evolved strictly linear, classical sovereignty being profoundly changed by the emergence and development of the European Union, a supranational structure.

Even if we would support the idea that the authority enjoyed by the EU comes from the Member States[12], it is impossible to deny that a number of actions at EU level take priority over the national ones, even though it applies due express or implied acceptance by Member States.

In the example given, although we would be tempted to say that there is no new kind of sovereignty because supranational structures do not enjoy coercive force necessary to enforce the rules which they develop, we can not deny the fact that EU Member States recognise the priority of EU law over the national one.

So we would say that, at first glance, the EU enjoys sovereignty in the legal sense; it creates legal standards higher than those of the Member States. Furthermore, Member States do not enjoy legal supremacy in the areas entrusted to the European Union. However, it is true that the implementation of EU measures, in the the overwhelming majority of cases, lies with the Member States.[13]

But beyond this idea, the EU is far from enjoying legal sovereignty in the true sense of the word, aspect evidenced by the fact that in public policies with a more pronounced national character (national defense policy, competition policy, fiscal policy) the supranational structure plays a secondary role.

In fact, the entire classification of policies into three categories: those which lie exclusively with the Member States, those which lie exclusively with the EU and those assume shared competences between Member States and the Union, denotes failure of the EU's legitimacy.

The fact that the European Union enjoys its own legal order established by the Treaties should mean the rethinking of the sovereignty concept.

There is a sharing of authority and governance between EU and its Member States; the latter participate in the work of EU, establishing its role and its existence, but their participation is reduced in the communitarised area.[14]

State sovereignty is the ultimate source of autonomy in terms of internal problems related to the organization and functioning of society.

The new institutional structure was charged not only with substantial powers which until then were in the hands of sovereign states, but also received normative powers, in concrete, the power to approve regulations and directives.[15]

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[11] Consolidated version of TCE, http://eur-lex.europa.eu/

[12] See Tokar, A., *Something happened. Sovereignty and european integration, Extraordinary Times*, IWM Junior Visiting Fellows Conferences, Vol.11: Vienna 2001.

[13] Ibidem, pag. 6.

[14] Anghel, M. I, *Suveranitatea statelor membre ale Uniunii Europene*, Analele Universitatii "Constantin Brâncusi" din Târgu Jiu, Seria Ştiinţe Juridice, Nr. 2/2010.

[15] Fossum, J.E., Menéndez, *The Constitution's Gift A Constitutional Theory for a Democratic European Union,* ROWMAN & LITTLEFIELD PUBLISHERS, INC, Plymouth, p. 81.

3. Fiscal sovereignty: from national to European level

In the context of a new type of sovereignty, the shared one, which is shared between the European Union and its Member States, what happens to the fiscal policy of the Member States and more specifically, their fiscal autonomy?

This is one of the questions we want to answer in detail.

If classical sovereignty implies the full power of the state to set tax rates, taxable income categories and categories of taxpayers, how much would the fiscal power be affected in the case of shared sovereignty.

EU Member States are reluctant to the idea of transfer of fiscal sovereignty to supranational institutions, as this would lead to diminished control over their own financial resources that are to form the state finances.

However, the system of sovereign states with a control focused on the domestic sphere, can facilitate creating and sustaining a unique society, with a distinct cultural and political identity, capable of follow its own vision of a desirable society. [16]

The actions of Member States in this field continues to stress the fact that they are not willing to give up their tax autonomy in favor of the European construction.

Therefore, EU legislation on tax matters continue to be adopted unanimously. However, all terms of direct taxes remains under the regulator of the Member States.

However, we can not deny the existence of three separate decision-making levels: European Union level, composed of all the powers which the Member States have ceded to the Community bodies, which they perform exclusively (antitrust, trade policy, monetary policy in the case of Monetary Union Member States); national level, consisting of exclusive competences, remaining within the sovereignty of Member States[17] and a level of shared competence, which belongs to both EU institutions and Member States.

Although fiscal policy is considered exclusive attribute of the sovereignty of the Member States, in the part related to indirect taxation, the European Union sets limits that must be respected by Member States regarding the Value Added Tax.

However, given that fiscal policy affects other European policies - competition policy, labor policy - through European treaties the powers of States were limited in areas connected to tax policy, to ensure coordination of this policy at Community level. The EU approach regarding fiscal policy is the harmonization of the laws and policies of Member States.

The concept of sovereignty has adapted to the structure and functioning of the European Union. These substantial changes that can not be easily overlooked, even in a situation where we have to accept that there is a new normative order that requires political power to move beyond national states.

Considering sovereignty as the attribute conferring a power of absolute government to an entity in a given territory through will of the people, in this case, at first glance we might consider that the European Union fits neatly into this pattern. But there are atypical features of this structure, which do not fit easily into the patterns of classical sovereignty.

Problematic in terms of the new type of sovereignty is how the national and European systems influence each other. It would be wrong to think that the relationship is a one-sided type.

The increase of duties incumbent to the European Union had the effect of lowering the possibility for Member States to develop public policies independently, without regarding the policies of other members of the European Union[18]. Therefore, although the national state remains the main actor on the international stage, it is not the only one.

From another perspective, the common European economic market prevents Member States from taking unilateral decisions as they affect fair competition, an essential principle of this market.

However, the states, by their own will, accept the European regulations affecting their internal legal order. The above aspects seem to create a paradox, however, the European Union is a non-standard construction, therefore, its degree of complexity is an increased one.

Therefore, increasing the powers that bring the EU closer to model of a structure which enjoys sovereign power has the effect of eroding the national sovereignty.

As the European Court of Justice ruled, the transfer of sovereign powers from the national to the European level works rather as a system of mutual limitation of power for national and European actors. If the former are limited by the principle of supremacy of EU law over national one, the latter are limited by the principle of conferral, which means that the EU can not act in areas where the Treaties do not empowered it to make decisions.

We can say that the European Union has gained ground against Member States in terms of decision making and public policy development. However, the question of sovereignty remains a thorny one, difficult to approach and managed by the European Union. This can be determined by analyzing the Treaties and EU legislation, action which would emphasize the fact that

[16] Ring, D., *What's at stake in the sovereignty debate?: International Tax and the Nation-State*, Boston College Law School, Research paper 153, 2008, p. 17, http://ssrn.com/abstract=1120463

[17] Chilarez, D., Ene, G.,S., *From fiscal sovereignty to a good fiscal governance in the European Union*, Revista Economică, No. 4/2012.

[18] Sjaak J.J.M. Jansen, *Fiscal sovereignty of the Member States in an internal market. Past and future*, Ecotax Vol 28, Wolters Kluwert Law and Business, The Netherlands, 2011.

the express term „sovereignty" is not used, but rather references are made to it.

However, in the TFEU art. 114, para. (2) is noted that the provisions of par. (1) of the same Article shall not apply to fiscal provisions. If in general, the European Parliament and the Council, through the ordinary legislative procedure, may adopt measures aimed at harmonization of national laws to ensure the functioning of the Common Market operation in tax matters this procedure does not apply.

Although states continue to maintain fiscal sovereignty, overall, it is increasingly diluted, which could be explained by three aspects:

The emergence and development of international mechanisms and institutions vested with decision-making functions;

- An extensive economic market that goes beyond a single state;
- Failure of States to absorb or mitigate macroeconomic shocks, given that monetary policy is a centralized European one and the fiscal one is decentralized, remaining attribute of Member States. This is confirmed by the economic crisis that states could not „discard" of.

These issues being presented, perhaps the most interesting feature of the new type of sovereignty, the shared one, is how the Member States power is limited by the European Union, and Union power is also limited by the Member States. We could consider this attribute works as a way to control and balance, as in the classical theory of sovereignty where the executive, legislative and judicial powers shall limit each other to ensure avoidance of abuse of power.

Shared Sovereignty implies that both Member States and European Union play the role of the decider in public policy making.

States could argue that the transfer of competences in the fiscal domain to the European Union constitutes acceptance of the loss of their fiscal autonomy. But in an economic crisis which greatly debalanced economies, the need for legitimate institutions with enough power and authority to tax transnational corporations and to share equitably the tax burden, so that the crisis is over, is undeniable.

However, the idea of an international or regional order in which fiscal sovereignty is dispersed and disaggregated[19], we consider being more effective because an event that takes place at international level can not be solved by measures taken solely at national level. Furthermore, the states show a high degree of individualism, reason for which, the measures adopted aim only self-interest.

With the entry into force of the Lisbon Treaty, the EU has acquired legal personality, the treaty expressly stating this fact and detailing its underlying elements. „The Union shall have legal personality". [20]

In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation. [21]

EU enjoys legal personality in the field of international law, not in the field of private law, treaties being just a series *res inter alios acta* documents, which function on the recognition by Member States[22]. This aspect could raise the question of a possible conflict between the legal personality of the European Union and the legal personality of the Member State.

Conclusions

From the perspective of sovereignty, the European Union does not fold under the classical theory of sovereignty, which implies absolute freedom of states to manage their internal affairs and autonomy towards other states, being rather a pattern of relative sovereignty, which means limiting the power of states in various forms (legislation, transfer of functions).

Tending to claim that states, by virtue of national sovereignty, have signed the EU treaties via their own will, would lead us to the conclusion that classical sovereignty remains the only kind of sovereignty, even after the evolution of the European Union.

Accepting the idea that the authority enjoyed by the EU comes from the Member States[23], it is impossible to deny that a number of actions at Community level has priority over the national ones.

Member States are not willing to cede sovereignty in the tax field to the supranational construction. Therefore, the European Union, on the one hand is forced to rather follow the path of tax harmonization, on the other hand to apply the „contract" type of fiscal governance. Decision making in the taxation field is a heavy one, which requires unanimity and correct application of EU law.

The EU's ability to adopt treaties and agreements with international organizations is expressly enshrined in the Lisbon Treaty. However, states have continued to feel the need to limit this legal personality through the Declaration no. 24 annexed to the Treaty of Lisbon.

According to it „the fact that the European Union has a legal personality will not in any way authoriz the

[19] Hurrell, A., *On Global Order - Power, Values, and the Constitution of International Society*, Oxford University Press, p. 293 şi urm.
[20] Consolidated Version of the Treaty on the European Union, article 47.
[21] Consolidated Version of the Treaty on the functioning of the European Union, article 335.
[22] See BLAHUŠIAK, I., Legal *Personality of the European union after the Lisabon Treaty – a fundamental change*, în COFOLA 2010 : the Conference Proceedings, 1. edition. Brno : Masaryk University, 2010, p. 1480-1498.
[23] See Tokar, A., *Op. cit.*

Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties."

Although, this repetition show that the sovereignty debate is still based on the international legal personality of the European Union.[24]

Objectives of the European Union and European Single Market are difficult to achieve in the context of confrontation with problems of fiscal sovereignty of Member States and territoriality understood as limitation of the power of taxation. The free movement of people, goods, services and capital among member countries of the Union may be put in peril. And if we add to this aspect the lack of fiscal prudence, the chances of fiscal integration will decrease considerably.

To avoid this very least desirable aspect, we must accept that although the authority enjoyed by the EU comes from the Member States, in some cases it has supremacy over the national level.

Therefore European regulations aimed at a common fiscal policy, through which it is ensured the fiscal prudence and the balance the economy, should be supported by EU Member States as regulations applicable with priority. However, Member States continue to defend their sovereignty in taxation matters against the supranational construction. This endows the European Union with reduced tax legitimacy.

Regarding the issue of sovereignty, transfer of attributes from national to the EU can be seen both as a dilution of sovereignty and as pure will of the Member States.

On the one hand states miss a part of their duties which are naturally theirs on the basis of their sovereignty of to provide the power required for the European construction to achieve its objectives.

On the other hand, in lack of willingness of Member States, the transfer of powers to the European Union can not be achieved.

Thus, as long as treatis vest the European institutions with decision-making power by will of the states, the states can not be classified as semi-sovereign, because they do not cede some attributes, but rather they pool them in the institutional structure of the EU. [25]

The need for sharing of sovereignty between the supranational and national level in the field of taxation and increase of the legitimacy of the EU is justified by the economic, political and social phenomena exceeding the national level.

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[24] David, R., *The European Union and its Legal Personality 1993-2010*, p. 22, www.ssrn.com

[25] See de Witte, B., *The emergence of a European system of public international law: The EU and its member states as strange subjects*, în Wouters, J., Nollkaemper, A., de Wet, E., (ed.) **The Europeanisation of International Law. The status of international law in the EU and its member states**, T.M.C Asser Press, 2008, p. 39-54.

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"EU IN CRISIS: CURRENT CHALLENGES IN THE AREA OF CFSP"/ A LEGAL PERSPECTIVE

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Abstract

The paper aims to capture - from a politico-institutional and legal point of view - the current challenges that the European project is facing with in the field of Common Foreign and Security Policy (CFSP) / Common Security and Defence Policy (CSDP).

In this context, it has been assessed the consistency and credibility of the EU profile in the crisis management both in its Southern and Eastern neighbourhoods as well as the perspectives of EU - NATO Strategic Partnership and cooperation.

Moreover, the paper critically examines the legal mechanisms and procedures in force in the field of CFSP / CSDP, putting forward, at the same time, some concrete suggestions and proposals for possible improvements.

Keywords: *Lisbon Treaty; Common Foreign and Security Policy; Common Security and Defence Policy EU - NATO Strategic Partnership; Intergovernment Cooperation.*

1. Introduction

Over the last years, the international security environment has progressively suffered an increased deterioration in the EU Neighbourhood - with older or newer crisis situations - both in the South (the endless Israeli – Palestinian conflict / the Middle East Peace Process; the Syrian crisis; the Iranian nuclear file; the highly fluid post-war situations in Iraq, Afghanistan and Libya) and in the East (with the dramatic events in the South-eastern Ukraine over the last year and the annexation of Crimea by Russia in March 2014 as well as with self-proclaimed breakaway regions and frozen crisis in the Republic of Moldova (Transnistria), Georgia (South Ossetia / the Russo-Georgian war; Abkhazia) and Azerbaijan (Nagorno-Karabakh).

As a direct consequence of Russia's increasingly agressive behavior, with obvious and brutal violations of international law, including its military intervention in Crimea, followed by the annexation of this territory as mentioned before, the relations between Brussels and Moscow have experienced a less "happy" period and have progressively become more and more strained with the subsequent sanctionatory regime imposed by the EU to Russia.

All this resulted in an increased concern of the EU and of its Member States towards a better use of the Union's toolbox – both institutional and legal - aimed at increasing the EU profile and efficiency in managing its CFSP/CSDP.

From this perspective, the article seeks, to a lesser extent, to make an inventory of the geopolitical and security challenges faced by the EU foreign policy, focusing mainly on an assessment of the legal instruments offered by Lisbon Treaty in the field of the CFSP / CSDP. At the same time, some concrete proposals and suggestions are advanced aimed at possible improvements or adjustments that could be made in the field.

In terms of **research methodology**, the article **put in mirror, on the one hand, the legal instruments available to the EU within CFSP / CSDP**, and the **specific requirements needed in order to allow the EU to act as a genuine global actor and to efficiently manage the challenges that the Union is facing on the international arena**, on the other hand.

2. Content

2.1. The Political Challenges

Since the very moment of the CFSP's launching as a specific dimension of EU external action (in the context of the entry into force of the Maastricht Treaty[1]), the EU Member States have expressed nuanced approaches as regards the perspectives and objectives of the EU foreign policy. Thus, while some Member States have constantly endeavoured to strengthen the EU's CFSP pillar, other Member States, especially those having a very pro-Atlanticist orientation have been sceptically as regards such a possibility, fearing the weakening or even the undermining of NATO's relevance with the development of CFSP.

In addition, some Member States have openly expressed growing concern about the fact that the development of CFSP will lead to a gradual transfer of power from the national level to Brussels with direct and clear implications in terms of loss - at least partially - of their sovereignty.

As a result of such diverse approaches, the CFSP has remained a privileged domain of the

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[1] February 1993 / http://www.eurotreaties.com/maastrichtext.html.

intergovernmental cooperation[2], with direct consequences on the preservation of "unanimity" voting rule as the main voting system within the second EU pillar at the expense of qualified majority voting. At the same time, the unanimity has caused constant and significant difficulties in getting common positions and promoting joint actions as regards important issues of the EU foreign policy.

One of the most striking examples of the difficulties faced by the EU in identifying a common approach or position in the field of the EU foreign policy is unfortunately represented by the Ukrainian crisis.

Thus, since the Ukrainian crisis has entered its military phase, through the annexation of Crimea by Russia, the EU Member States have expressed quite diverse positions, giving the impression of being concerned first and foremost by the protection of their national interests and only to a smaller extent by the promotion of their common interest as EU Member States. Subsequently, despite the sanctions regime imposed to Russia, which repercussions for Moscow can not be underestimated, the Member States have quite often had difficulties in speaking with one voice on the EU foreign policy and, in particular, in terms of the Ukrainian crisis management. Unfortunately, such controversial situation has eloquently been illustrated by the two rounds of negotiations with Russia hosted by Belarus – Minsk I and Minsk II - which outcomes have clearly pointed out once more a rather hesitant Europe having difficulties in defining a common position.

In addition, the format in which the negotiations in Minsk were conducted has raised some controversies due to the fact that the Franco-German tandem spoke on behalf of Europe without an explicit mandate from the EU – namely the European Council (possibly at the EU Council proposal). Against this situation, one may put the question - with all the due respect for the contribution of the two founding members of the European Communities /EU to the progress of the European project - whose interests did they defend in Minsk in the two rounds of negotiations? And wouldn't it have been more appropriate to invite the President of the European Council and the High Representative of the Union for the Foreign Policy and the Security Policy to take part to negotiations and to bring their own contributions to the peaceful settlement of a crisis involving the not only Germany and France but the interests of EU as a whole.

At the same time, we do consider that the format of discussions in Minsk would have been much more balanced if the North Atlantic Alliance were present on its behalf – together the EU - at the negotiations taking into account the community of values and interests of the two organizations. Last but not least, the United States - as the main guarantor for the peace and security of the European and Euro-Atlantic community - should have been invited to take part and to directly engage in any negotiation process related to the Ukrainian crisis.

Of course, one could argue - rightly - that the difficulties in achieving a consensus amongst the Member States on a common EU approach with respect to the situation in Ukraine as well as the complexity of decision-making procedures involved prevented the EU from being represented and not the least from shaping a unitary position at the talks in Minsk.

In this respect, there are still difficulties for the EU Member States to get a common vision and to speak with a single voice with its international partners as well as to efficiently manage the crisis / conflicts in the EU Neighbourhood - both to East and to South - despite the fact that the peace and security of the EU as a whole obviously depends on the peace, security and stability of the ENP region[3].

Actually, the rationale behind the current ENP reform process has been sourced from the need to improve the coherence and efficiency of EU action in its Neighbourhood and has focused – amongst other specific issues[4] - on some priority directions, such as: the need to enhance the ENP political and strategic profile; an increased EU involvement in the peaceful settlement of the frozen conflicts; an enhanced complementarity of the ENP tools with the Lisbon Treaty 's tool box in the fields of CFSP /CSDP as well as other sectors of the EU external action (namely development cooperation, humanitarian assistance; scientific and technological cooperation).

In the same logic, the EU aims at rethinking and adapting the European Security Strategy in order to better address the new risks for peace, security and stability of the European Union. In this respect, a strategic reflection process has already been launched amongst the EU Member States and the EU institutions aimed at updating the basis for a new European Security Strategy[5] in order to make it compatible with the new realities of continuously changing political and security international context. Such a debate represent a useful and necessary step in order to get a common approach from the Member States and the EU institutions including the European Parliament despite the fact that the latter – under the Lisbon Treaty - is still missing significant competences on the EU foreign policy.

[2] "Unanimity" voting system is also used in the "Freedom, Security and Liberty" area (former third pillar of Nice Treaty / judicial co-operation in criminal matters and police cooperation).

[3] Either it speaks about some breakaway regions in the East (Republic of Moldova, Georgia, and Azerbaijan) or about some frozen conflicts in the South (Middle East peace Process; the Syrian crisis).

[4] Increased differention amongst the ENP partner countries; ownership; flexibility; a more focus and tailor made approach.

[5] The previous ESS is dated 2003, with an updated version in 2008.

The strengthening and deepening of the EU - NATO Strategic Partnership has constantly had a special place in EU foreign policy, given the fundamental role played by the Alliance in ensuring the security of the Euro-Atlantic community. But again, we notice some residual stumbling blocks faced by the two organizations in terms of developing their institutional cooperation due to the still unresolved "participation issue" i.e. the dispute between Turkey and the Republic of Cyprus on the situation in the Northern Cyprus.

In our view, the existing blockage in the peaceful settlement of the "Cypriot file" is likely to create difficulties both the EU and NATO, with direct consequences on the efficiency of cooperation between the two organizations.

2.2. The legal framework on CFSP /CSDP

&.1. The Lisbon Treaty and the CFSP

The main improvements brought by the Lisbon Treaty in the field of CFSP / CSDP should be considered from a double perspective, both politico-institutional and legal.

In terms of **political and institutional reforms**, the Lisbon Treaty has created and consolidated new institutions and structures with relevant prerogatives in the field of the EU Foreign Policy namely the European Council, the Foreign Affairs Council and the High Representative for Foreign Affairs and Security Policy.

As for the **European Council**, it has been formalized as a permanent EU institution, headed by a President with a term of two years and six months, renewable once. This institution brings together the Heads of State or Government of the EU Member States, the President of European Commission as well as the High Representative for Foreign Affairs and Security Policy[6]. The European Council's role consists in "providing the Union with the necessary impetus for its development", including in terms of shaping and defining "the general political directions and priorities"[7] for the EU's foreign policy.

When it comes to the **Foreign Affairs Council**, we can't speak about the establishment of a new institution as such, taking into account that, up to the moment of entering into force of the Lisbon Treaty, the foreign ministers of the EU countries used to meet in specialized meetings of the Council, regardless of the formal name of the respective structure.

As regards the **High Representative of the Union for Foreign Affairs and Security Policy**[8], given the restrictive nature of the provisions of Article 13 / TEU, it can not formally be considered as representing an EU institution as such, but rather an office. Despite this, the HR, assisted by the **European External Action Service**, has obviously been meant to play a relevant role in shaping the CFSP, including in terms of "right of initiative" in the CFSP, together the Member States and the European Commission.

At the same time, it's worth mentioning that the HR is acting as a "triple-hatted" body, covering the responsibilities of three former or current Union's high officials: the former High Representative for CFSP/Secretary General of the Council[9]; the President of the Foreign Affairs Council[10]; the Vice-President of the European Commission and Commissioner for External Affairs[11].

As far as the **EU legal framework** is concerned, the Lisbon Treaty has preserved the intergovernmental feature[12] of the CFSP / CSDP - i.e. the unanimity as the main rule[13] in the decision-making procedures while slightly extending - by derogation from the provisions of the above-mentioned rule - the situations where the qualified majority voting is considered to be applicable when adopting a decision based on the following circumstances[14]:

- "defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives;
- "defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative
- "implementing a decision defining a Union action or position;
- "appointing a special representative".

In addition, a decision of the Council, by a qualified majority, can be adopted on the basis of an initiative of the HR establishing "the procedures for setting up and financing the start-up fund, in particular the amounts allocated to the fund"[15] for rapid funding

[6] Without having – in the case of the HR - the right to vote.

[7] Official Journal of the European Union, Consolidated versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union C 115, Volume 51, 9 May 2008.

[8] Official Journal of the European Union, Consolidated versions of the Treaty on European Union and of the Treaty on the Functioning of the European Union C 115, Volume 51, 9 May 2008, art. 18 (1).

[9] Function created by the Amsterdam Treaty, in force since 1999.

[10] With the Lisbon Treaty, the EU Council's powers have been divided between the General Affairs Council (which responsibilities are related to the preparation of the European Council's activity and the management of sectoral formations of the Council, with the exception of the Foreign Affairs Council) and the Foreign Affairs Council.

[11] With clear prerogatives

[12] Paul Craig, Grainne de Burca : "EU Law. Text, Cases, and Materials", Oxford University Press, Fifth Edition, 2011, pag 329-333.

[13] 9.5.2008 EN Official Journal of the European Union C 115/37, TFEU, Article 31, paragraph 1.

[14] 9.5.2008 EN Official Journal of the European Union C 115/33, Treaty on the European Union, Chapter 2 / Specific provisions on the Common Foreign and Security Policy, Article 31(2).

[15] 9.5.2008 EN Official Journal of the European Union C 115/37, TFEU, article 41, paragraph 3.

from the EU budget of actions to be promoted under the aegis of Common Foreign and Security Policy.

In this context, it is worth mentioning here that in accordance with the provisions of article 31, paragraph 1 / Treaty on the European Union a Member State has the possibility to invoke its **"abstention" or "constructive abstention"** when it comes to vote, meaning in concrete terms that the Member State is not obliged to pass to the implementation of the decision taken by its partners, despite the fact that the decision retains its significance for the Union as such, on the one side, and the Member State that has invoked its constructive abstention should avoid or refrain themselves from acting contrary to the provisions of the decision in question, on the other side.

Of course, there are some limitations imposed by the EU Treaties in connection with the "constructive abstention", i.e. if the Member States making use of constructive abstention - including by making a formal statement to this effect - represent at least 33% of the EU Member States representing at least 33% of the Union's population then the decision can not be adopted. We remark here an increased affordability that has been offered by the Lisbon Treaty when it comes to adopt a decision despite the existence of the "constructive abstention" compared with the Treaty of Nice in the sense that under the previous voting system in order to block the adoption of a CFSP decision it would have been enough to have constructive abstention of the Member States representing 33% of the weighted votes necessary for getting the qualified majority.

At the same time, we can remark that **the adoption of legislative acts as such has explicitly been excluded from the scope of applicability of the Common Foreign and Security Policy as well as for the Common Security and Defence Policy[16].**

Among the most important innovations introduced by the Treaty of Lisbon with direct implications in the field of EU foreign policy, including the implications of the Common Security and Defense, we have to mention **the "solidarity clause"**[17] and the **"mutual defense clause**"[18] respectively. The provisions of the two above-mentioned clauses are likely to strengthen the solidarity between the Member States while enhancing their involvement and participation in terms of countering any armed aggression or terrorist attack against a Member State from a third country, along with providing the necessary assistance in case of natural disasters or man-made disasters.

Last but not the least, we also notice another significant change made by the Treaty of Lisbon - with purely cosmetic appearance - namely **the replace of syntagma "European Security and Defence Policy" with "Common Security and Defence Policy"**. Such a change seems to have only a purely cosmetic effect, as long as, in substance, the mechanism of decision-making process in the field of CSDP remains practically the same. However, politically speaking, the overall demarche of renaming / "rebaptizing" the security and defence policy from "European" to "Common" **has or should have the meaning of a fundamental political commitment**: the passage - somewhere in the future, when appropriate - **to the "communitarization" of the security and defence policy** and subsequently a **possible effective application of the qualified majority voting system** on such matters.

&.2. The way ahead / Proposals for improving the coherence of EU Foreign Policy

Against this background, we can raise the question to what extent the legal framework provided by the Lisbon Treaty can meet the politico-strategic and security challenges faced by the EU on the international scene, including in terms of coherence and efficiency of its external action?

Obviously, the EU cannot have a significant performance on the international scene - as a credible global player - as long as its performance in the field of CFSP often seems similar to that of a car with the brake pedal pressed down.

In our view, an in-depth assessment and reflection on Common Foreign and Security Policy / Common Defence and Security Policy is still needed in order to make full use of Lisbon Treaty's toolbox while trying to adjust and improve where necessary the current strategies and policies on such matters.

The EU **cannot further ignore its inability to speak with a single voice on CFSP/CSDP issues as if nothing had happened.** As a direct consequence, the **EU cannot simply preserve the current decision-making system** in the field, **if it really wants to count as a credible player in the world affairs.**

In this respect, some improvements are needed in order to facilitate the consensus or at least the EU common positions on most important dossiers.

Amongst the **possible solutions**, we suggest:

- **improving the convergence, coherence and coordination amongst the Member States** in terms of **strategic vision and shaping** the EU foreign policy priorities through a wide-ranging debate, involving the EU institutions, the Member States, including the public opinion in the Member States / the European citizens; in order to reach such a crucial goal, the **Europeans need much more solidarity and a clear-cut and shared awareness of the EU common values and interests**; in this respect, the Member States should not be reluctant in asserting their political will to strengthen the EU role as a global actor; at the same time, the political leaders should act at national level as opinion leaders in order to better explain and shape their public opinion about the importance of CFSP for

[16] 9.5.2008 EN Official Journal of the European Union C 115/37, TEU, article 31, paragraph 1.
[17] 9.5.2008 EN Official Journal of the European Union C 115/37, TFEU, article 222.
[18] 9.5.2008 EN Official Journal of the European Union C 115/37, TEU, article 42(7).

their own welfare and security;

- **better use and implementation of "common strategies"**[19] which should be **better suited to geographical regions, strategic partners, groups of states, partner countries and, not the least, outbreaks of crisis**; as a direct consequence, such targeted "common strategies" **should allow the use of the QMV** when it comes to implement "common positions" and "joint actions" previously approved by unanimity within the European Council and / or the EU Council;

- **extension of the scope and applicability of article 31(2)** / TEU related to the use of qualified majority voting system in the field of CFSP, except for decisions with military or defense relevance;

- in addition, **the effective use of the provisions of article 48** (7) / TEU concerning the **"simplified revision procedures";** in this respect, under the provisions of the above-mentioned article the European Council can decide by unanimity - having the consent of the European Parliament and provided that no national parliament expressed its opposition to such a decision – to "switch from unanimity to qualified majority voting system"[20]; again, such a procedure does not apply to "decisions with military implications or those in the area of defense";

- **further development of "battle groups"**[21] **concept** using the provisions of the Protocol on the "Permanent Structured Cooperation in Defense" annexed to the Lisbon Treaty, as a genuine embryo of a future EU enhanced operational capabilities in the field of security and defense;

- o **more active role for the European Defense Agency** in terms of **supporting the development of a genuine European defense industry** monitoring and promoting the**;**

- not the least, **increased efforts aimed at overcoming the current institutional blockage** caused by the "participation problem" while **improving and upgrading the current bilateral legal an institutional cooperation framework between the EU and NATO;** successful demarches on the above-mentioned issues would result in a **more active involvement of the EU in the theatres through the EU-led missions using NATO military assets** (including in terms of strategic command, consultation and communication)[22] as well as through the EULEX Missions in close cooperation with NATO.

3. Conclusions

The **rapid-shifting nature in the current geo-political and international security context**, with a **more and more aggressive and revanchist Russia**, eager to regain its influence and status at global level, **strongly demands –** as a **top priority for the EU foreign affairs** - for a **rapid rethinking** and **reconsideration of the EU's tool-box in managing its foreign policy** aimed at **enhancing the EU engagement and profile on the international scene.**

From this perspective, despite some significant improvements brought by the Lisbon Treaty, mainly in institutional terms, the EU **needs faster and more flexible decision-making procedures in the field of CFSP / CSDP** and, why not, **even a reconsideration of the intergovernmental "hardcore"** of its foreign policy.

In our view, the achievement of such an objective demands a **clear-cut political will of the Member States** - as an **essential prerequisite** - to **deepen their integration on these matters**, along with the awareness by the Member States and the Union's political leaders of the fact that **a more credible and stronger EU's security and defence policy** can **better protect and promote the interests of their citizens and the EU values worldwide.**

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[22] In accordance with the provisions of EU – NATO Strategic Partenership (December 2002) and "Berlin Plus" arrangements in place since March 2003.

PUBLIC POLITICS AND CAMPAIGN CYCLES

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Abstract

The said paper proposes the analysis of public politics' evolution and their implementation during campaign cycles. An important factor in the modern democratic system's evolution is constituted by consolidating the mechanisms of formulating, implementing and evaluating public politics. A campaign cycle usually extends to 4 years as long as a snap election does not take place. The rule is common in the majority of European states. Generally many public politics are implemented in the first and second year of mandate (especially those that are very pragmatic from an economic point of view). However, the last year of mandate is predominantly reserved for popular reforms (pay rises in the public sector, pension indexations and rises, enhanced indemnisations, tax cuts for certain categories of citizens etc.), which often expose the state budget to significant pressures that can deteriorate the balance on a medium and long term.

Keywords: *campaing cycle, free elections, public politics, economic sustainability, public expenditures.*

1. Introduction

The free elections represent the apogee of any domacracy's manifestation (liberal, popular, direct, indirect or participative). However, what is democracy in essence? According to some authors democracy involves the government by the people, who hold the supreme power that they exert directly or through their representantives, chosen through a freely expressed vote, ensured by the electoral system. In other words, and as Abraham Lincoln asserted, democracy is the government of the people, by the people and for the people. On the other hand, do the people know what is good or wrong for them now and in the future? In reality, do the people represent general common interest or the associated groups' interest? Since, most of the times, in societies with a free past (in speech, information and association) the citizens can often reach conflict situations towards the ones they have chosen at a given point. The illustration of a conflictual situation consists of the introduction and application of diverse types of public politics. Public politics are nothing more than a set of rules applied by public authorities in the social, economic and cultural life of a nation. Public politics can be formal, meaning assumed, and informal as an excuse of the incapacity to do something. Unfortunately, the citizens of the ex-socialist camp countries are barely involved in the politics life, lack the knowledge of civil society bonds and just vote. However, what do they vote? Evidently, the political parties and hardly the individuals (president or mayor). Nevertheless, are the electors completely aware of what the political parties and electoral system signify? The political parties represent power (and opposition) presented under two forms: "impose your will" (Max Weber)[1] or "convince others to follow you" (Martin Luther King). According to speciality papers, political parties are groups of people constituted on the base of free consent that acts pragmatically, conscious and organized in order to serve the interests of a class, social group, human communities, with the goal of achieving political power in order to organize and lead society in accordance with the ideals proclaimed in the program platform[2]. "The party is a group of people reunited for the purpose of promoting through the common effort the national interest based on a specific principle accepted by all members" (Edmund Burke) or "… a group of people who wish to control the governamental apparatus by obtaining public functions in legally constituted elections" (Anthony Downs)[3]. In conclusion, political parties can be refered to as groups of interests.

Pluralist political parties are placed in a continous competition by resorting to promises which are often overbet in order to atract the electorate. The smaller a party is, or the farther to the extremeties it is situated, the more the probability of promising „heaven on earth" [4] arises. The overbet politics denote the situation in which political competitors attempt to draw from each other the electoral support by intensifying appeals and promises[5].

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[1] Weber Max, „The Theory of Social and Economic Organization", Oxford University Press, New York, 1947
[2] Law no. 14/2003 on political parties with the subsequent amendments
[3] Burean Toma, „European parties and parties systems", course support, pdf, page 5
[4] Burean Toma, quoted paper, page 21
[5] Giovani Sartori, „The Numerical Criterion", Oxford University Press, New York, 1990.

2. Content

The main question of our study is: where would the delimitation stand between reforms and populism concerning the political parties' evolution and the state's development?

Democracy represents[6] that certain institutional arangement required to reach political decisions, in which individuals attempt to obtain the power to decide through the means of a competition of votes. In the competition for votes, in which every vote counts, any „weapon" is used in the electoral battle, based on „the end justifies the means" principle. Normally, the politicians promise future actions by invoking the power to decide. However, every time votes are traded on the political market, the transaction risks are bore by the electors. The democracy model started in ancient Greece in which all citizens gathered in the Agora and took colective decisions regarding their statute.

Afterward[7], Charles Louis Montesquien (1689-1755) mentions in his work "The Spirit of the Laws" that

„every man invested with power is apt to abuse it... To prevent this abuse, it is necessary from the very nature of things that power should be a check to power."

Montesquien emphasized in his papers that the power division in a state is exactly the condition of freedom.

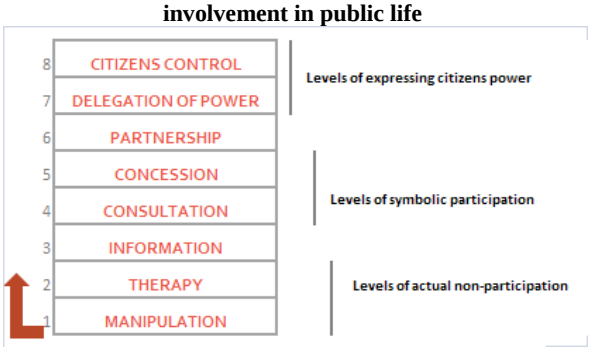
Joseph de Maisre (1753-1821) underlined that "the uncontrolled freedom of the individuals' will represents society's source for decadence. " "Through ambition man has obtained power and his great mistake is abusing it..." In conclusion the author affirmed that "we are all born despots".

Chantal Mouffe[8] affirmed in the same context that "the traditional parties' incapacity to offer a distinctive form of identification around some possible alternatives is that which created a field on which the right-wing populism can flourish. Indeed the right-wing populism parties are most of times the only ones that attempt to create collective forms of identification… Politics always imply the emergence of

"**us versus them**", hence the powerful attraction of their discourse, since it offers collective forms of identification around the people". There have been some changes throughout time and the citizens have started to increase their involvement in political life, evidently with the differences every country implies. Dependent on historical traditions, culture or degree of information the citizens participate more or less in the democratic life. This fact was also highlighted by Arnstein[9] in the ladder of citizen participation in the reform of the society they belong in.

Between the levels of non-participation and the citizens' expression of power, a symbolic participation exists which begins through the level of information. This is also the dividing line between manipulation and participation in the act of government.

Arnstein scale – regarding the citizens' level of involvement in public life



Source: Radu Nicosevici, Corina Dragomirescu, Simona Fiţ, Despina Pascal, Mircea Mitruţiu, quoted work, page 15

Evidently, the least informed or misinformed the citizens are, the easier it is for them to be manipulated. The absence of information or misinformation is an action that falls under the incidence of mass media. Otherwise, the mass media that is affiliated to several political parties can turn at any time toward the side of manipulating the news presented in a sense or another according to interests instead of fulfilling the role of moderator in disseminating information. As Thomas Jefferson judged many years ago, "Were it left to me to decide wheter we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

We shall present a few examples that illustrate the dilemma of public politics versus populist measures:

1) The starting point in the carried out analysis is represented by the Hellenic Republic's situation[10], a country in which adhering to the European Union and introducing the euro currency (measures that required radical economic reforms) lead to the improved perception towards the country and to diminishing the investments' risks and costs. All these meant enormous long-term benefits for everybody but were poorly visible from the level of a Greek citizen. The governments in Athens, along with sindicates in the public sector and other interests groups, have decided to postpone as long as possible any disciplinary measures in budget expenditures since this matter involved political costs. Consequently, the absolutely necessary reforms were delayed, including the

[6] Radu Nicosevici, Corina Dragomirescu, Simona Fiţ, Despina Pascal, Mircea Mitruţiu, „Civic and social dialogue through lobby and advocacy", Timişoara 2012, page 10

[7] Ciprian Bogdan şi Sergiu Mişcoiu (coord.) „Political ideology", Adenium Publishing House, 2014

[8] Chantal Mouffe in Panizza, 2005, page 52

[9] Arnstein, Sherry R. „A Ladder of Citizen Participation", JAIR, vol. 35, No. 4, July 1969, pp. 216-224

[10] Annual rapport of analysis and prognosis. Romanian Academic Society (SAR). Romania 2010, page 9

pension's reform or elimination of unjustified administrative expenditures.

By acceding to the government the political parties that promoted an inexpensive populism starting from 1980 to 2010 attracted the expenditure of all loans that were simoultaneously gained with the unprecedented increase of consumption. In this situation the public debt in Greece reached 350 billion euros in 2009. In 2010 the country was approaching bankruptcy and in the year 2012 the New Democracy conservatory party was winning the elections by promising negociations with those who lend Greece and ceasing the austerity measures. In spite of all these, very few reforms were implemented and the situation of Greece hereby presented itself in 2014[11]:

- over 1,5 million unemployed, out of which 65% young persons;
- new unpayed taxes of 1,5 billion euros per month;
- 2,5 million employees and 3 million retired persons;
- annual incomes of 50 billion euros in the greek state;
- 28 billion euros per year for the pensions' budget, out of which 15 billion euros supported by the state budget.

Regardless of the situation, the European countries insisted that Greek debts should not decrease. Spain and Italy would have demanded the same thing had the Helen state's financial debts been reduced. Given that the Greek debt reached in 2014 the sum of 340 billion euros, Spain and Italy's debt summed up together 3000 euros.

Returning to the situation in Greece, the party governing in 2014 did not carry out any kind of reforms and instead imposed new taxes that were increasingly harder to support by the population. Consequently, in January 2015, the elections are won again on the strength of unfounded promises by the right extremist party Siryza. This is the most blatant act of political populism. As a matter of fact, according to the online explicative dictionary, the term "populism" designated a political Russian movement at the end of the 19th century, which envisioned a socialist society, contrary to the western industrialism. Presently, the term "populism" designates a favorable attitude for satisfying the nation's wishes, even in contradiction to its real interests. The populists accuse the elite and criticize the money element or social minorities (ethnic, political or administrative), accused for a possible power seizement. The populists counter them with a majority that they would represent.

At the beginning of 2014 Greece had a public debt of approximately 323 billion euros which exceeded 175% of the country's GDP[12].

Greece's main creditors (Billion euros)

Germany	56
France	42
Italy	37
Other euro area countries	34
FMI	32
Spain	25
International Monetary Fund	20

Source: www.wallstreet.ro

The measures proposed by the Syriza party for the economic domain regard the following actions[13]:

- erasing a great part of the public debt's nominal value and the rest is suggested to be payed in terms of Greece's economic growth;
- increasing the public investments carried out by the government with at least 4 billion euros (targetting the error's annulment caused by the salvation program offered by the euro area and IMF, considered by Siryza to be major errors);
- increasing wages and pensions aiming at stimulating the population's request and consumption, including also an increase in the monthly minimum wage from 683 € to 751 €.
- social measures with a budget of 2 billion dollars intended for the „humanitary crisis" which regard: free electricity for aproximately 300.000 households on the brink of poverty; alimentary funds for other 300.000 families with no income and free medical care for uninsured employees.
- reducing the tax quantum per property with the exception of large ones – a measure that estimated to have a budgetary impact of 2 billion dollars.

All these measure (public politics) seem attractive to the voting citizens. The problem arrises when we analyse the applicability and sustainability of these apparent generous measures.

2) Populist measures existed in France as well. In the electoral campaign of 2012, the president Francois Hollande proposed a tax for large fortunes that almost reached 75% (it was named exceptional contribution of solidarity) [14]. The legislative proposition was moderated after Francois Hollande won the elections. Nevertheless, in December 2012, the measure was

[11] http://economie.hotnews.ro/stiri-finante-19267605-analiza-cum-ajuns-grecia-fie-condusa-partidul-populist-syriza-cum-trece-tara-luna-februarie-critica-pentru-finantele-tarii.htm

[12] CNN Money

[13] http://www.wallstreet.ro/articol/International/179049/efectul-de-domino-al-datoriei-greciei-asupra-creditorilor-pe-cine-ar-afecta-sustragerea-de-la-plata.html

[14] http://economie.hotnews.ro/stiri-finante-19000551-franta-pregateste-ingroape-liniste-fara-ceremonii-celebra-controversata-taxa-75-asupra-salariilor-foarte-mari.htm

initially rejected by France's Constitutional Counsil which considered it to almost be a measure of confiscating fortunes. Finally, the tax was promoted in December 2013 in a highly modified version which represented a tax payed by large companies for employees with incomes over 1 million euros but with a cover of 5% of the business number. The measures determined a number of actors, business men or enterprising citizens to continue their activity abroad (Belgium or Great Britain) and even to renounce their French citizenship.

The French Prime Minister Manuel Valls announced the end of this measure in October 2014 especially because it did not obtain the anticipated results.

3) At the beginning of 2015 a new crisis emerges on a European level. Switzerland's Central Bank decided to renounce the minimum ceiling of monetary exchange, considering that its existence is no longer justified. Thus the Swiss franc's value increased with 30% against the euro and reached a record level. Well before this measure the debtors in CHF had great difficulties in reimbursing the Swiss franc loans.

Campaigns of promoting Swiss francs credits had existed in many European states since 2007. This currency was presented as a viabil solution for those who did not fulfill the loan standards in other currencies. For example, in Romania, the CHF course was 1,99 RON in August 2007. It was clearly an attractive course which seemed the miraculous solution for easily sustained loans. A loan contract represents a bilateral aggrement between a bank and client and both parts assume through it the advantages as well as the risks that reside in the said loan contract. We must take into account the fact that in most cases the clients obtain their incomes in a currency other than CHF. It was forgotten that any currency loan supports some major risks: exchange rate increases, rate interest evolutions in the financial-banking market and, just as important, the evolution of personal income. In 2008 the financial crisis began and it determined evolutions that were difficult to anticipate. Regarding interest rates on the financial-banking market, these evolved favorably in the largest part of the 2007-2015 interval. The problems emerged with the incomes of families that took loans (young families which mostly took real estate loans) in CHF. The crisis generated massive unemployment in many European states and an accentuated decrease of incomes.

BNR exchange rate for the Swiss franc

Year	CHF – RON rate on January the 1st	% variation
2007	2,1044	-
2008	2,1744	3,3
2009	2,6717	22,87
2010	2,8496	6,66
2011	3,4211	20,05
2012	3,5528	3,85
2013	3,6681	3,24
2014	3,6546	- 0,37
2015	3,7273	1,99

Data source: BNR

We can observe in the chart that the maximum variation years in which the CHF increased were 2009 (22,87%) and 2011 (20,05%). These evolutions were also manifested in other European states: Hungary, Poland, Croatia etc. The crisis' climax culminated with the measure taken by Switzerland's Central Bank in January 2015. Some states tried to protect the CHF debtors well before January 2015. In many cases the measures taken were neither moral nor sustainable on a long-term. The costs being assumed by the state budget means nothing else than involving all contributors. The measures taken in Europe either target populism or economic pragmatism[15]:

a) Poland represents the most affected European country by the CHF crisis (over half a million Polish families have credits in Swiss francs). Whithout reaching a concrete measure the opinions oscilated in regard to:

- populist measures (the Law and Justice party presented a proposition that will aid those with CHF credits – the possibility for them to reimburse their loans on the Zlot – CHF exchange course prior to the swiss currency increase);
- waiting tactic, following the CHF trend and stabilizing the situation (deputy primeminister Janusz Piechocinski);
- economic and moral pragmatism (Leszek Balcerowicz, ex-governer of Poland's National Bank, declared it to be imoral and unjust should the State help those who took loans in CHF, thus discriminating the Polish who decided not to assume the risks and take credits in national currency. "When we take a risk and win, it is OK, whereas if we risk and lose, let others come and pay for us") [16].

The CHF situation is supervised and analised by the Committee for Financial Stability, the Polish Government, Finance Ministry, Central Bank and commercial banks representatives.

b) Hungary is the first country to adopt a populist measure in regard to the CHF credits. Governor ORban forced the banks to support the largest part of the currency shock by implementing a mechanism through which the citizens may reimburse

[15] http://economie.hotnews.ro/stiri-finante_banci-19137947-polonia-moral-statul-ajute-cei-imprumutati-franci-cand-riscam-castigam-dar-cand-riscam-pierdem-vina-altii-plateasca-pentru-noi-vezi-cum-reactioneaza-guvernele-din-jur-problema-chf.htm

[16] Dan Popa - http://hymerion.ro/2015/01/19/cum-reactioneaza-tarile-din-jur-la-problema-chf-polonia-ar-fi-imoral-ca-statul-sa-ajute-pe-cei-imprumutati-franci-cand-riscam-si-castigam-e-ok-dar-cand-riscam-si-pierdem-sa-vina-altii-sa-pla.html

the CHF credits at a fixed course well under the market one (256,6 forints for a CHG while presently the level is 319,2 HUF/CHF). The measure was taken in 2010 (propagandistically used by Victor Orban in the electoral campaign) and further denounced by international financial forums as being a measure that endangers the Hungarian and European monetary system's stability.

c) Croatia tried an early approach to resolve the CHF in the year 2011. Prime minister Jadranka Kosor proposed to the banks to reprogram the credits so that the monthly rates' value would be as close as possible to the rate from the moment the credit was given and to practice a fixed rate of the CHG as opposed to the Croatian kuna (the CHF represented 5,8 Croatian kuna or 0,78 euros).

The difference between the real and the fixed exchange rate, respectively the effective cost of this measure, should have been kept as the debtor's particular debt, without interest, for a period of ten years. In this period a favorable realignment of the monetary courses was anticipated in such way that the debt would erase itself. The government forced the banks to accept these measures by imposing their application for debtors in Swiss francs. Furthermore, in a decision that can create precedent, a court of justice in Croatia sentenced in a commercial law file that the banks should transfer the CHF mortgage credits into national currency loans because at the moment when they closed the contracts the clients were not informed of the interest's increases provided that the Swiss franc appreciates.

The judicial decision affected the subsidiaries of nine international banks (Zagrebacka Bank, Privredna Bank, Erste Bank, Raiffeisenbank, Hypo Alpe-Adria-Bank, OTP, Splitska, Volksbank and Sberbanke). The costs of this measure, estimated by economic analysts, are of aproximately one billion euros. The Croatian court also decided that the commercial banks should establish fixed interests and decrease the balance based on the monetary exchange rate that the mortgage contract was finalized. Over 100.000 Croatians contracted loans in CHF, out of which 75% were mortgage loans. The majority of banks in Croatia renounced on giving loans in Swiss francs in 2008.

d) In Romania there are 75.412 physical persons with loans in Swiss francs and 95% of the loans are concentrated in six commercial banks. The CHF financings weigh 4,5% in the total balance of loans in the Romanian monetary system, out of which 3,8% returns to the population and 0,7% to firms. The measures proposed by the political environment have been placed between an extreme populism (the conversion of CHF credits to RON at the rate from the moment in which the contract was signed – the measure's cost being assumed by the state) and economic rationality (the 3 months rates will be payed at the December 2014 rate or the costs will be supported by the bank as well as the clients through individual treaties).

3. Conclusions

Public politics versus populism. The great dilemma of political people. In appearance the public politics, as well as the populist ideas (measures), "sound good for the electors". The difference is given by their sustainability in time, by the real spot in the rational priorities scale, by the real impact factor in the community etc.

As Ivan Krastev[17] mentioned (during the 21st of September 2014 interview with the occasion of the Conference, "And if Europe fails", organized by the New Europe College) the message of the populist regimes is "trust nobody" and thus, the people who trust nobody can change nothing. Due to the increasing economic crisis the populism reaches unprecedented proportions. For example, Hungary's case in which liberal Victor Orban wins the elections by understanding that the resources can no longer be redistributed since they have been exhausted. He redistributes the guilt situation by publicly revealing who is quilty for the economic –financial state in which the country is placed. Unfortunately the example is not singular and the world contains plenty such political liberals, Vladimir Putin or Marie le Pen for example. The countries with such leaders can experience the loss of independency in banks, mass media or NGOS. The main idea of these politicians is "give us more power if you want us to change something in good". Unfortunately, people are tempted to do this because in an authentic democracy power is so difused within society (or interest groups), that it makes it impossible to place a concrete blame. When a political character emerges and assumes a part of the responsabilities or another character with a reconciliation and reconstruction message instead, the population tends to react favorably (voting that which is right). The politician is corrupt, affirmed Ivan Krasnev[18] when he sustained the idea that: "I will fight everybody for your interest" while thinking in actuality of his own interest. The most eloquent example to this extent is of Russian citizens who in spite of voting for Vladimir Putin mention in all surveys that the Russian government is deeply corrupt and totally inefficient. The problem of these politicians is not winning the elections from 4 to 4 years, but the fact that after winning they try to consolidate power

[17] http://www.hotnews.ro/stiri-esential-18150762-pericolul-ascensiunii-regimurilor-populiste-estul-europei-ivan-krastev-dupa-castigarea-alegerilor-incearca-consolideze-puterea-pana-ajung-imposibil-inlocuit-prin-mijloace-democratice.htm

[18] Ivan Krasnev, is the president of the Liberal Strategy Center in Sofia and a permanent member of the IWM Institute of Human Sciences in Wien. He is a member of the founding council of the European Council for Foregin Affairs, a member of the advisory council of the ERSTE Foundation.

until it is impossible to replace them through democratic means. In this situation they can change the electoral system and even the constitution and not care about the minority's interests.

In the European Union, as long as economically stable states such as Germany exist, the populism cannot extend. With this purpose and from the experience of EU member states, on an European level, minimum standards of public consultation are being promoted by aiming at the potentiation of efficient endeavours of the civil participative society. These standards impose clear and precise information, identifying the interested parts, circulating information, terms for participation, acknowledging contributions and formulating responses regarding the populations' needs.

In the entire European Union a special accent is being placed on encouraging the development of an informed civilian society that can decide alongside with competent forums. Here are a few of the advantages that occur when the civilian society pariticipates in the democratic life:

- the mechanisms of structured public consulting offer the groups affected by the law project the possibility to express the support or amendments and argue their opinions;
- the civilian society will be part of the legislative process and will easily accept compromise;
- the civilian society will no longer be able to manifest its discontent towards an approved law project if it had the chance to previously express its point of view;
- the civilian society will become responsible with the legislative process without searching vague possibilities of influencing law projects.

Essentially, should they remain in the level of electoral campaign zest, the populist statements would not at all represent a major problem for the democratic systems.

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PUBLIC POLITICS IN THE ENERGY FIELD

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Abstract

The present endeavor proposes the analysis of public politics which regard the energy sector. The energy sector represents a fundamental and determining component in the states' social-economic development, a sector which is related even to national security. The European Union is the largest energy importer on a global scale, importing approximately half of the energy demand and the pessimistic projection is placed at approximately 70% in the perspective of the following two decades. Accomplishing energy security on the European Union's level implies a number of directions for action: diversifying the sources and routes of transport in regard to natural gases; intertwining member countries so that no E.U. state is left isolated in crisis situations; decreasing dependency of conventional sources and increasing energy efficiency; reinforced dialogue with energy suppliers.

Keywords: *energy system, energy security, public politics, economic sustainability, politics regarding energy on the European Union level.*

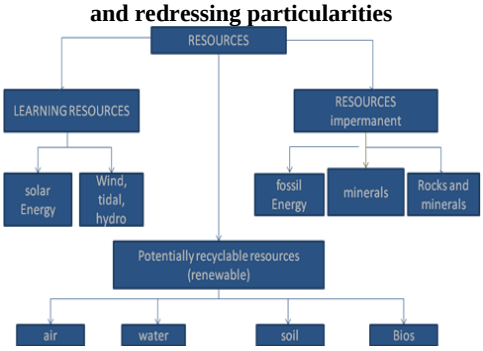
1. Introduction

As far back as the previous years we have been drawing attention (through our studies published at CKS in 2013 and 2014) on the exponential growth of the planet's population while the resources of the said planet are in a continuous decrease. Resources mean energy, hence our current endeavor since the modern society has an industry mainly based on energy.

The main energy resources must be found in appropriate amounts and must be conveniently exploited from a technical, economic and lasting perspective point of view. These sources are represented by fossil fuels (coal, petroleum and natural gas, heavy petroleum and asphalt), pyroschist, biomass energy, hydroelectric power, nuclear power, geothermal energy etc.

Natural resources and especially energy resources have always influenced the evolution of human society, the economic development, national economies of the world's states, the global economy in its ensemble. The interdependency between the existence or inexistence of resources and the level of the world's states' economic development has long been understood and has marked the world's political evolution.

Classifying resources after the exploitation period and redressing particularities



As it was evaluated in the Agenda 21[1] in 1992, "Energy is essential to economic and social development and improvement of life's quality". The pacifist vision of the UNO's members is contradicted by a series of authors who associate the existence of resources with the international degree of power possession and control wielding or even with something more critical such as terrorism. For instance Walter S. Jones[2] considered power to be an international actor's capacity to use its tangible and intangible resources in such way that it can influence the international relations' results to its own benefit. In the same context the expression "energo-fascism"[3] was introduced and through it the American analyst considered that the beginning of military conflicts that aim at fractioning energy resources were defined. Hydrocarbons were especially considered among the resources.

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[1] **Agenda 21** represents an action plan that is not mandatory implemented by the United Nations in regard to durable development. It took place in Rio de Janeiro, Brazilia, 1992.

[2] Walter S. Jones, „The Logic of International Relations", Ed. Harper Collins, 1991

[3] Michael T. Klare, „Blood and Oil: The dangers and consequences of America's growing oil dependency", Ed. Henry Holtand Co, New York, 2004

As far back as 1908, since petroleum was discovered in Iran, the British company AIOC – Anglo-Iranian Oil Company[4] immediately started to exploit it (Laurentiu Dologa, 2011). The British used the local cheap workforce and if protests arose they would appeal to workers from neighbor countries for a period exceeding 40 years. Unfortunately many military conflicts are based on holding or controlling the energy resources' exploitation. Proof to that effect is represented by the wars in the Persian Gulf, Angola, Chechnya and more recently Ukraine.

Nevertheless, Robert Cuttler[5] considered that as long as they can generate military conflicts they can also represent a mean for international diplomatic negotiation and thus introduced a new term called "cooperative energy security" that he considers it to be able to insure equity in the relations between producer, exploiter and consumer through diplomatic negotiations. Many authors associate to him with the opinion that the current world is a terrain of continuous searches for certain resources at reasonable prices[6], or that limiting resources could, as a result, determine the large consumers to renounce the energy independence in favor for energy interdependence. The energy interdependency can emerge between producer, exploiter, distributor and consumer as links of the same trophic chain in which everyone aims at promoting their own interests, or the interdependency between large producer corporations and governments, which is also sustained by Yengin Daniel[7], the president of Cambridge Energy Research Associates (CERA). As a matter of fact, Yergin is also known for his statement according to which petroleum is 10% economy and 90% politics, which he gave in order to describe the importance of this energy resource in the 30's of the last century.

2. Content

2.1. Legislative regulations regarding energy

The 1952 treaty constituting the European Coal and Steel Community (ECSC) as well as the 1957 treaty for constituting the European Atomic Energy Community (EURATOM) represented the first modest trials of legislative regulation in the energy fields. Although coal was representative for the 19th century and petroleum for the 20th century, these two vital resources of energy were not legislatively taken into consideration until after the Second World War. A huge petroleum consumption engaged by the international conflagration determined the specialized authorities to foresee the exhaustion of petroleum reservoirs.

In order to fight against the lack of "traditional" energy from the 50's, the six founding states of the European Union attempted to find in the nuclear energy a method of obtaining energy independency. From the very beginning of this organism the member states had a common vision regarding the role and importance of managing energy resources.

a) The Single European Act (1987)[8] marked a turning point for the single market but the energy did not receive a special interest because, at that time, the governments were not willing to abandon a part of their control over the national energy monopolies in favor of opening to the market.

b) The Maastricht Treaty that was concluded in 1992 and recognized under the name of Treaty on European Union brought a couple of additional definitions for the internal energy market without including an energy chapter. The European commission prepared a chapter proposition which Great Britain, Holland and Germany vehemently opposed. The same faith applied to another proposition made by the Commission, which regarded the administration of the Energy Charter by the Energy Commission inside the EC. The proposition to include the Energy Chapter was replaced on the agenda of the next Amsterdam Treaty, in 1997, but was once more rejected. It is interesting that the European Parliament was a strong supporter of the Energy Chapter while her adversaries were the member states. Nevertheless, the EU treaty brought something new for the energy sector by broadening the action surface of the subsidiary principle, valid until that date only for environmental issues.

c) The Amsterdam Treaty (1995) approved for the first time a community initiative in the energy field – Trans-European Energy Networks (TENs), a project that aims at extending the transport, telecommunication networks and the pan-European energy infrastructure beyond the Union's strict border. The purpose of these programs is to enhance the capacity of the national networks to interconnect and interoperate, the process of accessing them as well as to connect the isolated and peripheral areas with the central regions in the Union. A special budgetary line for administrating these programs exists in the Union's budget.

d) The European Charter of Energy. The idea that the economic re-establishment in the ex-communist area as well as the energy supply assurance in countries from the community area could be consolidated through collaboration in the energy field

[4] http://www.ziare.com/international/cia/rasturnarea-democratiei-iraniene-de-catre-cia-1084814
[5] Robert Cuttler, „A Strategy for Cooperative Energy Security in the Caucasus", in Caspian Crossroads 3 no. 1, 1997
[6] Proninska Kamila, „Energy and Security: regional and global dimensions", Ed. Oxford University Press, 2007, p. 216
[7] Yergin Daniel, „Ensuring Energy Security", in Foreign Affairs, vol. 85 no. 2, 2006, p. 70-72
[8] „Of the European Union's energy policy". The study was elaborated during the Phare project RO 0006.18.02 – Forming public servants from local administration in European business and managing the project cycle, implemented by the European Institute in Romania in collaboration with the human dynamics in the year 2003. The study is part of the Micromonographies Series – European Politics, the updated version.

was launched during the European Council of 1990 in Dublin. Thus the European Charter of Energy emerged, whose final document was signed at Hague by 51 states in December 1991. The framework for legal cooperation that put into effect the Charter's principles was established through the Energy Charter Treaty. The treaty is based on respecting the Internal Energy Market's principles and represents an extension of it towards the entire Europe and further on (Japan is one of the signatories). An important part of the Treaty refers to the energy efficiency and the problems related to the environment's protection. It also includes articles that establish conditions of competition, transparency, sovereignty, taxation and environment. The treaty became effective in 1998.

e) The Green Book of Energy. The European commission plays a central role in the debate carried out by several actors in the energy market. The European Commission's first communication that approaches the matter of a common energy policy dates from 1995 and it was called The Green Charter „For a European Union Energy Policy".

The White Book, "An Energy Policy for the European Union" followed in the same year, then a new sequence of communications in 1996 and 1997, called "Green Paper for a Community Strategy – Energy for the Future: Renewable Sources of Energy", respectively "White Paper: Energy for the Future – Renewable sources of Energy". These documents stand at the base of the present common energy policy and of the European legislation created to put it into practice. The complexity of the problems related to producing energy, transport and energy consumption has increased considerably in the last decades, simultaneous with the aggravation of global environment issues, climate changes and exhaustion of natural resources. In addition to these, the European Union is confronted with a few specific problems among which the most serious is the one related to the pronounced dependency for imported energy resources. Placed also under the pressure of the engagements assumed through the Kyoto Protocol, the European Commission launched in the year 2000 the third **Green Book "Towards a European strategy for the security of energy supply"**. The final rapport regarding the Green Book of Energy was presented by the European Commission on June the 27th 2002. A recent moment which signaled acceleration in the development of the common energy policy took place in the **Barcelona European Council** (March 2002) where the total liberalization of the electric energy market was decided for the industrial and commercial consumers starting with the year 2004.

2.2. The European policy within the energy market domain[9]

The internal market of energy is still fragmented and has not reached the potential of transparency, accessibility and choice. Although the companies have grown beyond national borders their development is still influenced by a series of different national rules and practices. There are still many barriers for an open and just competition. At the same time the member states need to eliminate subventions from the sectors with a negative impact on the environment. Sustainable efforts are made in order to achieve the target of insuring 20% of the consumption out of renewable sources. The European Commission issued the Third Package of legislative previsions dedicated to the internal electric energy and gas market. It establishes the necessary regulatory framework for a complete energy market disclosure and has become effective on the 3rd of September, 2009.

1.The Regional Market. Recent evolutions in the central-eastern European area indicate the development of certain market examples based on different options, projects that are not fully convergent. Nevertheless, the accomplishments made in 2010 and at the beginning of 2011 brought with them the optimistic signal that the differences of opinion and the unequal stage of maturity and liquidity represent obstacles that can be surpassed through collaboration, taking into consideration the mutual interest and imperative implementation of the EU directives. Therefore[10]:

- on April the 4th, 2010 Nord Pool introduced a new bidding zone (Estlink) represented by the Estonia market;
- on August the 20th, 2010 the electric energy market OKTE starts its activity in Hungary;
- on November the 9th, 2010, the connection by price of central-western markets is launched as well as the connection by volume of the regional market CWE, thus formed with the Nordic region;
- on November the 30th, 2010 the Memorandum between the Ministry of Economy, Commerce and Business Medium of Romania and the Economy, Energy and Tourism in the Bulgarian Republic was launched for organizing and implementing the project for connecting electricity markets;
- on December the 15th, 2010, Poland was connected by price to the regional market administered by Nord Pool Spot;
- on January the 1st 2011 Slovakia 's operator in the electricity market, OKTE, starts its activity;
- on January the 1st 2011 the markets in Italy and Slovenia connect.

These legislative elements are meant to insure more safety in food supply, to promote durable development and to insure conditions for a fair market competition. The effective separation of the energy's production and sale from its transport, which is stipulated in this new legislative package, will create more freedom of movement for investors in the energy markets.

[9] http://www.minind.ro/dezbateri_publice/2011/strategia_energya_20112035_20042011.pdf
[10] http://mmediu.ro/new/wpcontent/uploads/2014/01/20111107_evaluare_impact_planuri_strategiaenergyaactualizata2011.pdf

2. The present energy situation.

The important energy resources are divided only in a few categories: solid fuels, hydrocarbons especially petroleum and gases, nuclear energy and renewable energy. From this entire energy mix 60% are hydrocarbons.

During the year 2000 the weight of energy resources in the global energy balance hereby presented itself: petroleum 36,8%, coal – 25,1%, natural gases – 23,5%, hydropower – 7,0%, nuclear energy – 6,4%, other resources – 1,2%. As a result of the energy crisis considerable changes have been made in the structure of the global energy balance for decreasing the weight of petroleum and natural gases and increasing nuclear and renewable energy[11]

Among this energy mix the solid fuels have the following geographical distribution: 66% of the global total of petroleum is situated in the Close and Middle East. The remainder of petroleum is exploited from diverse regions as follows: 8,3% from North and Central America, 8,2% from South America, 7,2% from Africa, only 6,8% from Europe and 0,2% from Oceania. There are also off-shore reserves in the territorial waters belonging to states in the Persian Gulf regions, North Sea, Gulf of Mexico and Guiney. Natural gases are concentrated in Russia, Iran, Qatar, UAE, Saudi Arabia, USA, Venezuela and in the continental platform: Great Britain, Holland and Norway. In the territorial distribution coal occupies 56,7% of the global reserve in Russia, 24% in USA and 9,4% in China.

As far as the geographical distribution of energy consumption is concerned it is possible to mention that it is totally irregular by recording large differences from a continent to another as well as from a country to another. Thus, in the year 2000 the global energy consumption was dominated by Europe (including Russia) and North America with 60% while the rest of the continents had insignificant consumptions. The larger consumers based on country level and per inhabitant are the USA, China, Russia, Japan, Germany, Great Britain and Canada, with a total sum of 70% of the global energy consumption.

The energy consumption in the EU represents approximately 18% of the global level by comparison to USA's level of 23%[12]. Being a gross energy importer, the European Union is dependent on external resources mainly originating from the Russian Federation, Norway, Africa and the Middle East. In this context and simultaneous with the EU's economic and social development, its dependency will amplify in the following period. Also in the European Union the energy consumer sectors are transports and industry with over 60%, followed by domestic consumers with 25%, services and agriculture with 15%.

The European Union is currently in the situation of representing the most important energy importer. The 27 member states of the EU presently hold only 0,6% of the global petroleum resources and approximately 2% of the natural gases.

The energy's mix evolution in the European Union

Resource of energy	Gross intern energy consumption in the EU %		Tendency
	2011	2030 estimation	
Petroleum	35	33	↑
Gases	24	22	↓
Nuclear Energy	14	14	~
Renewable Energy	10	18	↑
Solid Fuels	17	12	↓

Source: European Commission 2003

European Union suppliers of petroleum and natural gases (2011)

Petroleum source	Petroleum %	Natural gases %	Natural gases source
Russian Federation	35	30	Russian Federation
OPEC countries	33	28	Norway
Norway	12	13	Algeria
Kazahstan	6	11	Qatar
Azerbaidjan	5	10	Unspecified
Mexico	1	4	Nigeria
Others	8	4	Egypt, Libya, Trinidad Tobago, others with 1% each

Source: European Commission 2013

[11] European Commission 2013 – Challenges in the energy domain and energy policy – The Commission's contribution to the European Council reunion on May the 22nd, 2013

[12] http://ec.europa.eu/dgs/energy_transport/figures_archive/energy_outlook_2020/execsum.pdf

EU's final energy consumption by sector in 2011

Sectors	Final consumption of energy in the EU% (2011)
Transports	33
Industry	26
Household and residents needs	25
Services	13
Agriculture	2
Other sectors	1

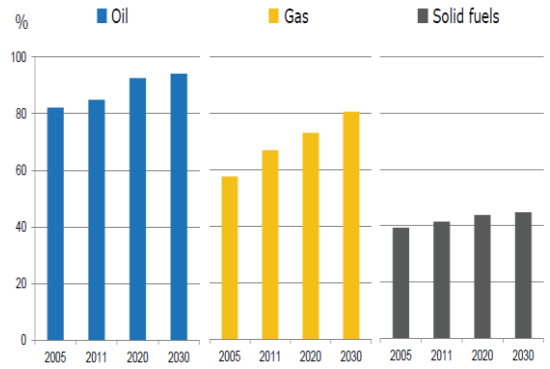
Source: European Commission

The situation is not much different in regard to the coal reserves, the EU has only 4% of the reserves identified on a global level and the energy production capacity represents 18% of the global one. On the other hand, Europe annually imports petroleum, gases and coal with the value of 406 billion EUR (3,2 of the GDP) and it is foreseen that the dependency will rise. According to the European Commission's "EU Energy Outlook by 2020" rapport in the following 15 years the EU will reach the point of importing 70% of its energy requirements.

The petroleum products request is expected to be higher by 50% in 2030, as opposed to the current level. The consumption is expected to increase from the present 85 million barrels per day to 105-115 million in 2030. In order to satisfy this need it is required that in the 2012-2030 period investigations in developing extraction and refinement capacities

The extraction, refinement and the infrastructure for transport and storage require investments of 5950 – 7550 billion USD[13] during the 2012-2030 period for their development in order to satisfy this need.

The percentage of imported fuel in the EU's total consumpion



Source: European Commission 2013

2.3. Romania's situation

The main interest projects promoted by Romania are represented by: Nabucco, P.E.O.P, A.G.R.I (the Azerbaijan – Georgia – Romania interconnector), Interconnecting the national system for transporting natural gases with the one belonging to neighbor states[14].

a. Nabucco. The Nabucco project aims at establishing a pipeline on the Turkey – Bulgaria – Romania – Hungary – Austria track, with a total length of 3296 km. The pipeline will cross Turkey on a 2000 km portion, 400 km in Bulgaria, 460 km in Romania, Hungary 390 km and Austria on 46 km. The pipeline's initial capacity is of 8 billion m^3/year with a linear increase until reaching the designed capacity of 31 billion m^3 natural gases/year in 2020.

In fulfilling the Nabucco project the following six firms are participating – Botas (Turkey), Bulgargaz (Bulgaria), Transgaz (Romania), Mol (Hungary), OMV (Austria) and RWE Gas Midstream GmbH (Germany).

Materializing the Nabucco project is a priority for Romania. The project is receiving support from all the actors involved and has been recognized by the EU as an infrastructure project with primary importance considering that it is the Southern Corridor's central element.

The interstate Nabucco agreement, signed at July the 13th, 2009 in Ankara and confirmed by Romania through the 57/2010 law for ratifying the Agreement between the Austrian Republic, Bulgarian Republic, Hungarian Republic, Romania and Turkey Republic regarding the Nabucco Project, published in the Official Monitor no. 2020 on March the 31st 2010, became effective on August the 1st 2010.

b. PEOP. The PEOP project is part of the European program INOGATE (Interstate Transport System of Petroleum and Gases).

The PEOP will have a total length of 1360 km (out of which 649 km on Romanian grounds), will start from Constanta port and will reach its destination in Trieste port, Italy. In Trieste the pipeline will connect to the Pipeline Transalpine (TAL) system, which supplies Austria and Germany, with the existing possibility of supplying the refineries in northern Italy.

One of the project's counterpoint is represented by the interest shown by suppliers such as Kazakhstan şi Azerbaijan.

c. The AGRI project (Interconnector of Azerbaijan-Georgia-Romania). The AGRI project implies the transport of natural Azerian gases through Georgia and by crossing the Black Sea based on the LNG technology by constructing two terminals (liquation and regasification) in Georgia and Romania. The transport capacity that is taken in consideration at this moment is of 8 billion m^3 natural gases/annually.

[13] Oil Supply Security, Emergency Response of IEA Countries, International Energy Agency, 2007
[14] http://ue.mae.ro/node/425

This project contributes to the consolidation of three-lateral cooperation through concrete common actions in the energy infrastructure domain, more exactly through the transport of Azerian gas in liquefied form from Georgia, along the Black Sea, in a LNG terminal in Constanta.

b. Interconnecting the national transport system of natural gases with the neighbor states. "Romania's Energy Strategy for the 2007 – 2020 period" has established among the main objectives, conformed with the EU policies, to interconnect the National Transport System to the European transport system.

To this extent the strategy for interconnecting the National System of Natural Gases Transport with the natural gases transport systems in the neighbor countries, elaborated by the SNTGN Transgaz Medias S.A., anticipates the action's fulfillment in the following directions:

- Interconnecting with Hungary on the Arad-Szeged relation;
- Interconnecting with Bulgaria, on the Giurgiu-Ruse relation;
- Interconnecting with the Moldavian Republic, on the Ungheni-Iasi relation.
- Interconnecting with Serbia.

The projects for interconnecting with Hungary and Bulgaria have received European financing during the European Energy Program for Recovery.

3. Conclusions

Analyzing the evolution of fossil fuels weight of last century's global energy market emphasizes important modifications. Thus, if at the beginning of the last century coal occupied a dominant position in the global energy balance (over 90%), after the second world war its weight vertiginously dropped in 25 years by reaching 28,7% as opposed to the weight of other sources, such as petroleum, natural gases and nuclear energy, that increase.

The current certain global reserves of fossil fuels can insure an energy consumption over a period of 100-120 years at the present level of production and consumption.

The fuel production on country levels signals a strong concentration in a reduced number of states. Hence, in 1999 only nine states were part of this category: U.S.A., China, Russia, Saudi Arabia, Canada, India, Great Britain, Australia and Germany held approximately 60% of the global production of fossil fuels[15].

Under these conditions the existence of a management is required for the electrical energy demand. The energy consumption will have to be controlled and managed, especially by closely monitoring the energy efficiency and by diversifying the primary energy sources. In order to insure the primary energy supply in Europe, the creation of a new energy partnership has been agreed between the EU and Russia and it will contain precautions related to the network's safety, the investments' protection, and major projects of common interest.

The new and renewable sources of energy presently represent only 6% of the EU's energy balance. If the trend is maintained they will only cover 9% of the total consumption by 2030. The directive regarding the promotion of energy produced from renewable energy sources placed an important step toward attracting the interest for investing in alternative sources. As far as the nuclear energy is concerned, the fears connected to global warming have changed its perception. It is an acknowledged fact that using nuclear and renewable energy, along with the increased energy efficiency, lead to limiting the greenhouse effect caused by the gases issued? by fossil fuels. In order to completely abandon the nuclear energy 35% of the electric energy production requires to be provided from other sources. As a result the nuclear option remains open to the European states that desire it. However, processing and transporting radioactive wastes remains an unresolved matter. The new member and candidate countries that own old reactors are obliged to shut them down or modernize them, as the case is for the nuclear groups in the Dukovany station in the Czech Republic or Kozlodui in Bulgaria. Being a subject of major interest, nuclear safety will become the object of regular rapports, a standard of common practices and a European control and peer-review mechanism will be elaborated. The states will need to build national systems of radioactive wastes deposit.

The energy commerce in the EU covers only 8% in the case of electric energy and still requires interconnection capacities. A development plan exists for the gas and electricity networks and several projects of European interest have been identified. In the same context, the safety for food supply imposes and effort of long-term anticipation and consolidated relations with third countries. Detaching consumption from the economic growth is a tendency of common energy politics, through which the trials of decreasing and ending the negative influences of the energy sector on the environment and social life are carried out. The recommended instrument is the efficient use of energy.

[15] http://www.scritub.com/geografie/ENERGYA-MONDIALA93744.php

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CREATING ELECTRONIC IDENTITY - FUNDAMENTAL OBJECTIVE OF E-GOVERNMENT

Cristina ARITON-GELAN*

Abstract

Providing quality government and administrative services to citizens is a goal of the current trends in terms of creating conditions for a social environment smart, inclusive and sustainable. In this context, the e-government is the main pillar of the information society and one of the main pillars of the knowledge society. The work that we propose aims to provide an analysis of the concept, characteristics and values in the current e-government. Thus, the following objectives are targeted: description of the phenomenon of e-government features and values involved him, in closely related to services provided to citizens and facilitate their participation; analysis of certain aspects of the phenomenon of e-government implementation in Romania, in close connection with the evolution of the phenomenon in an international context and in particular, in the European context; analyzing the main aspects of the methodology for implementing e-government phenomenon in public administration, contained in the National Strategy for the Digital Agenda for Romania 2020. The results of this study follow the outline of the instrument e-government can contribute to social sustainability and determine the impact this phenomenon has on our society in accordance with current trends and conditions.

Keywords: *e-government; public administration; national strategy; electronic identity; digitization of the public sector.*

1. Introduction

The study we propose is part of the administrative sciences, covering a matter of administrative communication techniques. Through this study we intend to analyze how to implement e-government phenomenon in the administrative system in Romania, given that, due to the development of new technologies, it requires increasingly more administrative reform of using information and communication technologies. In this regard we intend to justify what extent e-government is an effective means of communication in public administration, to argue about the advantages and disadvantages of e-communication phenomenon without ensuring visibility of public institutions and services they provide, to realize a short analysis regarding the implementation of e-government phenomenon in Romania closely related to how it manifests in Europe and to analyze the most important aspects of e-government in public administration, contained in National Strategy for the Digital Agenda for Romania in 2020.

In order to achieve the objectives that we have set will provide an analysis of the e-Romania phenomenon, as it appears in projects and programs on the administrative system in Romania and an analysis of national strategies for the Digital Agenda for Romania for 2010 - 2020.

2. E-Government - efficient means of communication in public administration

At the beginning of XXI century, *digital government* or *e-Government* has been proposed as a new model for public services, a model based on the principles of government accountability and facilitate citizens the opportunity to fulfill their obligations to the state. Software development services and Web technologies has provided a way to improve the efficiency and effectiveness of large bureaucratic organizations. Thus, the administrative system in relation to citizens, developed the idea of e-communication that means an electronic communication in which elements such as the use of IT systems, both hardware and software, to give citizens access to information and public services, use websites to inform citizens of a communication by electronic mail have become the most effective means of networking.

In recent years, more and more governments of countries in developing are interested in reforming their administrative systems using information and communication technologies (ICT). This would allow governments to avoid the dilemma between reducing costs and improving quality and creating management structures to operate more efficiently and to involve lower costs. Also, new channels of interaction will increase transparency, increased accountability, and the degree of citizen participation.

Reforming administrative systems using information and communication technologies involves

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developing e-communication phenomenon. The phenomenon has two major objectives: to achieve major improvements in response speed, efficiency and accessibility of public services and to bring the governments closer to citizens. In this regard, among the potential benefits of new technologies for services performed and provided by the government include: reducing administrative costs; faster and more accurate response to the citizens to applications and database queries, including outside normal working hours; access to data present at all levels and administration structures, from any location; increasing the capacity of government; assistance to local and national economies by facilitating the development of government-business environment interface; a means to achieve efficient public feedback.

The introduction of information and communication technologies can help reduce the appearance of corruption opportunities in the sense that it can be detected and removed more easily. There are also situations where ICT system may not have any effect on this phenomenon or even to provide new opportunities for its development.

In addition to the benefit ratio administrative e-communication were identified and a number of disadvantages[1], including:

- Hyper-surveillance of taxpayers, meaning that public authorities can have a very good record of the activities of contributors, by using various technologies for e-Governance (mobile, cameras, etc.). There are times that this action has advantages (such as monitoring terrorist or criminal activities), but outside of them may be a violation of freedoms of citizens;
- Implementation and maintenance of e-Government services involving financial costs ever higher;
- Inaccessibility of e-Government services for certain categories of citizens: what are in locations without Internet connection or those who can't afford the use of computers for various reasons (financial or health reasons - people with visual impairments);
- False sense of transparency may be due to the fact that since the authorities having access to data, they can be altered or removed, without the public to realize this;
- Electronic services can be targets of electronic attacks.

The successful use of e-Government services to citizens and their adoption is dependent on certain requirements that these services should meet. According to GD. 195/2010 on the approval of the National Strategy "e-Romania"[2] these requirements relate to: the trust that citizens must have in government and security electronics electronic versions of official documents received; possibility authentication and electronic signature; transparency in providing public services; accessibility of public services for all citizens without discrimination; easy to use electronic public services through clear and simple structure; data security to protect them; effective cooperation between authorities; modularity e-Government services to keep pace with the latest technology; e-Government interoperability.

2.1. Electronic communication - useful tool for providing public data

The new trend in terms of the visibility of public institutions and services they offer have a number of advantages such as: speed, low costs, the possibility of continuous updating, entry into networks or their initiate, interactivity.

The speed refers to the speed of electronic communications. The technology involved to the evolution of the Internet allows transmission speed smoothly and messages in the most demanding digital form formats (formatted text, complex images, sound, Video). The electronic communication is an effective means of networking between administrative institutions and citizens.

An administrative institution which must distribute documentation, forms, information from databases can introduce a system to contact his office of public relations through a general email address. Team members can establish a "response protocol" that will bring a major improvement in relations with citizens, whereas the latter will receive an electronic response, largely standardized, without consuming too many material resources or time (not will wait days or weeks post, will not have to waste time and money to travel to the headquarters organization resource to solve a problem).

Electronic communication is effective when organizations launched a public action, after the model of the "snowball" requires the participation of other organizations, the media awareness and public raising. The rapidity of electronic data transmission motivate organizations wishing to make known their projects and actions. If human resource, time and cost required for processing information on traditional media and their distribution proactive communication discourages, the use of electronic communication motivates disseminating information to their internal or external recipients.

Relatively small costs involved in electronic communication leads to a desire to shift the communication of traditional media (brochures, reports, catalogs, brochures, posters) to Web pages and e-mail communication. When printing an annual report involves certain costs depending on the complexity of the information and print quality (to which we add the cost of design and distribution), load

[1] *** „Case Study in Public Administration Services", conducted in the *Strategic Program for the Promotion of Innovation in Services by Open Continuing Education*, Project co-funded by European Social Fund through Sectorial Operational Program Human Resources Development 2007 - 2013, pp. 12-13.

[2] Romanian Government, HG. 195 / 2010 approving the National Strategy "e-Romania", 2010.

the same report on the website of an institution may involve a limited communication budgets using Internet connection and paying any telephone. Thus, the costs include the costs of creating a website (with features according to standard design, the amount and complexity of information and security requirements), its maintenance costs and distribution costs of electronic information, which are practically reduced to Internet subscription and telephone costs. In addition, information is more easily taken up by the receiver of information. A direct consequence of electronic communication, both intra and inter-organizational institution is to reduce administrative costs (telephone, fax, mail, courier, printer / copier and supplies for them).

To make known projects and actions set out in a unit of time, for example during a year, we can choose the electronic version of their presentation, which involves placing information on the website of the institution. Maintaining on the site of an institution of news pages, a page in which the events or news that becomes landmarks of organizational and enabling stakeholders to be informed of its activities, is an effective promotional tool. The website can also be updated in real time and the information posted may include links to other useful resources.

Once created a web page should be entering the network or its initiation, a phenomenon known as networking. The phenomenon represents fast networking ability with other sites in the same field or in other fields: government bodies, commercial companies, international organizations or the media. Networking represents very often a defining element in the start of projects, fundraising and exchange of experience.

Interactivity requires a web user involvement in the communication process. There are several ways in which users can be involved in the communication process, namely: contact by email institution on any page of the website, not only in the initial or the dedicated address or phone; to complete registration forms to access the database, to newsletters or other secure parts of the website, which provides to the institutions important information about its public and helps to build an accurate picture of people interested in his work; to mark an address as a permanent source of information.

The introduction of e-communication in the administrative system seems to be a goal of facilitating services provided to citizens. Thus, the interaction of an electronic public services performed by users, the possibility of access to services as varied conditions in order to increase citizens' satisfaction, the possibility of defining and monitoring of workflow are issues that should be considered when which means we relate to effective administrative services. Acceptance of these new ways of interaction, due to the development of new communication technologies, means to implement government policies in reality that citizens face increasingly more and more.

Currently e-Government is a major driver of public administration reform and its modernization[3]. E-Government strategy is formulated, since 2000, as a necessity for all the European Union for all Member States. In this context arises the concept of *electronic State* or *e-state* concept developed by I. G. Androsova[4]. The *electronic State* or *e-state* is the synonym of "State of XXI century», which is capable of providing, in addition to socio-economic development in conditions of uncertainty, and restore citizens' confidence in state institutions, and creating of new channels of participation policy to boost the development of democracy.

Electronic government is reforming the public sector using new information management techniques. The aim is to increase political participation of citizens and to streamline the administrative work through civil society participation in decision-making and ensuring transparency of administrative acts.

3. Implementation of e-governance in Romania and European context

In the context of electronic government (e-Government) must increasingly more as an component essential of the new information society, knowing, in recent years, an exponential growth globally and especially in Europe, the Romanian government promoted and promotes various projects that make electronic services an instrument of public administration reform. Thus, in 2009, the Ministry of Communications and Information Society (MCSI) proposed a national strategy accompanied by an action plan to help steer public sector to the information society, the main instrument of action being the e-government[5].

As a single public authority in organizing and coordinating the implementation of national programs and projects of electronic government and electronic administration (under GD 12/2009[6]), MCSI proposed a unified vision to create a coherent and integrated national system for public services online dedicated of the citizens and businesses. Among its objectives included: to create a society that includes access to all citizens by increasing the usability of information society services; reforming operational models within the government sector and increase operational

[3] Baltaru R. A., „Reforma în administrația publică. Studiu privind e-Guvernarea la nivelul Uniunii Europene". In *Administrarea Publică*, 2012, nr. 3, p. 114.

[4] Apud. Tudor Pînzaru, „E-guvernarea: concept și valoare", in Jurnalul Juridic Național: Teorie și practică, iunie 2014, p. 80.

[5] *eRomania*, V1 - June 2009, Romanian Government, Ministry of Communications and Information, p. 3., available at www.romania.gov.ro.

[6] HG 12/2009, available at http://lege5.ro/Gratuit/gezdcobtgi/hotararea-nr-12-2009-privind-organizarea-si-functionarea-ministerului-comunicatiilor-si-societatii-informationale.

efficiency through appropriate use of information and communication technologies.

MCSI aim to achieve a national electronic system dynamically and continuously updated to streamline the relationship between government and citizens, including information on all areas of economic and social life[7]. Thus, while reforming structures and operational models to promote the idea of introducing Digital City model or Digital County by identifying, auditing and development of public services, in conjunction with the translation and trans-dressing in digital format, and promoting this practice in local government and business environment[8]. It was estimated that by the end of 2013, citizens, businesses and central and local government will always benefit from a defined set of e-Government services at a level of quality and maximum safety and ensure increased number of users, sustainability services and updating them.

The strategy proposed by MCSI shall be addressed a new concept of e-Government, namely e-Romania, based on a common vision of creating a coherent and integrated national system for online public services dedicated to citizens, businesses and local and central administration. Through this system every citizen, whether living in Romania or not, every business or government user will be able to inform, to access public services online to solve any administrative problem in the fastest and favorable way.

In 2014, the Ministry for Information Society, in line with the EU's growth strategy, launched in 2010 for the next ten years, which referred to deficiencies in growth patterns in Europe and aims to create an environment more intelligent, more sustainable and more inclusive, proposes a *National Strategy for the Digital Agenda for Romania 2014 - 2020* adapted to the economic and social reality of Romania[9]. This strategy refers to the four areas of action, the first of which relates to e-Government, Interoperability, Cyber security, Cloud Computing, Open Data, Big Data and Social Media and aims to increase efficiency and reduce costs in the public sector in Romania by modernizing the administration[10]. Among the *Objectives 2020* refers to citizens were using e-Government services and the analysis performed that in Romania, in 2013, 5% of citizens using e-Government services, Romania's target in this respect, until 2015 was 35%, compared to that of the EU is 50%[11].

The reason that Romania intends to implement e-Government 2.0 concept is closely related on the one hand with cultural and behavioral changes, and on the other hand on the benefits of the social aspects of interaction between government and users. The e-Government requires a transformative vision, supported by ICT to deliver better public services by government and citizen involvement in government support approaches. The phenomenon involves the modernization of central and local government in providing services to citizens and businesses in an integrated, transparent and secure manner.

In a study conducted by the United Nations on the development of e-Government in 2012 by defining and implementing effective strategies, European countries are on the first place, being followed by the USA and Asia. The less developed in this regard are the countries on the African continent.

Regional and Economic Groupings	Index value	Online Service Component	Telecomm. infrastructure component	Human Capital Component
Africa	0.2780	0.2567	0.1094	0.5034
Americas	0.5403	0.4648	0.3602	0.7958
Asia	0.4992	0.4880	0.2818	0.7278
Europe	0.7188	0.6189	0.6460	0.8916
Oceania	0.4240	0.2754	0.2211	0.7754
World	0.4882	0.4328	0.3245	0.7173

Source: Study on development of e-Government in 2012, conducted by the United Nations[12]

EGDI Index (e-Government Development Index) to provide Romania by the U.S. was 0.5632. This ranking it below the mean value given in Eastern Europe, namely: 0.6333. EGDI it was calculated as a sum of three factors, namely: the percentage use of online services, telecom infrastructure (relative to the percentage of Internet users, the percentage of subscribers to fixed telephony, mobile telephony subscribers percentage, the percentage of subscribers to fixed line Internet subscribers and percentage broadband communication services) and human capital index generated according to the level observed in adult education and school enrollment rates)[13].

As a measure to increase EGDI index, Romania proposes three actions required, namely: the creation of legislation and operational framework for the implementation of *Government Enterprise Architecture*; creation of capabilities of ministries *Government Enterprise Architecture* - delegating and educating the agencies to use it and make it its own initiative; the issue of the *List of e-Government ICT standards* that provide the recommended standards for ICT projects (Required, Recommended, Optional, Rare, Withdrawal, etc.) with cyclic process of these standards (Draft, Approve, Commenting, Withdrawal, etc.). The first action aimed creating the Government Enterprise Architecture for Romania, whose main

[7] *eRomania*, V1 - June 2009, Romanian Government, Ministry of Communications and Information, p. 7, available at www.romania.gov.ro.
[8] *eRomania*, V1 - June 2009, Romanian Government, Ministry of Communications and Information, p. 7, available at www.romania.gov.ro.
[9] *National Strategy regarding the Digital Agenda for Romania*, in October 2014, the Ministry for Information Society.
[10] *Ibidem*, p. 6.
[11] *Ibidem*, p. 35.
[12] Apud. *National* Strategy regarding the Digital Agenda for Romania, in October 2014, the Ministry for Information Society p. 36.
[13] *Ibidem*.

objective was to define a uniform set of standards, policies and architectural guidelines that public entities will be used for investment and ICT initiatives. Benefits subjects were uniform vision for the implementation and promotion of all projects and public entities. The second action aimed to support public entities have adopted as Government Enterprise Architecture and had as benefit a better adoption Government Enterprise Architecture and uniform implementation of its, being provided the same deadlines. Regarding the third action specify that standards will be proposed by the corresponding entity in the ministries and that they will be placed in the approval process completed by the Ministry for Information Society. Like achievement within the three actions estimated half of 2015.

The need to strengthen public administration is also subject to the concern of the Ministry of Regional Development and Public Administration. Thus, *The Strategy for Strengthening Public Administration 2014 - 2020* highlights the need to address the main shortcomings that prevent the administration from Romania to fulfill role expectations of its beneficiaries. Among them were identified: excessive politicization, which is an obstacle to good governance; a political and organizational culture that rule rather as an easy source of income for individuals and / or legal only as a promoter of economic development, able to contribute to the welfare of its citizens who ceases to be regarded as mere taxpayers; the absence of a coherent strategic vision on the long-term future of Romania; insufficient trust in administration (among officials, citizens, between officials and policymakers), that generates resistance to change, concentration of decision-making at the highest level, particularly political (correlated with lack of initiative at the administrative level, low transparency of public administration and a corruption level high perceived); insufficient involvement of partners from academia, business and civil society and even associative structures of administrative-territorial units in defining strategic visions or in terms of real consultation in decision-making[14].

In this context, it established the general framework of public administration reform for the period 2014 - 2020. It is considered that despite financial support from the European Union to increase administrative capacity, resulted in the pre-accession funds and later in financing of the *Operational Program Administrative Capacity Development*, the factors mentioned above have generated excessive bureaucracy and costly to the government, have generated a lack of transparency and efficiency of public spending and also a gradual de-professionalization of public administration. Therefore, it is considered that in the negotiations with the European Commission on the Partnership which will be the basis of grants from structural funds for the period 2014 - 2020 there will be a growing concern, both in the Romanian Government and the European Commission on the modernization of public administration and build capacity for it to effectively fulfill the role of facilitator of socio-economic development of Romania.

Strategy development process was initiated by the Ministry of Regional Development and Public Administration (MDRAP) which, together with the Prime Minister (CPM), defined the main strategic guidelines. The strategy was accompanied by an action plan that included both short-term objectives, aiming the year 2016 as a deadline by which Romania will have to meet all compliance related to public administration domain and long-term strategic objectives, aimed 2020 as correlated with progress within the *Operational Program Administrative Capacity*. It is considered that the proposed action plan and results to be derived from the implementation, monitoring and evaluation will be the basis for reviewing the future strategy and to develop of this strategy to reform public administration in Romania for increasing the quality of service this one.

4. E-Government in public administration - matters contained in the National Strategy for the Digital Agenda for Romania in 2020

In order to achieve a modern and efficient public administration Ministry for Information Society has developed National Strategy for Romania Digital Agenda 2020. National Strategy for Romania Digital Agenda was developed based on the Digital Agenda for Europe 2020, which is the reference framework for development digital economy. The primary objective of the Digital Agenda 2020 it represented supporting economic recovery in Europe to ensure sustainable economic growth, smart and promoting social inclusion and to develop a Digital Single Market[15].

Some of the objectives set by the European Digital Agenda were taken and adapted to the current context of Romania and aligned with the strategic vision of ICT Romania 2020. The aim was to ensure the development of ICT Romania to the countries in the region and establish the premises for integration Romania, in terms of ICT, in the Digital Single Market of Europe. The National Strategy for the Digital Agenda for Romania directly targeting the ICT sector and aims to contribute to economic development and increasing competitiveness of Romania, both through direct action like effective development of the ICT Romanian sector, and indirect actions such as increasing efficiency and cost reduction in the public sector in Romania and improved productivity of the private sector by reducing administrative barriers in

[14] *Strategy for Strengthening Public Administration 2014 - 2020*, Prime Minister's Office, Ministry of Regional Development and Public Administration, Project in June 2014, p. 5.

[15] *National Strategy for the Digital Agenda for Romania in 2020*, Ministry for Information Society, p. 7.

the relationship with the state and improving labor competitiveness in Romania.

E-Government Strategy in Romania, as outlined in this document, focuses on services to adduce life events (Life Events). Life events are important steps in the life of a citizen or an enterprise that are composed of inter-institutional services that serve citizens and business interaction with the Public Administration in Romania[16]. Considering the Digital Agenda for Europe 2020, Romania has defined four key areas of action adapted to the current context, which will be followed as Romania's vision for Digital Agenda program, leading to sustainable economic growth and competitiveness. The first field of action, entitled e-Government, Interoperability, Cyber Security, Cloud Computing, Open Data, Big Data and Social Media aims to increase efficiency and reduce costs in the public sector in Romania by modernizing the administration[17]. This area of action presents the activities undertaken by the Public Administration of Romania to implement the 36 life events (identified as priorities and commitments of Romania) by 2020. in the context of the latest available data from the European Commission on the Digital Agenda Scoreboard (DAS)[18], which follows the progress of Member States towards the targets assumed, this showed that in 2013 only 5% of Romanian citizens using e-Government services, compared to a European average of 41%. In terms of indicators focusing on public services needs of civil society and transparency of public services, Romania had a score of 40, respectively 17, against a European average of 70, respectively 49, it was necessary action to implementation of a good e-Government in Romania.

National Strategy for the Digital Agenda for Romania 2020 includes a SWOT analysis for e-Government and interoperability[19], achieved for 2013 and identifying the strengths, weaknesses, opportunities and constraints e-Government phenomenon.

Strengths identified by SWOT analysis concern: the existence of a strong ICT sector, with national integrity and the presence of major global ICT companies on the market in Romania; well-developed ICT infrastructure in cities, which is in development in terms of Internet access in public areas; the existence of a functional online procurement platforms at government level (www.e-licitatie.ro); MSI existence acting as general coordinator of ICT strategies at the governmental level; CERT-RO existence in cyber security; existence of cyber security strategies and development of electronic public procurement - ESPP.

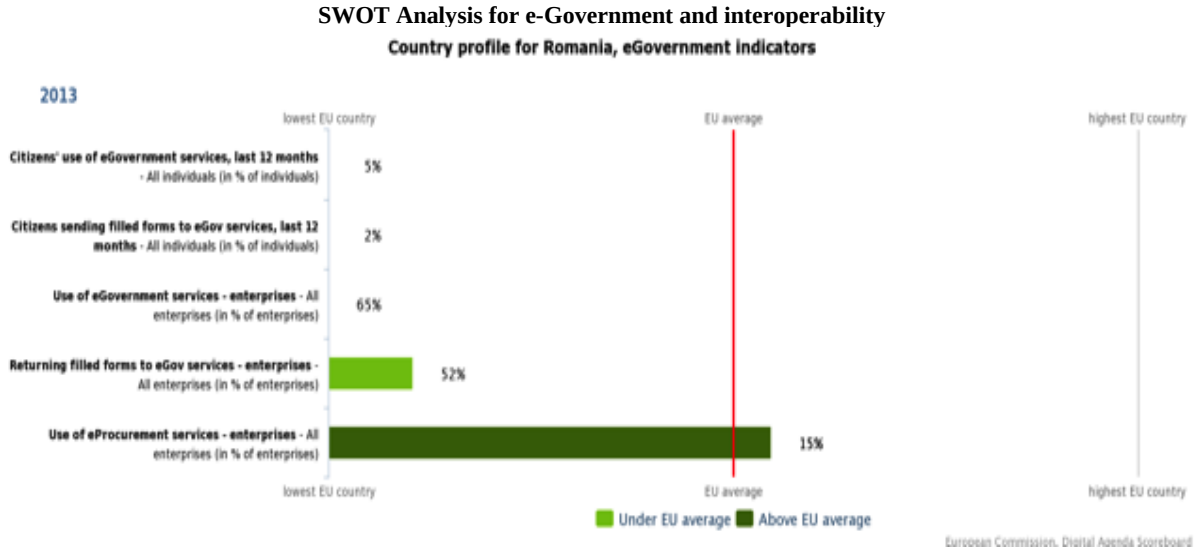
In terms of weaknesses were identified: lack of legislative framework on interoperability government institutions and information systems; lack of insurance security systems of public institutions; lack of public sector investment programs coordinated in a consistent manner; lack of coordination in terms of appropriate security measures; lack of a long-term strategy on public sector ICT staff training; the absence of a single electronic authentication and identification of users; the existence of a relatively small number of computerized public services according to their degree of sophistication; the lack of interoperability in public administration in Romania; lack of functionality online procurement system; lack of a coordinated and consistent communications to promote online government initiatives; the existence of problems of scalability, timeliness and cost-effectiveness in terms of ICT infrastructure developed in various government organizations; granular acquisition hardware and software solutions that do not provide transparency at government level.

The opportunities identified in the SWOT analysis were: the development of an infrastructure for e-Government public services; increasing the use of public services available online; preparation of intra-coordinated project implementation, supporting thus achieving interoperability; European e-Government alignment structures; increasing the transparency of government activity; Cloud Computing technology development and management of data centers; increased use online environment for solving the problems of citizens; low investment funds from the state budget.

Threats or constraints relate to: the digital divide recorded at regional level: rural-urban; decentralization of public authorities and the difficulty to impose the use of interoperability standards; changes in the political environment that may influence growth or to achieve goals; activities organized cybercrime groups; lack of trust in online cyber security systems.

[16] *National Strategy for the Digital Agenda for Romania in 2020*, Ministry for Information Society, p. 25.
[17] *Ibidem*, p. 18.
[18] http://ec.europa.eu/digital-agenda/en/digital-agenda-scoreboard.
[19] *National Strategy for the Digital Agenda for Romania in 2020*, Ministry for Information Society, Annex 3, pp. 127 – 128.

Taking as it's a starting point the results of SWOT analysis is proposing a series of actions to address the most important issues. These related to: implementation of public services online[21]. In this context, increasing the efficiency and transparency of public administration and improving the economic



Source: National Strategy for the Digital Agenda for Romania in 2020

preparing coherent process of computerization of public services based on life events (Life Events) and increase the transparency of public administration; definition of an institutional structure to provide a unified vision, manage centralized and coordinated aspects of computerization of public services and achieve interoperability at European level on the opportunities identified in Romania; use opportunities for European coordination to ensure improved performance interoperability of information systems implemented at national level and to improve cyber security; support the use of open source and standards to facilitate and ensure future interoperability of information systems; introduction of technologies such as Cloud Computing and unified management systems for data centers to reduce administrative costs and increase efficiency in public administration activities; use social media to improve communication both government institutions and private sector representatives to support their activity[20].

For a better implementation of e-Government, National Strategy for the Digital Agenda for Romania in 2020 provides the following: ensuring transparency in the dissemination of information by public services; creating platforms and interfaces of e-Government; effective cooperation between central and local administrative structures, public and private; working procedures for the development of e-Government solutions for business management; creation of a centralized electronic authentication of users and their unique identification of integrating electronic identification requirements resulting from the environment were identified as short-term strategic priories. It is believed that prioritizing government services that relate to Life Events will bring a significant improvement in the way citizens relate to governance because refining those services will facilitate citizens' interaction with public institutions.

Conclusion

The XXI century brings with it the idea of *electronic state* or *e-state*. Romania has made and filed in this a considerable effort to align with the e-Government standards imposed by the EU and required by the actual current of development and evolution of a modern administrative system. If the period 2007 - 2013 the Administration of Romania has seen many institutional reforms that aimed, on the one hand, in order to better adapt insurance obligations country (for example, the establishment of institutions such as Managing Authorities or the National Integrity Agency), and, on the other hand, reorganization to streamline public spending or implement a different political views, since 2014 requires that priority implementation of the e- Government 2.0 concept, which should be based on a common vision of creating a coherent national system and integrated for online public services dedicated citizens, businesses and local and central administration. Analyzes that we conducted on the various strategies that Romania has proposed over the years, since 2009, have revealed that there were ongoing concerns Romanian competent authorities in this regard. These concerns were both the

[20] *National Strategy for the Digital Agenda for Romania in 2020*, Ministry for Information Society, Annex 3, p. 128.
[21] *Ibidem*, p. 25.

legislative and operational level. Suggested strategies aimed both short term goals and long-term strategic objectives in terms of administrative reform. It is also appreciated that the proposed action plan to achieve the objectives and results that will come from the implementation, monitoring and evaluation of actions taken will be the basis for reviewing the future strategy and to develop a strategy to reform continuous and coherent the government of Romania to increase the quality of services provided by it.

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SOCIOTHERAPY AS A CONTEMPORARY ALTERNATIVE

M. Kubilay AKMAN*

ABSTRACT

Sociotherapy was launched as a therapeutic system in 20th Century, which has very strong theoretical and historical relations with the discipline of Sociology. Why there was a need to suggest a new way of therapy, while psychotherapy is existing? We have witnessed that there are some social dimensions of psychological problems which require a solution based on "socialization" between therapists and patients. There is a "healing power" in socialization and it has been the basis for all sorts of group therapies, including Sociotherapy as well. In this paper, we will have the opportunity to discuss the theoretical knowledge on Sociotherapy and consider its possibilities for applying contemporary socio-psychological problems in society. Knowledge society gives us a suitable platform to practice various therapeutic disciplines to find out solution for the problems created by the same society. This paper may be seen as a part of this purpose, finding viable and operative solutions to socio-psychological problems that today's individuals experience in their daily lives.

Keywords: *sociotherapy, clinical sociology, group therapy, interpersonal therapy, psychotherapy.*

1. Introduction

When we have a look to therapy-related activities it is obvious that there is a great dominancy of psychotherapy over all other types of therapeutic ways around the world. Discussing the historical, theoretical and scientific reasons of this situation is really a wide topic and not possible at all to cover in the scope of this paper. However, we should at least mention here that the understanding and conception based on "individualism" and consideration of "self" as nucleus of society inevitably bring a person-focused, individual-centered perspective of therapy concept and psychotherapy finds a suitable basis somehow in this discursive intellectual / scientific environment. Individual psychological problems are mostly coming from social causes and limiting their cure, healing and therapy on an individual level prevents possible alternatives to create substantial solutions for them. Our tendency is not to continue through a critique of psychotherapy. However, it is better to know why sociotherapy is not so wide-spread at academies, therapeutic institutes and hospitals. This individualistic discursive perspective has blocked the improvement of sociotherapy until 21st Century, although it has a history and background for decades.

The main focus of psychotherapy is based on the person; however, for sociotherapy the object-situation is more important. Psychotherapists are concerned with intrapersonal systems, as for sociotherapists, the situation and its social conditions are much more determining. Sociotherapy consider social, cultural and environmental issues as effective parts of creating a therapeutic way (Edelson, 1970: 176). This theoretical understanding will be helpful below regarding to understand that how sociotherapy works.

Academic and scientific researches, publications and lectures on sociotherapy have existed in USA and Europe since first half of 20th Century. There are outstanding researches we will mention below and application of sociotherapy continued uninterruptedly until today. The interest of writer of this paper to sociotherapy is beginning from early 2000s. This discussion on main concepts and perspectives of sociotherapy may be considered as a modest contribution to a subfield of sociology which has a more potential to provide in the future than it has already disclosed. Although, historically it has been defined as a part of sociology and as its therapeutic application, sociotherapy seems really compatible to other fields of social sciences as well, such as anthropology, management, political sciences, social work, Etc.

In the following pages of this article you are going to read on the possibility of a "usable" and "relevant" sociology, how to perform a therapeutic activity through a sociological perspective and the advantages sociotherapy in terms of providing solutions to socio-psychological problems of contemporary individuals. Of course, this is a field requires further discussions and you may consider this paper as your first step into sociotherapy, if you are not acquainted yet with this field.

2. Ontology of Sociotherapy

When sociology was "born" as an independent and "positivist" social science, it used to have a very practical approach and tools. In works of Comte, Spencer, Durkheim and other classics the existence of sociology had the least common with an abstract, philosophical and sophisticated discourse. Their concept of sociology was pretty practical and pragmatic. However, by the time, especially in 20th Century sociology somehow came closer to a more philosophical level. Even, it was not easy to decide if some names are sociologists or philosophers, for

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instance Marcuse or Adorno. Sociotherapy can be considered as a return of sociology to its applicable technical and functional value again.

As L. Alex Swan states, "sociology must be real, relevant, useful, and applicable" (Swan, 2014: 153). Sociotherapy is one of the ways for a more useful and functional sociology. For this purpose, "we must change the way we train sociologists to produce scientists-practitioners whose role is to create the specific contextual knowledge and understanding for application and social intervention" (Swan, 2014: 327). Because, it is not easy to realize the required transformation toward a therapeutic sociology, with conventional approaches at sociology departments of our academies. We need to find new strategies for training of future's sociologists.

Individual is not a lonesome "person" disconnected from society for us, during sociotherapy sessions. We need to locate a client into his / her social contexts and "in sociotherapy the social personality of the person is involved. It is the public individual in interaction. The viewpoint taken by the director of the session directs his attention toward the group as structure. A general catharsis is intended" (Cornyetz, 1945: 463). This catharsis is a way of healing / treatment for socio-psychological problems of person.

During this Conference you will have the opportunity to follow a comprehensive presentation on Viktor Frankl's logotherapy system by another colleague. According to Frankl's "Logotherapy approach to interactional group therapy, the treatment dynamics of noticing, actualizing, and honoring are facilitated or triggered by six elements of group treatment (…): group balance, group task orientation, group cohesion, dynamic group reflection, existential group reflection, and experimental participation" (Lantz, 1998: 98). This is something more or less we expect from sociotherapy as well: a therapy process based on harmony and interaction in group.

The understanding which emphasizes that problems which have social backgrounds and causes require also social ways of solution is the main principle for the ontology of sociotherapy, flourishing in the realm of sociology. Based on this main principle, there is a lot common between sociotherapy and other varieties of group therapies in spite of all differences in technical and theoretical levels.

3. How Does It Work?

Socioterapy is a field in which interpersonality is a crucial requirement, although its approach to interpersonal socialities are pretty different than psychotherapy's approach. Because of this reason, "sociotherapeutic ideology point of view emphasizes the therapeutic value of the multiplicity of interpersonal and social situational encounters occurring in the patient's treatment setting" (Armor, 1968: 247). Sociotherapists are using and manipulating social milieu and environmental components for a kind of "milieu therapy," or with another naming "group therapy." In their understanding, "mental illness is caused by social and environmental factors, usually those occurring with the patient's recent life situation" (Armor, 1968: 247). So, they use this environment and situations as powerful therapeutic tools.

The practical approach of "sociotherapy helps people to regain self-respect, rebuild trust, feel safe again, overcome unjustified self-blame, re-establish a moral equilibrium, have hope, live without terror, forgive those who have harmed them, apologize to those whom they have wronged, and regain their rightful place in the community" (Richters, 2010: 105). With another expression, sociotherapy is a way for regaining the lost harmony together with people, with whom probably we have shared losing process of this harmony previously, via mutual mistakes.

Paul Wilkins, in his "person-centered sociotherapeutic model" provides us some important points to establish a balance between "we" and "me". According to Wilkins: "The We implies a connectedness, an inter-relatedness that goes beyond the organism." With this perspective, we are all belonging to "We" and harming "We" is something like you are harming yourself. Based on this consideration, "We is more than an immediate community, more than humanity, more than all living things. It is our planet in its totality" (Wilkins, 2012: 243). Regardless if you have a "person-centered" or "group-centered" sociotherapy concept, these points seem applicable anyway.

There are some essential differences between psychotherapy and sociotherapy. According to J. Stuart Witely, "psychotherapy is primarily a listening process, with understanding coming from the therapist's interpretation of the individual's communications and facilitating the development of a more stable emotional life. Sociotherapy is a more active process, with behavioral change coming from the experience of new and more satisfactory ways of coping with interpersonal interactions" (Whiteley, 1986: 721). As you can see, the therapeutic power of sociotherapy is more dynamic and necessitates interaction.

Clients need to change themselves and their behaviors in therapeutic process: "Sociotherapy is the relearning of social roles and interpersonal behavior through the experiencing of social interactions in a corrective environment" (Whiteley, 1986: 721). Rand L. Kannenberg calls it "Resocialization" process; as a therapeutic way which requires relearning established problematic values and behaviours; being liberated from previous learnings of social environment (family, school, friend groups, Etc.) and changing social roles with more effective and beneficial ones (Kannenberg, 2003: 90). Sociotherapists are effective participants and organizers of these resocialization activities.

L. Alex Swan has defined his strategies and system in sociotherapy as "Grounded-Encounter

Therapy" (GET) and according to Swan's theory GET "is a process of encounter, interpretation, and situation analysis which allows for the discovery of essential facts and explanations that are grounded in the social situation (context) of the clients. It provides for the devising of strategies, plans, and approaches for change, growth and development that are also grounded in the social context of the clients" (Swan, 1984: 62). GET's diagnostic and therapeutic techniques are shaped through "the personal encounter between the clients, and between the clients and the therapists. Through the dialogues and sharing of feelings and thoughts, clients can communicate to each other their concerns and describe their situation so that an authentic Picture emerges" (Swan, 1984: 63-64). Seeing this authentic picture may be understood also as seeing a picture of final solution for socio-psychological problems.

4. Towards a Successful Sociotherapy

Annemiek Richters and her colleagues have stated that: "The term sociotherapy may suggest a medicalizing approach to social problems. The point of sociotherapy, however, is that its therapeutic value comes from the active input of the group members as they participate, question, advice, influence and correct each other in their social contact" (Richters, 2010: 99). This social contact is the key for a high level of success in sociotherapy.

Modern society has some problems which are aged and they need to be approached with more effective techniques. Sociotherapy is a functional response for these aged problems. In confrontation of contemporary situations, "If we had enough social intelligence, we could solve the problem directly by scientific methods, but since we have not yet developed this method of attacking our social problems, we shall probably have to go through a long period of neurotic worry, anxiety, and confusion until we finally solve the problem by wasteful fumbling-passive adaptation-rather than by the rational, direct, and effective means of science-guided active adaptation" (Bain, 1944: 457). As sociologists, more than a half century we have been discussing for this kind of "science-guided" techniques for curing socio-psychological problems.

Richters and co-authors at her research report suggest us some principles for success, based on discussions conducted by Rapooport and Bierenbroodspot previously. These principles for an effective sociotherapy are:

"1) two-way-communication at all levels - this communication is a precondition to warrant that everyone is informed about what goes on in the group and can use that information in decision-making;

2) decision-making at all levels - this promotes, among other things, sympathy within the group as a whole and with individual members;

3) shared leadership - this actually means democracy, the sharing of power and responsibility;

4) consensus in decision-making – when the group cannot come to an agreement, no decision is forced, but the discussion continues until consensus is reached;

5) social learning by social interaction here-and-now - this learning will also benefit group participants in their social interaction in the wider society" (Richters, 2008: 101).

Of course, these principles may have some variations in different cases. However, they can be taken still as a foundation to keep the sociotherapy practice and applications focused in the main line. The methodological points analyzed before by Gerald W. Lawlor may be very effective in this main line. According to Lawlor these are followings: "1) Situations and roles assigned by the director; 2) Continuing scenes; 3) Free association; 4) Life problems" (Lawlor, 1946: 275). Sociotherapists should interpret these points in their particular case and practices; afterward, they need to find their own customized methods if necessary. Flexibility is crucial for a successful sociotherapy application.

Sociotherapy is like a strategy to take the potential which already exist in societies and upgrade it with some arrangements for particular needs. It is called as 'community-based' sociotherapy by Richters. The power of local communities is functionally adopted into sociotherapy process in this approach (Richters, 2010: 97). Actually, people in societies and local communities are already performing a kind of "unconscious" sociotherapy to themselves and to each other. What sociotherapists recommend may be considered as a systemized version of this existing therapeutic tendency for a more effective solution to socio-psychological problems challenging in any level.

5. Conclusion

Contemporary societies have a contradictory position which provides problems and possible solutions at the same time. Many economic, social, cultural and socio-psychological problems have their origins and deep roots in societal factors. Problems are produced and spread when and where people are socializing. The main conceptual epistemology of sociotherapy is based on this reality: the source of therapeutic knowledge and possible applications are the same with the origins of these problems. Therefore, socialization or "resocialization" appears as a productive therapeutic power source for all sociotherapists, despite their theoretical differences. Sociotherapists take an active role, redesign and direct social environments for therapeutic purposes. The early literature on sociotherapy is coming from last century. However, although it started as an academic sub-discipline of sociology comperatively a long time ago, it has not substantially spread as a therapeutic

system widely yet. The reasons of this situation are beyond the borders of this paper. As we have tried to discuss in the previous pages sociotherapy is a very functional and practical approach to modern socio-psychological problems which may be seen even as a return to 19th Century early sociology's practical and applicable beginning ideals. We have reasons to be optimistic or pessimistic regarding the future of sociotherapy. However, it is always better to be realistic. Sociotherapy has a potential to grow and spread as a useful therapeutic system, however it depends on conditions and preferences of today's social scientists. If there are more social scientists who are interested in sociotherapy then this sub-discipline of sociology may reach to the position it deserves since 20th Century and quite far away to arrive there yet.

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THE LIMITS OF ESP TESTS

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Abstract

Global market forces have determined not only higher education institutions all over the world to include ESP courses in their curriculum to enhance their students' future employability, but also public and private organisations to offer their employees the opportunity to attend ESP courses in order to meet the continuously growing ESP needs. From this perspective, ESP compentence could become a subcomponent of one of the key competences for lifelong learning, communication in foreign languages. Therefore assessing ESP competence seems to acquire paramount importance since stakeholders need accurate information about the ESP learners' abilities to cope with specific language tasks. This article offers a concise overview of the principles and practices of ESP assessment, a detailed description of the features of ESP tests, while focusing particularly on the limits of ESP tests in order to identify possible solutions to overcome them.

Keywords: *English for Specific Purposes, language assessment, ESP assessment, language test, ESP test, specific background knowledge, language proficiency, authenticity, specificity, tasks.*

1. Introduction

Nowadays, no formal learning can be envisaged without some form of assessment, because educational stakeholders are eager to be informed about students' progress. Moreover, the course objectives, content and methodology are also scrutinized in this process, so that suggestions for improvement could be made, if necessary.

English for Specific Purposes (ESP) is specialized English language teaching that aims to develop the specific skills of the learner in response to the needs identified or indicated by various stakeholders. This specificity includes equipping learners with 'not only knowledge of a specific part of the English knowledge, but also competency in the skills required to use this language' (Orr, 2002: 1). Furthermore, ESP learners comprise almost all adult age groups, as well as cultural, linguistic, professional and academic backgrounds.

In line with late 20th century trends characterising curriculum development in general and English as a Foreign Language curriculum development in particular, ESP practice has evolved into a spiraling protocol of standard procedures: needs analysis; syllabus design; selection and production of materials; methodology; assessment. Thus, ESP practitioners play multiple roles, being responsible for designing customized syllabi, preparing materials, carrying out research and evaluating specific language progress.

The field of ESP assessment has been seen as a separate and distinctive part of a more general movement of English language assessment, focusing on measuring specific uses of English language, among identified groups of people. Moreover, ESP assessment has been viewed in the broader context of the teaching and learning process. Thus, assessment does not stand alone, but occupies a prominent place in the ESP process, giving an ESP teacher a wealth of information on the effectiveness and quality of learning and teaching (Dudley-Evans and St. John, 1998: 121). On the other hand, tests enhance the learning process and act as a learning device, and, particularly, an ESP test is an aid to learning, encompassing benefits such as reinforcement, confidence building, involvement and building on strengths (Dudley-Evans and St. John, 1998: 210-212).

This article reviews the theoretical issues related to ESP assessment in general, trying to pinpoint to the characteristics of ESP tests. The limits of ESP tests, as evinced from research conducted in this field, are briefly described and possible solutions are indicated.

2. ESP Assessment: A Brief Outline

The process/product dichotomy helps us differentiate between the concepts of assessment and testing, in general: assessment is a process, which may offer answers not only to questions such as how much students have learned (this purpose is achieved by means of a test = product), but also to questions on how they learned and why certain results occurred. This information is obtained through techniques other than tests, including observations, surveys, interviews, performance tasks, and portfolios. Thus, assessment is a comprehensive concept, centering its endeavors on student learning, and serving the purpose of student improvement and development through a variety of ways.

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The guiding principle of assessment in ESP pedagogy is gathering evidence to understand the effectiveness of the course in terms of the skill enhancement of learners. The traditional needs analysis in ESP covers the purpose of the assessment, the personal, educational, and knowledge characteristics of the learners, and the context of specific purpose language use (Douglas, 2013: 367).

Therefore, assessment instruments employed in specific purpose programs are not, in fact, completely different from assessment instruments in general or from assessment tools used in language programs as such, because the ultimate purpose of assessment is to give learners an opportunity to show what they have learned and what they can do with what they have learned, by being given the same instructions and the same input under the same conditions.

Nevertheless, ESP assessment is distinguishable from assessment in general and language assessment in particular as it targets specific purpose language abilities. Thus, if we want to know how well individuals can use language in a specific context of use, the assessment needs to include both (1) their language knowledge and their background knowledge and (2) their use of strategic competence in relating the salient characteristics of the target language use situation to their specific purpose language abilities (Douglas, 2000: 282).

3. Main Characteristics of ESP Tests

From a more general perspective, tests are summative assessment tools and their goal is to evaluate student learning by comparing it against some standard or benchmark. In contrast with formative assessment instruments, which exihibit high degrees of flexibility, 'most tests are conducted under supervision and require candidates to answer questions in a given time limit, without reference to books or other people' (Dudley-Evans and St John, 1998: 211). What is more, tests can be labeled as low-stakes or high-stakes, depending on their function. In a low-stakes test, the results typically matter far more to an individual teacher or student than to anyone else and it is usually distributed, rated and graded by the teacher personally, whereas in a high-stakes test, test results are used to determine an important outcome, having major consequences or being the basis of a major decision.

Language tests play a powerful role in many people's lives, acting as gateways at important transitional moments in education, in employment, and in moving from one country to another (McNamara, 2000: 4). As compared to general English tests, ESP tests are developed within an ESP context, aiming to comply with the narrowly defined requirements of any specific area of language use.

What really matters in ESP testing is whether learners can communicate in a specific target language and use knowledge of the field in order to achieve their aims, in order to understand and be understood, in order to get their message across in English. The ESP approach in testing is based on the analysis of learners' target language use situations and specialist knowledge of using English for real communication. Thus, when envisaging an ESP test, the ESP underlying principles should pervade the whole process: (1) language use varies with context; (2) specific purpose language is precise; (3) there is an interaction between specific purpose language and specific purpose background knowledge (Douglas, 2013: 368).

ESP tests are not exclusively employed to measure proficiency, but they may also be given to place students or to check their progress. These functions may even overlap in certain situations (Hutchinson and Waters, 1987: 146), offering valuable information to all stakeholders. Therefore, a placement test could not only reveal the learner's needs, but also his/her potential for learning along the ESP course, and an achievement test could not only give the learner a glimpse on his/her progress, but it might also function as a motivator.

Moreover, ESP tests are criterion-referenced tests, being designed to represent the candidate's level of ability, hence his/her performance is interpreted with reference to the criterion judged to be essential for proficiency in a particular task (Hutchinson and Waters, 1987; Douglas, 2000). Thus, an ESP test calls for an interaction between the test taker's language ability and specific purpose content knowledge, on the one hand, and the test tasks on the other (Douglas, 2000: 19).

Another important aspect of ESP testing is the target group. ESP learners stand out as it is assumed that they have become aware of both their target needs (subdivided into necessities, lacks and wants) and their learning needs (Hutchinson and Waters, 1987: 54-61). Unlike general English tests, which are sometimes targeted for certain age groups (e.g. Cambridge YLE – young learners), ESP tests are more likely to be used with adults, either at a tertiary level institution or in a professional work situation.

Although the washback effect is not ESP specific, it is worth discussing this issue here, since it heavily weighs on test quality. At macro level, the higher the stakes, the more impact a test may have 'on learners and teachers, on educational systems in general, and on society at large' (Hughes, 2003: 53). At micro level, washback refers to the impact of testing on 'what is taught and how it is taught' (Dudley-Evans and St John, 1998: 214). At this level, washback may prove beneficial in certain situations, as it could show the teachers either what should be changed in the tests and, the opposite, if some parts of their teaching should be changed in order to focus more on what it is tested. Moreover, the changes operated in the tests by the teachers could help learners improve their language abilities.

When devising an ESP test, valid and consistent measures of language ability should be developed as

well. These measures are expected to be as reliable and authentic as possible, provide accurate descriptions about specific language abilities, have beneficial impacts, be practical and cost effective in terms of administration, time, money and personnel. Nevertheless, only authenticity, interactiveness and impact/practicality are quintessential for language tests in general (Bachman and Palmer, 1996), and the quality of any ESP test stands out especially to authenticity (Dudley-Evans and St. John, 1998, Douglas, 2000).

Considering the most important factor affecting the quality of an ESP test – the level of *authenticity*, ideally, an ESP test should engage the test takers in accomplishing various genuine tasks through which their general English knowledge (linguistic competence) could interact with their ESP content knowledge in a real life context. Such an interaction is deemed absolutely necessary throughout the entire ESP testing process, as authenticity of the tasks refers to the similarity of the task content to the specific and specialized target language situation. In addition to that, authenticity is important because of its potential effect on the test takers' perceptions of the test and, hence, their performance (Bachman and Palmer, 1996: 24).

In a perfect world, after attending an ESP course, learners' previous English skills would refine, helping them to successfully deal with domain specific situations. Hopefully, their background knowledge would increase and this would enable them to make appropriate inferences and thus boost their ESP skills. Tests taken by learners at the end of their ESP course should provide stakeholders with some evidence, by predicting how effective and confident the test-takers might be in a specific target situation.

4. The Difficulties of ESP Testing – Possible Solutions

Even if ESP is widely acknowledged as a well established field (see Hutchinson and Waters, 1987; Dudley-Evans and St John, 1998; Douglas, 2000; Basturkman, 2010), when it comes to understanding what is to be assessed in an ESP test, practitioners seem to be on less solid ground. Two theoretical issues need considering in Douglas's view (2000, 2013): (1) whether the construct of specific purpose language ability actually exists and (2) how the criteria for assessing specific purpose language performances should be derived.

On the one hand, it is argued that the only justification for developing specific purpose language tests is to achieve face validity, and test developers usually achieve this by exclusively focusing on the purely linguistic elements of specific purpose communication (Davies, 2001: 143). On the other hand, stemming from the absolute and variable characteristics of ESP (Strevens 1988 in Dudley-Evans and St John, 1998: 3), it is argued that a specific purpose language performance depends on non-linguistic knowledge (Jacoby and McNamara, 1999: 233). In reality, these two opposing views are brought together on a continuum, because ESP tests cannot acquire absolute values in terms of authenticity and specificity. Thus, ESP tests range from low authenticity/specificity to high authenticity/specificity, depending on specific context itself (Douglas, 2013: 371).

Authenticity does not lie in the mere simulation of real-life texts or tasks, but rather in the interaction between the characteristics of such texts and tasks and the language ability and content knowledge of the test takers (Douglas, 2000: 22). Therefore, the distinction between *the ability to do future tasks or jobs in the target language use situation* and *the ability to use language in specific future tasks or jobs* is crucial, as any relevant ESP test should find a way to successfully combine the assessment of these abilities.

The problem related to properly defining specific purpose language ability proves to be so complex that it is really difficult to come up with a solution that would comply with the demands of any ESP situation. Nevertheless, if further analyzing this issue helps identifying the elements that define specific purpose language ability: *context* and *tasks*. According to Douglas (2000: 41), in producing reliable ESP tests, 'we need an understanding, first, of the context and tasks in the specific field we are interested in, and second, of how to translate these features into test tasks'. The framework proposed by Douglas (2000) for analyzing target language use and test task characteristics is meant to provide a basis for test development, as well as for analyzing existing specific purpose language tests to determine their degree of specificity. The framework is made up (1) *rubric* – 'characteristics that specify how test takers are expected to proceed in taking the test' (Bachman, 1990, in Douglas, 2000: 50); (2) *input* – 'the specific purpose material in the target language use situation that language users process and respond to' (Douglas, 2000: 55); (3) *expected response* – 'refers to what the test developers intend that the test takers do in response to the ESP situation they have attempted to set up by means of the rubric and input' (Douglas, 2000: 62); (4) *interaction between input and response* – in terms of reactivity, scope and directness (Douglas, 2000: 63); (5) *assessment* – 'consists of a construct definition, a set of assessment criteria, to be called criteria for correctness, and a set of procedures for rating or scoring the performance' (Douglas, 2000: 67).

The degree to which the learners' level of language knowledge and their level of specific background knowledge affect their ESP test performance has been intensively investigated (Salmani Nodoushan, 2007; Krekeler, 2006; Clapham, 2000, 1996; Ridgway, 1997). Nevertheless, research findings have been unable to tip the balance in favour of any of these variables, as, in some cases a specific background knowledge effect is detectable and in

others it is not. For example, even if intermediate proficiency test takers seemed to have benefited from their background knowledge to obtain a higher score, for low and high proficiency candidates the value of this variable was irrelevant (Clapham, 1996, 2000).

This lack of conclusiveness related to the effect of specific background knowledge on ESP test performance has been attributed to four problems: (1) background knowledge is difficult to assess; (2) there is lack of criteria to identify qualities of specific language material, which makes it difficult to compare relevant studies; (3) there may be considerable task effects and the test tasks also vary to a great extent across studies; (4) there seem to be interaction effects between background knowledge and language proficiency (Thoma, 2011: 115).

5. Conclusions

The field of ESP language testing has a rich and dynamic future. The troublesome issues in ESP language testing have been briefly commented upon in this paper and partial solutions have been indicated. The problem of authenticity/ specificity, which could apparently be solved by selecting input data from genuine sources, is difficult to cope with in reality, as low and high levels of authenticity/ specificity could exist for ESP tests, depending on the situation. Moreover, so far research findings have not provided irrefutable evidence related to the importance of specific background knowledge when taking an ESP test (Thoma, 2011: 118).

Therefore, more research is badly needed to indicate practical solutions to the problems evinced by specialists investigating the field of ESP testing. Experts in ESP teaching should involve professionals from various domains in designing and conducting relevant research, so that ESP tests would become more fair, reliable, authentic, valid and practical.

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THE STRUCTURE OF THE DRAMATIC DISCOURSE AND ITS RELATION TO MEMORY IN AMALIA TAKES A DEEP BREATH[1] BY ALINA NELEGA

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Abstract

The present paper aims at identifying the dramatic instruments which Alina Nelega used in her best known play – "Amalia Takes a Deep Breath" – in order to make her artistic message heard and discovered by the Romanian and foreign theatre audience[2].

We have approached Alina Nelega's play through a semiotic perspective, conceiving it as a set of signs and codes that may be identified both at literary level (the play seen as a dramatic text) and at the level of stage representation (the play seen as stage-acting), with the result that the reader and the theatre amateur are invited to interpret them in accordance with his/her horizon of expectation[3].

On a first level of interpretation, we have analysed the structure of the dramatic discourse: the succession of episodes that compose the play, the dramatic tension created within them, the use of rhetorical instruments and the theatrical dimension which the text reveals through its 'openness'[4] towards the audience.

On a secondary level, we appreciate that the play illustrates one of the main features of drama and theatre: its capacity 'to translate' individual memory by making it audible to the others (including to other generations and geographical areas) with the result that it becomes known and (re)interpreted and finally accepted as a collective experience about that community's own past. In our opinion, this is the most important message which Alina Nelega's play tries to express - respectively that Amalia's dramatic destiny (destroyed by the oppressive totalitarian factors of the communist regime) is an active remembering about the collective experience of our people who experienced totalitarism and a matter that comes to justify the identity issues with which the Romanian society is confronting today.

However, 'Amalia Takes a Deep Breath' is not a lesson about the past, it is not a text that is meant to teach, but rather an attempt to awaken the others' awareness as regards collective memory and an attempt to cure historical traumas through art.

Keywords: *post-communist Romanian feminine drama, the translation of memory through and into drama and theatre, stage-audience communication, monologue, author-reader communication.*

1. Introduction

1.1. An outline of the writer's activity

Alina Nelega is one of the most important Romanian playwrights that made her voice distinctively heard after 1989, at a time when the eclectic landscape of post-totalitarian literature had to re-invent itself by creating a new canon and, thus, a new set of aesthetic values.

The fame that the author currently enjoys is due to the prizes[5] she won and to the efforts she made for the development of drama in Romania.

Alina Nelega has been a very active presence in Romanian literature since 1992. She has published prose[6] and theatre[7] with the result that dramatic discourse has become her favourite form of expression

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[1] The play written by Alina Nelega was published by LiterNet Publishing House in 2005; it was represented on stage for the first time at *Teatrul Act*, in Bucharest, in 2007. The stage director was Mariana Cămărăşan and the actress who interpreted the role of Amalia at the time was Cristina Casian.

[2] In the present paper, by audience we mean both the readers of plays and theatre goers.

[3] See Hans Robert Jauss, *Experienţă estetică şi hermeneutică literară*, (Bucureşti: Editura Univers, 1983); Ormond Rush, *The Reception of Doctrine: An Appropriation of Hans Robert Jauss' Reception*, (Roma: Editrice Pontifica Universita Gregoriana, 1997) 39, who defines the *horizon of expectation* and its role as an attempt: "<<to examine the text in its original historical context – by examining the dynamic of its original production and reception (*the text within history*)>>, <</…/ to trace a history of the text – by examining the text's reception by communities of readers in different historical periods (*the text throughout history*)>> and <</…/ to examine the text in relation to general history – by examining the way a text, in its social function, not only arises out of, and is received from within a historical context, but can also have determining impact on that wider, general history (*the text and history*).>>"

[4] We use the term *openness* to refer to the use of monologue as a form of communication between the author and the main character, on the one hand, with the reader/audience, on the other hand.

[5] The play *www.nonstop.ro* received the UNITER prize for the best Romanian play of 2000, while the play *In traffic* obtained the UNITER prize for the best Romanian play of 2013.

[6] Alina Nelega published short stories and the novel: *thel@stwitch* [*ultim@vrăjitoare*].

[7] Apart from the plays mentioned in footnote 1, Alina Nelega published a volume of *Theatre and Short Stories* [*Teatru şi povestiri*], (Bucuresti: Unitext Publishing House, 2003), as well as the volume: *Kamikaze. Monologues and Monodramas* [*Kamikaze. Monoloage şi monodrame*], (Bucureşti: Cartea Românească, 2007).

and has made her internationally[8] famous; as the author noticed - the oscillation between prose and theatre was solved by itself in time for the writer understood later on that everything she would write "seemed to turn into theatre"[9].

In her attempt to attain originality and to discover her voice as a drama writer, Alina Nelega experienced different forms of dramatic discourse in a constant search for original and challenging dramatic topics, as well as for identifying the right tone in her style.

The passion for theatre made Alina Nelega support its development by organizing a drama writing contest (Dramafest) and by getting actively involved in the setting up of theatre journals (Postscenium and ultimaT).

1.2. Critical approach

In deciphering the significances and levels of significance of the present play, we adopted a semiotic[10] analytical perspective, in an attempt to identify the message of the play, which may be dealth with from a variety of points of view: from aesthetical to cultural, educational and political ones.

As regards the analysis of the dramatic discourse, the first thing that we have underlined in this paper is the simplicity of form – which is obvious in the reduction to the essential of stage participation in dramatic action and the minimum number of component elements that are included in the dramatic discourse: there are no details offered as regards the set; the vestimentary code is also oversimplified. In fact, the simplicity of form and its capacity to represent and signify is one of the basic characteristics of theatre. According to Keir Elam, simplified form is illustrative for the very nature of theatre: "It is an essential feature of the semiotic economy of the theatrical performance that it employs a limited repertory of sign-vehicles in order to generate a potentially unlimited range of cultural units, and this extremely powerful generative capacity on the part of the theatrical sign-vehicle is due in part to its connotative breadth."[11]

In our approach to the present play, we took as a starting point the largely shared perception that theatre is a collective art thanks to its reliance upon an ever-changing repetitive public representation and perception of the play, in which the individual is permanently linked to the others: "Theatre appears to be a privileged art of capital importance, because more than any other art, it shows how the individual psyche invests itself within a collective relationship. The spectator is never alone; as his or her eye takes in what is presented on the stage, it also takes in the other spectators, just as indeed they observe him or her."[12]

In order to analyse the component parts of the text, we paid particular attention to the succession of scences, the stage indications (the character's dressing code), the functions of monologue and the types of texts whereby Amalia's life story is revealed (the prayer, the letter and the poem).

2. Content

In post-communist Romania, choosing to write a literary text that deals with the 'decay' of the human being (from a mental and physical point of view) and the dissolution of one's values (moral and cultural ones) due to the suppression of the totalitarian society is a cultural act that anyone would expect to happen.

The play Amalia Takes a Deep Breath depicts the traumatic experience of living in the totalitarian and post-totalitarian Romanian society, which leaves few chances of survival to the weak and vulnerable ones.

In her confrontation with an oppressive society, Amalia's destiny is broken with the result that her mental and physical state gradually deteriorates until it is annihilated through suicide.

The text – written as a monologue – reiterates through the voice of the character the experiences of her past until she identifies herself with her present situation in the post-totalitarian society.

The use of the monologue in this play makes room for another form of dialogue, i.e. 'the dialogue with the public' (from here and everywhere). The main function of the monologue is its capacity to investigate and reveal personal past to the collectivity. Dialogue, which is more frequently used in theatre, modifies the dramatic perspective since it comprises the replies of the characters and it enlarges the distance between the first level of significance (the verbal and visual one) and the level of interpretation as an effect of the multiplicity of points of view that exist over the topic. In other words, with monologue the communication channel poses fewer obstacles to the sent message in comparison with dialogue:

"The monologue, which does not depend structurally on a reply from an interlocutor, establishes a direct relationship between the speaker and the it of the world of which he speaks. As a 'projection' of the exclamatory form (TODOROV, 1967, 277), the monologue communicates directly with all the members of the audience; in theatre, the whole stage becomes the monologuist's discursive partner. In fact, the monologue addresses the spectator directly as an accomplice and a watcher-hearer."[13]

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[8] Her plays have been translated into English, German, French and Russian and are frequently interpreted both in Romania and abroad.

[9] Alina Nelega, *Îmi venea ușor să scriu teatru*, in "Observatorul cultural", 130 (August 2002); *original text*: „...de la un timp, tot ce scriam se transforma in teatru."

[10] Keir Elam, *The Semiotics of Theatre and Drama*, (Taylor & Francis: 2002): "Semiotics can best be defined as a science dedicated to the study of the production of meaning in society. […] Its objects are thus at once the different sign-systems and codes at work in society and the actual messages and texts produced thereby." (p.1)

[11] Keir Elam, op.cit., p. 10.

[12] Manfred Pfister, *The Theory and Analysis of Drama* (Cambridge: Cambridge University Press: 2000), p. 5.

[13] Patrice Pavis, *Dictionary of the Theatre. Terms, Concepts and Analysis* (Toronto: University of Toronto Press Inc., 1998), 219.

The use of the monologue is a complex discourse instrument for, as Glennis Byron noticed, it creates links between all the subjects and elements included within it: "speaker, audience, occasion, revelation of character, interplay between speaker and audience, dramatic action and action which takes place in the present."[14]

The use of monologue brings another advantage: it gives a sense of universality to the story presented on stage. We read/hear/watch the story of a single character; however, this story originates in the collective past of all those who lived during the first decade of the communist regime, which were extremely oppressive. Thus, the monologue becomes the channel wherein the audience gets connected to an individual perspective over past and is thus linked to the roots of its collective memory. Individual memory becomes, through theatre, the story of the entire collectivity.

The monologue comprises 8 episodes from different stages of the character's life: her childhood, adolescence, maturity and old age. The monologue mainly relies on:

- direct utterances in the form of prayer (which reveal information about the character's family and history);
- imaginary utterances addressed to the former family members (which reveal the tension between them caused by the harsh political context);
- direct utterances presented in the form of pathetic letters addressed to the authority representatives;
- the insertion of poetical fragments that depict a grey, gloomy-like atmosphere and reveal the character's loss of hope and alienation;
- the frequent use of exclamations and of the vocative.

The text starts abruptly and it places the reader/spectator right within the oppressive atmosphere characteristic of the so-called "obsessive decade" (the 1950's).

The first scene of the play, written as a 'prayer', records the first traumas that Amalia underwent in her childhood: poverty, famine, sexual abuse and her parents' and grandparents' political persecution. Everything is narrated with the words of a child who does not understand the complexity of the post-war context she was living in. Her prayer reveals the naïve perception over the experienced tragic family events: the death of her grandpa and mother, the episode of poverty and famine, as well as the first lessons her mother gave to be able to survive: to learn how to breathe in order to make life tolerable:

"And, after a while, we started to take breathing exercises with mum. And she taught me how I could also become an angel, like she did. You can do that if you know how to breathe deeply, deeply enough. Thus, you breathe deeper and deeper, you flicker your arms, just like this – and, after a while, you start ascending gently above the ground. Then, you breathe deeper and deeper and you find yourself floating even more smoothly, higher and higher until you are no longer seen in the distance – and you never come to touch the ground once more. This is actually what happened when mum found out about papa's passing away."[15] (my translation)

The second episode is a nostalgic intermezzo which functions as a meditation about the disappearance into nothingness of all things and beings; it is the first feeling of alienation that Amalia experiences:

"Where do all the things that no longer exist disappear? Where does the tea that we have drunk go, what about year 1960, the colourful spelling book, the song that I've just sung, Mișa, the teddy bear that I dropped in Moșu's grave and that nobody wanted to fetch, where's Moșu – where's Vitea, where's Paris that city about which maman and papa used to talk about, saying that we are going to go there and settle down there all of us...?"[16]

The third episode marks the beginning of Amalia's personal decay. The third episode presents in the form of a 'letter of complaint' the tragic separation of the 16-year old girl from her grandma (Babushka), her brothers (Lulu and Vitea) and her pet (a pig confiscated by the authorities in a period of poverty and famine). The letter is written in the hospital and it concludes with the words:

"And this is how I remained alone, Comrade Commander. For Vitea left, as you told me, to dance for the Beloved Commander, Lulu, as you know, is in the reform school because this tramp and rogue is no good at all. Babushka is with Moșu and with maman and papa. And Fani..."[17]

The third episode represents the beginning of Amalia's lonely fight for survival: her attempt to overcome previous abuses and to find happiness in a marriage which proves hopeless from its very beginning is followed by her moral decay. The sudden transformation of Amalia from the candide little girl

[14] Glennis Byron, *Dramatic Monologue* (Routledge, 2003), 8.

[15] Alina Nelega, *Amalia respiră adânc* (Bucuresti: Editura LiterNet, 2005), 5; *the original fragment*: „Și, după un timp, am început să facem exerciții de respirație cu maman. Și ea mă învață cum să ajung și eu înger, ca ea. Dacă știi să respiri adânc, destul de adânc. Respiri tot mai adânc, dai din mâini, uite-așa – și, după un timp, te înalți ușor, ușor de la pământ. Respiri tot mai adânc și te trezești că plutești lin, tot mai lin, tot mai sus, până când te pierzi în zare – și nu mai atingi pământul niciodată. Așa cum a făcut ea, când a aflat de papa.".

[16] Alina Nelega, *op.cit.*, p. 10; *the original fragment*: "Unde se duc toate lucrurile care nu mai sunt? Unde merge ceaiul pe care l-am băut, anul 1960, abecedarul cu poze colorate, cântecul pe care l-am cântat chiar acum, Mișa, ursulețul pe care l-am scăpat în groapa lui Moșu și n-a vrut nimeni să se ducă după el, Moșu unde-i – unde-i Vitea, unde-i Parisul, orașul ăla despre care tot vorbeau maman cu papa, că o să mergem acolo, că o să ne mutăm cu toții acolo...?"

[17] Alina Nelega, *op.cit.*, p. 17; *original text*: "Și așa am rămas singură, Tovarășe Comandant. Că Vitea a plecat, așa cum mi-ați spus, să danseze pentru Iubitul Conducător, Lulu, cum știți e la școala de corecție pentru minori că e vai de capul lui de vagabond și golan. Babushka e cu Moșu și cu mama și cu papa. Iar Fani..."

she used to be to the harldy recognizable immoral woman that she has become is a detail that shocks the audience. The unexpected process of moral decay that she gets entangled in is in fact illustrative of the moral decay that the oppressed population undergoes in any toatalitarian society that is deprived of rights and subjected to various forms of aggrievance and aggression. Psychologically, the victim (collectivity) comes to look for and desire self-destruction.

The accelerated decline that Amalia's life follows is described in scences 3-8 without pathetic hues, but rather with courage and a sort of candour that the character seems never to lose in spite of the hard times that she experiences.

The text is vivid and dynamic as the episodes which compose the main character's life follow each other quickly until they complete the full picture of the character's broken destiny.

The poetical insertions included in the text enhance the dramatic effect of the character's monologue through the images of despair and the mixed feelings of alienation and fear that they suggest. The fragment below is from a poem that is written in a half pathetical, half bitter style in order to recreate the atmosphere of terror that dominated the first decades of communism. The text shocks because of the contrast between the words of thanking that temporise the poetical discourse and the opposite state of facts (Amalia's dramatic life experience):

„Thank you./For the happy childhood – thank you./For the quiet sleep,/without dreams,/ untroubled by the subteran cries/of political prisoners,/thanks you./

Because you have brought electricity throughout the country/and have taught me how to read,/in the deafening light of the bulb,/deviding intor syllables/from/Steaua Roşie [The Red Star],/Scânteia [The Sparkle],/Steagul rosu [The Red Flag],/Communist ideas,/thank you."[18]

The fragment below is illustrative for the self-sacrifice that the human being chooses as a form of survival by spiritual and body self-mutilation:

"Once upon a time there was/a winter/when it was very cold and we had to choose: we ate or we died./I didn't like to eat my heart,/they had to force me to do it,/but I discovered,/after the first bite,/that it was tasty enough,/so, in the end,/it wasn't that hard to do it:/it was tender/and very warm."[19]

3. Conclusions

Memory[20] - understood as the right to remember and as an instrument for discovering one's collective identity, as well as for curing the destructive effect of past traumas - is an essential part of the message which Alina Nelega intended to create in her play.

The destiny of Amalia is illustrative not only for the Romanians on whom mental and physical torture was inflicted during communist times, but also for the destiny of any nation/person that is deprived of fundamental rights and freedoms.

The play is an invitation to collective remembering and meditation with the final goal of understanding what and why it happened during the previous political regime in Romania. Like in psycho drama, the one involved in the dramatic discourse and the ones invited to read/visualise it are able to discover, analyse and understand the conflictual experiences that their society members (parents, grandparents, etc.) confronted with.

The text neither tries to convince, nor does it try to prove or to teach anything. It flows naturally like memory which rebuilds with each line in the play a universe that we can never forget once we get into contact with it.

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[18] *P.20„Mulţumesc./Pentru copilăria fericită – mulţumesc./Pentru somnul liniştit, fără vise,/netulburat de strigătele subterane/ale deţinuţilor politici,/mulţumesc.*
Pentru că ai electrificat ţara/şi m-ai învăţat să citesc,
în lumina asurzitoare a becului,/silabisind/din/Steaua Roşie,/Scânteia,/Steagul roşu,/Convingeri comuniste,/mulţumesc."

[19] "A fost odată,/o iarnă,/când era foarte frig/și trebuia /să alegem: ori mâncam, ori muream./Nu mi-a plăcut să-mi mănânc inima,/a fost nevoie să mă sileasc㠄/dar am descoperit,/după prima mușcătură,/că era destul de gustoasă,/așa că, până la urmă,/nici n-a fost chiar așa de greu:/era fragedă/și foarte caldă."

[20] *Jeanette R. Malkin*, Memory-Theatre and Postmodern Drama*, (Michigan: University of Michigan, 1999), 3: "Theatre is the art of repetition, of memorized and reiterated texts and gestures. A temporal art, an art-through-time, theatre also depends on the memoried attentiveness of its audience with whose memory (and memories) it is always in dialogue. For Aristotle, the pleasure of art, of mimesis, is lodged in our ability to recognize in symbolic representations something that we know in 'real life'. We remember and relearn the world through art. For Stanislavsky, there is no acting without the activation of memories from experience."*

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A NUTRITION OVERVIEW THROUGH CENTURIES. THE PRESENT-DAY NEED OF NUTRITIONAL EDUCATION IN SCHOOLS

Simona ILAŞ[*]

Abstract

The type of alimentation and the food quality of individuals has undergone remarkable changes along with the progress of the human species. This study contains an historical overview regarding human nutrition from the primitive forms until the paradoxes of contemporary alimentation. Nutritional education aims to inform and to train a person about food choices, dosage and cooking, how to identify authentic food and to understand the value of nutrition. Children need a balanced diet in order to grow and to become healthy adults. The importance of nutritional education in school is discussed taking into account the need of creating healthy eating habits which should be followed through the whole life, but also the lack of physical activity to children.

Keywords: *historical overview, eating habits, health, nutritional education, school.*

1. Introduction

This study focuses on the field of human nutrition. It aims to present an historical overview regarding human nutrition, emphasizing on the dietary revolutions. The evolution of the knowledge of food and diet is also discussed taking into account the contemporary alimentation which allows us to explain the need of nutrition education in schools. Its importance is explained by showing the need of creating healthy eating habits, children being in need of having a balanced diet in order to become healthy adults.

The human being has experienced three great dietary revolutions. Until about 10,000 years ago, man lived from the products of hunting and from fruit, his diet was predominantly meat-based. Important to note is that anthropologists have been unable to find signs of dietary insufficiency in paleontologic remnants. On the other hand, skeletons of humans from more advanced societies bore the marks of starvation or dietary insuffiency. About 10,000 years ago, man discovered agriculture as well as domestication of cattles. It began class differentiation, bringing as consequence the slaves and the poor's dietary insufficiency. In the 19th century, there were introduced refined and semirefined products, concentrates and industrial foods, sugar products and refined flour into the diet.

Civilized man had limited his diet to a small number of products. By doing so, he increased the possibility of the occurrence of some chronic shortages of essential nutritive elements. Overfeeding and the abuse of concentrated and refined foods, together with the sedentary and stressful nature of modern life have contributed to the occurrence of some serious diseases such as atherosclerosis, diabetes, obesity and dyslipidemia. Also, another aspect is undernutrition- a part of the world's population continues to starve. Food teachnology, a characteristic of modern civilization, favours the development of some diseases such as dental caries, as well as increased morbidity from coronary disease, ulcers, diabetes. Chronic poisoning due to the industrial food additives also affects health.

People's food choices are influenced

by many factors: (a) biologically determined behavioral predispositions include humans' liking at birth for sweet and dislike for bitter and sour, hunger/ satiety mechanisms, and sensory specific satiety. (b) Experience with food. Humans have the capacity to learn to like foods through associative conditioning, both physiological and social. (c) Personal factors. Intra-person factors such as beliefs, attitudes, knowledge and skills and social norms, and inter-personal factors such as families and social networks also influence our food choices. (d) Environmental factors powerfully influence people's food-related behaviors as well. Food availability and accessibility as well as the social environment and cultural practices, material resources, and food marketing practices either facilitate or hinder individuals being able to act on their beliefs, attitudes, and knowledge about healthful eating (Contento, 2008: 176).

Nutritional education aims to inform and to train a person about food choices, dosage and cooking, how

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to identify authentic food and to understand the value of nutrition.

2. Human Nutrition – Short Historical Overview

Until about 10,000 years ago, man went through the so-called "pre-agrarian era", where food resources consisted of meat from hunting, and only on secondary plan by fruit picked from the trees. This predominantly carnivorous diet had provided the primitive man macro- and micronutrients, all insufficient quantities so that era was not marked by food deficiencies. In the following millennium, meat consumption (coming from various domestic animals) decreased because of the development of agriculture; food intake gradually came to be represented by vegetables. The period was called "agricultural era" and it was marked by the first appearance of food deficiencies. Ancient civilizations, progressively differing by social order, economic and religious identities, took diverse food styles.

Moving to the Middle Ages generated major changes in diet. By the eleventh century, the common nutritional characteristic was global insufficient alimentation; including the next two centuries, the usual protein intake still remained much deficitar. In addition, in an age of ignorance and religious limitations, severe fasting periods of the year had a considerable negative impact on the nutritional status of the population. The first attempts to improve the population's nutrition occurred at the beginning of the sixteenth century, which marked slowly the shift towards an age where food deprivation, although persistent, diminished in intensity.

Eighteenth and nineteenth centuries brought another series of habitual dietary changes, where the type of food gradually approached to the one of the modern man. There are introduced new products in nutrition, as results of the Industrial Revolution, such as sugar and sugar products, then food concentrates, pasta. Over time, the daily diet has begun to contain increasing amounts of refined products with nutrition and increased energy density and low quantitative residue.

A trend that can be noticed, if we look at the human diet in terms of time, is the reduced use of a number of plants and animals for daily food. Limiting his food sources, the modern man is more likely - if we compare him with the primitive man, for example, who used everything the wildlife gave him – to develop chronic shortages of nutrients, with all the paradoxical wealth of the few food varieties used. Another feature is the association of food quantity and quality excess with food deficits, often serious and with damaging consequences for the health of large segments of the world population.

Oldest concerns regarding daily diet, as a therapeutic tool used for treatment of diseases belong to Hippocrates of Cos; the hippocratic ideas marked medicine until the sixteenth century. Hippocratic School used the term "diaita" to define the overall study of human lifestyle, including diet (whose role was recognized as central) and other environmental influences on it. The word used in Latin "dieta" means all factors that affect one way or another our health: air, food, ambient temperature, exercise. In the first century AD, it appeared the restriction meaning of diet, under the influence of Egyptian medical school, which considered food as "the source of all evil". This concept had subsequently appeared in other Oriental medical schools, but was naturalized in Europe much later, through the school of Pythagoras.

Medical world of the Roman Empire meet Hippocratic conception through Galien (second century AD). Great personalities of ancient Rome - such as Ovid, Seneca, Cicero, Horace - resisedt food abundance and excess and instead prefered food abstinence, up to recommended diets similar to those called later vegetarian trends.

The development of anatomy, physiology and chemistry in the 17th and 18th centuries began to change the dietetic concepts of the era. Anatomy and physiology experienced the discovery of the blood circulation (W. Harvey, 1619) and of the lymphatic circulation through the chycle ducts (J. Pecquet, 1647, O. Rudbeck, 1652). The body was looked at as a kind of hydraulic machine or as a distilling apparatus (Jean Tremolieres). Until the end of the 18th century, none of the concepts on diet had a physiologic basis. The fact that food comprised a source of energy with which the body took care of vital needs was a truth that was subjected to discussion only at the end of the 18th century together with the discovery of oxygen and the understanding of the process of combustion (Mincu, 2001: 98).

The exceptional progress made in chemistry began in the 19th century bringing with it development in food chemistry. New classifications in food chemistry were made. The protein, carbohydrate, lipid, mineral and water compositions of the foods were determined and the transformations they had underwent in the human body were investigated. New concepts were developed such as specific heat, energy conversion, calories, protein metabolism. Justus von Liebig established that the caloric energy of the body resulted from the burning of the main nutrients furnished by food. M. Rubner in Germany and W. O. Atwater (1844-1907) in the USA determined the composition and the caloric value of the ingested products, the changes that they underwent in the body as well as the waste produced. Beginning with the 20th century, attention has been turned to noncalorigenic substances contained in food.

In 1926, H. M. Evans and G. O. Burr made a first observation on the symptoms of deficiency resulting from exclusion of lipids from the diet. In 1930, Burr discovered that this deficiency was due to certain polyunsaturated fatty acids. Hansen (1944) noted some pathologic derangements in children who had not been enough fed with essential fatty acids. Bronte-Stewart

(1960), Eales and Brock (1959) showed that vegetable fats in their natural state had decreased cholesterol levels and when they were hydrogenated, they increased them. The conclusions of A. Keys and Ed. Ahrens Jr.'s works were that animal fats increasde cholesterol levels and the risk of atherosclerosis while vegetable fats diminished cholesterol and prevented atherosclerosis. The value of fats in the food only came to light in recent decades.

3. The Need of Nutritional Education

It is used the phrase "paradoxes of modern food" (Olinescu, 2001) as reference to the following aspects: (a) Abundance of food is extremely uneven. In some areas such as Western Europe, North America, parts of Asia, there is an abundance of food accessible to everyone, while in other places undernourishment and malnutrition occurs. (b) Attitude towards food. In some countries, there is an average life level which remarkable increased; also, every developed country has newspapers, magazines containing nutritional headings. (c) The existence of food abundance causes an excessive consumption. The preference for certain food groups (carbohydrates, lipids), excessive consumption quantity unbalanced nutrition (caused by poverty, greed, old traditions) favor disease and low immunity. (d) Health. While developed countries increased the mean age, the proportion of degenerative diseases, cardiovascular diseases, diabetes, cancer is higher. Here it is necessary to inform the public about diet, nutrition education activities. Also, food and advertising campaigns have had an increased involvement leading to increased appetite, which focuses on the psychology of food (choice assortment of food, the way they eat, what liquids we drink); we mention as well the quality of packaging and the rich cooked assortment.

Nutrition education has been defined as any combination of educational strategies, accompanied by environmental supports, designed to facilitate voluntary adoption of food choices and other food and nutrition related behaviors conducive to health and well-being; nutrition education is delivered through multiple venues and involves activities at the individual, community, and policy levels (Contento, 2008: 177).

Changes in the socio-economic field reflect at the educational phenomenon level and they require the restructure of the assigned contents, as well as the intervention at young ages in terms of training and practicing behaviors that are included in nutritional education. Bad eating habits and lack of physical activity have an impact on children and many complications can arise. Taking into account the fact that two thirds of children with obesity remain obese in adulthood, it is required to create healthy eating habits and involvement in sports. Preschoolers need a balanced diet, which is essential for growth and for becoming healthy adults. Nutrition education principles should be followed through the whole life, thus ensuring a good health and a high level of comfort in life.

D. Benton (2001) found that low blood glucose was directly associated with decreased attention, memory low and aggressive behavior. Sugar turned out to be such an important cause for anxiety (M. Bruce, M. Lader, 1989; W. Wendel, W. Beebe, 1973), aggressive behavior (Yaryura-Tobias J., F. Neziroglu, 1975), Hyperactivity Attention Deficit (R. Prinz, D. Riddle, 1986), depression (L. Christensen, 1988), eating disorders (D. Fullerton, 1985), fatigue (L. Christensen, 1988) and difficulty in assimilating information (S. Schoenthaler, 1986). Studies also show that most hyperactive children eat more sugar than other children (RJ Prize, 1980) and that balancing blood sugar levels affect the IQ of the child (AG Schauss, 1983). Caffeine is another factor that has a destructive effect on the balance of blood sugar levels. It is also an appetite suppressant. Coke and energy drinks contain a caffeine amount approximately to the one found in a normal cup of filter coffee. These drinks have a higher content of sugar, so their stimulating effect can be considerable. Cocoa, the active ingredient in chocolate and chocolate beverages provide significant amounts of theobromine, which has an effect similar to caffeine. Regarding fats omega 3 and omega 6, called "essential fats", they affect the types of intelligence (IQ, EQ and PQ). Makrides M. (1995) and L. Stevens (1995) showed that children who show a deficiency in essential fats are more difficult to learn, while children who are breast-fed have a higher IQ at age 8 years compared to children who are bottle-fed, due to high levels of essential fats in milk.

Holford (2010) points out that diseases which are caused by an unhealthy lifestyle, such as type II diabetes and fatty liver disease (hepatic steatosis), previously only encountered in elderly overweight adults, now appear into an alarmingly high number in children.

Macavei (2001) considers that the objectives related to nutrition and food behavior aim at acquiring knowledge on nutrition functions, the need of proper nutrition, nutritional factors and nutritional value of foods, food errors, basic knowledge of culinary art, food habits, food hygiene, food preparation and storage.

Nutrition education can be considered as having three essential phases or components. 1. A motivational phase, where the goal is to increase awareness and enhance motivation of the intended audience. Here the focus is on why to make changes. 2. An action phase, where the goal is to facilitate the ability to take action. Here the focus is on how to make changes. 3. An environmental component where nutrition educators work with policymakers and others to promote environmental supports for action. Each component needs to be based on appropriate theory and research. Nutrition education is needed now more

than ever; programs that link research, theory, and practice are more likely to be effective.

4. Conclusions

The differences between the diet of our ancestors and the present day diet of the developed countries that have been touched by the industrial revolution, modern agriculture and modern manufacturing techniques as well as methods of preparing food appear to have a significant impact on health. A characteristic trait of nutritional diseases is that they are directly connected to the degree of civilization of the people affected. Physicians as well as nutritionists are increasingly convinced that dietary habits adopted in the last 100 years in Western Europe have contributed to the increase in the frequency of heart disease, hypertension and some forms of cancer. The influence of the diet on the state of health was felt at the beginning of the last century and was practically unheard of in peoples that lived in the wild having a diet resembling to that of the ancestors of the pre-agrarian period.

Currently, one of the characteristics of modern food is limiting to a few products, which increases the possibility of chronic shortages of essential nutrients. This deficit has emerged due to the misuse of concentrated and refined products. To this we add the human characteristics of present-day: stress, sedentary lifestyle, and the living in a polluted environment.

Nutrition education, as part of the "new educations" occupies a priority position in the contemporary world problems. In recent years, the prevalence of obesity and overweight in adults and children has increased steadily. Management of overweight in children is an issue increasingly more common for primary care physicians. The dramatic increase in the incidence of childhood obesity and its pediatric effects and tendency to persist in adulthood are a vast public health problem and justify the importance of introducing effective preventive and therapeutic strategies.

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VIOLENCE AND AGGRESSIVENESS IN SPORTS. ETIOLOGY

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Abstract

The present paper analyses the causes that lead to violent behaviour in sport (from the social, economic, biological and psychological factors to the violent patterns promoted by mass media) and it identifies the measures that could be adopted for preventing and fighting against this widespread phenomenon in today's society.

The phenomenon of violence in sport appeared subsequent to the "Sport Revolution", which occurred in the 19th century, when sport became a mass and democratic phenomenon. Today sport is accessible to all society members for whom it has acquired cultural and economic importance; however, it is generally agreed that sport events are more or less frequently accompanied by violent behaviour on the part of most or some of its supporters.

This scientific article enumerates the causes that trigger violent behaviour in society: from the inner ones (tension, fear, lack of success, incapacity) to the social, biological, psychological and economic ones (lack of education, illnesses, trauma and poverty). Similarly, the present article analyses the influence of mass media upon human behaviour while taking into consideration two paradigms: there is a former paradigm, according to which mass media strongly influence human behaviour, by inculcating upon people violent reactions; there is a latter paradigm, according to which the influence of mass media on human behaviour is relatively insignificant for it is the individual that controls this influence.

In this paper I have also analysed the risk factors that trigger violence and aggressiveness on stadiums, according to the inquiries made by the Ministry of Administration and Domestic Affairs.

As solutions for violence prevention and deterrence, I have suggested:

- the implementation of the objectives promoted by the Olympic Movement, which may contribute to the formation of a better and more peaceful world through the education of the youth in accordance with the principles and values of the Olympic spirit; the adoption of educative and social measures with a view to improving relationships between supporters and clubs by promoting dialogue with rival clubs, by using CCTVs, investing in infrastructure, consolidating the social role played by clubs, better organizing the ticket stalls, adopting a better legislation in the matter and by using well-organized police forces that are specialized in violence prevention on stadiums;

- the adoption of Mahatma Gandhi's non-violent behaviour code (by becoming a Satyagrahi, i.e. an adept of non-violence);

- promoting physical education in schools and clubs for developing an ethical attitude in life;

- cultivating a competition and fair-play spirit among the young people;

- reinforcing European cooperation between schools, universities and clubs;

- promoting an anti-doping attitude among the young people;

- discouraging violent behaviour through education;

- developing the team spirit through sport, including in corporations;

- getting the old people involved in sport activities for improving their living standard and health condition;

- consolidating the employers' associations' and labour union representatives' interest in sport and competition.

Violence in sport is a topic which remains open to interpretation and which will be further tackled by researchers and specialists in education and sociology. It remains a topic to be dealt with in mass-media while pointing out sensationalist and shocking pieces of news. It remains a topic of interest to authorities and civil society, which will try to prevent and fight against it. As a conclusion, this paper underlines the idea that the deterrence of violence is a sine qua non condition not only for sport events to be organized in a civilized manner, but also for the system of education to be successful.

Keywords: *violence in sport; aggressiveness in sport; etiology; prevention and deterrence of violence in sport; non-violent education.*

1. Violence and Aggressiveness - Etiological Approach Directions

The omnipresent, daily, conformist, repetitive and deviant human behavior, explained by motivational theories by biological model scientists, such as Konrard Lorenz[1] or Freud, the inborn traits and mechanisms lie at the basis of the activities of every individual. Freud believed that the information stored in our subconscious actually determines our behavior[2].

The images, frustrations, failures we gather up during our lifetime become an "archive" of the subconscious. Interpretation of dreams, Tiefenpsychologie[3], explanations of the unconscious, has created Freudian theories. The tensions and fears, the conflicts among our instinctive desires (life and death instinct) and our moral obligations[4] have

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[1] Konrad Lorenz, *Aşa-zisul rău,* Humanitas Publishing House, Bucharest, 2005, p 314

[2] Sigmund Freud, *Opere, volumul 3, Psihologia inconştientului,* reviewed issue. Bucharest, Trei Publishing House, 2010, p 37

[3] Sigmund Freud, Opere, volumul 9, *Studii despre societate şi religie*. Bucharest, Trei Publishing House, 2010, p 464

[4] Andrei Cosmovici, *Psihologie generală*, Iaşi, Polirom Publishing House, 1996, p 280

explained the individual behavior (tendency towards pleasure), the life and death instinct (destruction tendency), resulting in the antagonism between the two instincts. The hope for success and the fear of failure are two variables that are part of the risk taking theory. The attractiveness/interest of the individual and the performed action are closely linked variables. Supporters usually choose successful teams or teams of an upper/lower league. Failure and defeat make many individuals wish for the full success of a favorite team, out of their desire to show their superiority and supremacy. The differences between humans and animals[5] of subsequent studies have shown elements that are common to both species (dance, feathers, clothing, accessories), which gave rise to the desire to impress, to show one's superiority. Supporters of stadiums try to show their support for their favorite team by wearing distinctive sports clothing items and by cheering and shouting loudly from the bleachers.

The internal/biological factors and the external ones are: educational, cultural and society related. The development of the needs/necessities pyramid is based on physiological/primary needs, safety needs, the need for a sense of belonging, for esteem and self-fulfillment, which are the motivation of human behavior. Abraham Maslow also introduced[6] the self-transcendence stage which includes two categories of needs, self-achievement (intellectual-creative) and survival.

In this case, people of medium or higher classes explain the behavior of the supporters on stadiums as being justified by their needs. The explanation of the motivation of the needs is based on several requirements; Clayton Alderfer's model includes: a) existence needs; b) relatedness needs and c) development needs[7].

The natural hierarchy of the needs of every stage is considered by Maslow as directed upwards, but the failure to satisfy a need placed on a higher level does not lower the individual to another needs level. Once we satisfy a need/desire, we consider it meaningless (we take it for granted). Unhappy or even anxious, we tend to turn towards new ideals. For example, a child who has a favorite football team generally thinks that he deserves to be present in the bleachers on the stadium at first, then he wants to become the member of a gallery, and later on the leader of that gallery. Each of these needs has been satisfied.

Conflict, competition and the needs' interdependence can motivate one's actions. Perception, thinking and memory are fundamental elements of individuals, guiding and directing their behavior and needs. In our case, the supporter has his father as ultimate childhood model of masculinity (perception), of behavior at home and in the bleachers (memory), but his perception about the forms of violence and aggressiveness will guide him and will make him display his masculinity in other forms.

The three basic elements are at the forefront of the motivational cognitive theories. The idea of pleasure, analyzed on more than 3900 American teenagers, represents the motivation to practice a sport[8], pleasure being a) perceived; b) filtered and c) analyzed.

For some teenagers, pleasure is generated by their outer beauty and health, while for others pleasure consists in the fact that they are on the same team with their friends. Allport considers personality situations and traits as determined by one's individual behavior[9].

Stability and predictability are given by the personality traits[10]. The character traits of an individual, such as the optimism, define his or her behavior. A supporter is, by its behavior, optimistic, seeing only the positive side of the situation of his favorite team. As representative of the situationists, Mischel[11] believes that predictability and individual behavior can be explained as determinant based on the given situation. In some cases the experience and past history of an individual influence his/her individual behavior. The two determinants of behavior are characteristic situations and the interaction between the character traits, creating explanatory paradigms. The behavior of the supporters on stadiums can sometimes deviate or become delinquent. We will try to present a few explanations by using certain behavior patterns and learning paradigms perspectives. In our case, the interaction between individuals creates, for each individual, an environment that favors the learning and picking up of delinquent behaviors (from those people susceptible to become delinquents or deviants), also known as distinctive association.[12]. Individuals pick up both conformist as well as nonconformist behaviors, and the latter then become natural for them and unnatural for the society. Sutherland explains the deviant behavior in terms of delinquency as being taught, practiced, not as a genetic inheritance. The (verbal/non-verbal) communication, violation of the laws and social regulations and their learning become contact ideas for the individuals with the same type of behavior. On stadiums, deviant

[5] Irenäus Eibl-Eibesfeldt, *Agresivitate umană*. Bucharest, Trei Publishing House, 2009, p 53-188

[6] Abraham Maslow, *Motivaţie şi personalitate*. Bucharest, Trei Publishing House, 2008, p 9-25

[7] Clayton Alderfer, „Theories reflecting my personal experience and life dent," *The Journal of Applied Behavioral Science, 25*(4), 1989, pp 351-351

[8] Jarmo Liukkonen, Yves Vanden Auweele, Beatrix Vereijken, Dorothee Alfermann, Yiannis Theodorakis, editors, *Psychology for Physical Educators*, Human Kinetics, 2007, chapter 7

[9] Allport, 1991, pp 25-38

[10] Hans Eyseneck, *Descifrarea comportamentului uman*, Teora Publishing House, Bucharest, 2000, p 166

[11] Walter Mischel and Yuichi Shoda, *A Cognitive-affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics and Invariance in Personality Structure*. Psychological Review no.102, 1995, p 246-268

[12] Edwin H. Sutherland, *Principles of Criminology*, USA, General Hall, 1966, p 55-61

supporters repeat and practice the concealing of white weapons and pyrotechnic materials etc., improve their conduct, becoming more "special" among the supporters[13].

From a cultural and social point of view, in what concerns deviant behavior, deviance is the product of economic inequality. The inability of the individual to succeed, through legal ways, is the main factor, according to Cloward and Ohlin[14]. Individuals that are present on stadiums adhere to a group of supporters, individuals born/raised in neighborhoods and who, by becoming nonconformists, try to gain prestige and respect. The explanations given by the labeling theories first consider the mentioned behavior as not being deviant. For example, a vulgar joke told by a supporter to his group can be regarded as an attempt to release tension, while the same joke told by a student in class to a teacher would be evidence of a deviant behavior. There are also situations when a behavior is automatically viewed as deviant due to the existing preconceptions. If a person is labeled (as thief, drug addict, alcoholic, coward) he/she will have to live with it and deal with the fact that the society will not accept him/her. Therefore, supporters will usually be catalogued and considered as hooligans, punks etc., labels that associate them with delinquent behaviors, a delinquent being "bad by definition".

According to the Durkheimian theory, the main characteristic of a crime or offense consists in the fact that it generates a clear reaction from the society, called punishment. The manner in which Durkheim views crime is not statistic, as we might believe if we took into account the criterion of the generality or frequency of a certain behavior, being used to distinguish between normal and pathological.

In order for an act to be considered a crime it must do more than deviate from the regular way of doing something, namely it must generate a certain reaction from the others, a reaction that occurs when the collective feelings affected by the crime are alive and strong. The definition of crime therefore includes two types of elements: a deed that affects the collective consciousness, on the one hand, and a special reaction in the form of a punishment or penalty, on the other hand[15].

Researchers have concluded that four primary emotions surface when individuals and groups with equal or different statuses and powers interact: fury (caused by the loss of status), fear (caused by the loss of power), sadness (caused by the irremediable loss of status) and pleasure (caused by the boost of status). Applying the power/status theory, Theodore D. Kempera analyzed the emotions generated by the extremely violent terrorist attack on the Twin Towers on September 11th, 2001[16]. On the other hand, Steven L. Gordon developed this approach, differentiating between the emotions according to their nature and classifying them into "biological emotions" (such as fury and fear) and "cultural emotions" (such as love, friendship and jealousy). The former are a combination of sensations and gestures, coming as a response to different stimuli, while the emotions of the second category are the product of the bodily sensations, gestures and cultural meanings learned within the groups we belong to[17].

The most important thing in the study of violence and aggressiveness is the explanation of the violent and deviant behavior, since deviance is no longer considered an objective act, with a strict rigid nature, but a matter of significance, subjective evaluation, depending on two points view:

a) The point of view of the public who perceives and defines a behavior as deviant;

b) The point of view of the social actor involved in the actual act of deviance.

Therefore, a first conclusion on the characteristic elements of those acts considered as deviant is that they are disapproved by a significant number of individuals. Therefore, a deviance is a behavior that violates an expectation, a habit or a social norm in force or a generally accepted social value. For this reason, we can assume that some deviant behaviors relate to the social rules, values and norms that govern social life and that deviant behaviors can be defined by reference to the regulatory order of a society.

As a form of deviance, delinquency is a complex phenomenon that defines all behaviors that are in conflict with the values protected by the society and the legal standards. The factors that generate delinquency or crime, as phenomenon specific and particular to a deviant behavior, can be divided into two big categories: a) internal, individual factors; and b) external social factors.

The first category includes the features and neuro-psychological structure of the individual characteristics of each individual's personality. The second includes the socio-cultural, economic and educational factors of micro and macro human groups which integrate an individual, starting with one's family (Rădulescu, Banciu, 1990, p. 59).

As noted by Rădulescu (2010, p. 233), American researcher Alfred M. Mirande outlined a model of social norms which involves both legal and illegal acts.

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[13] Robert Merton, *Social Structure and Anomie*, *American Sociological Review, Volume 3, Issue 5 (October 1938)*, p 672-682

[14] Richard Cloward şi Lloyd Ohlin, *Delinquency and Opportunity*, New York, Free Press, 1966

[15] Durkheim, 1991, pp 36-37

[16] Theodore D. Kemper, "Social constructionist and positivist approaches to the sociology of emotions," *The American Journal of Sociology*, 1981, no. 87, p 336-362

[17] Gordon apud Jonathan Turner and Jean Stets, 2005, p 30

Table 2. Types of criminal and deviant conducts, according to Alfred M. Mirande (1975)

BEHAVIOR	FROM THE POINT OF VIEW OF THE CRIMINAL LAW	FROM A REGULATORY POINT OF VIEW
ILLEGAL	Criminal offence (deviance) (1)	"Normal" crime (2)
LEGAL	Non-criminal deviance (3)	Conduct complying with the law and regulations (non-deviant and non-criminal) (4)

(*Source:* **Rădulescu, 2010, p 233)**

The table also draws attention to the existence of criminal actions which are considered acceptable from a regulatory point of view, but not from the point of view of the non-criminal deviance, namely activities and interventions which fall outside this sphere of crime.

Following the review of the aspects presented in this chapter we can say that multiple variables influence human behavior, starting from the ones presented by the researchers who studied the internal/biological factors, up to the fundamental traits of an individual's personality. Furthermore, economic inequality represents another variable that must be taken into account concerning a deviant behavior. Whether innate or learned along one's life, aggressive behavior is sanctioned by various types of punishments when the bodily and mental integrity of other individuals are affected. The sociologists' contributions have brought into focus the importance of the cognitive elements in the formation of character traits, taking into account the contribution of the personal history and experiences.

2. Mass-Media versus Violence and Aggressiveness in Sports

From an institutional perspective, the mass media is represented by social institutions, both cultural as well as economic, which provide communication within the society.

The first such means of communication in historical order is the movable printing press, which was developed in the middle of the fifteenth century. It is believed, however, that we can speak of **mass-media** from the mid-nineteenth century, namely as of the time when is had a sufficiently large and heterogeneous audience. The newspapers and books published before this period were dedicated to the elites only. In the fourth decade of the last century, the development of the "penny press" (cheaper press) led to a spectacular increase of the audience, but especially to a change of its structure, becoming a mass audience. The cheapening of the press, including books, is the main cause of this phenomenon, but we must also take into account the change of the topics, the publications being addressed primarily to ordinary people from that moment on.

According to the Center for Media Studies[18], 11 TV channels were monitored between October 29 and November 1st, 204, in a 2 weeks sociologic study where a total number of 832 hours of broadcast programs were analyzed. According to the same study, 5,749 scenes of violence were registered between July and November 2004, representing approximately 46 scenes per day per channel or 9 scenes per hour per channel.

Regarding the Romania mass-media of the transition period, M. Petcu mentioned the following[19]: *„The transition of the Romanian society from a totalitarian socio-political system to a democratic one was accompanied and stimulated by a new, emancipated, pluralistic press which has provided the support required for the interaction between various social groups.(...) The demand for the transition of the Romanian society from communism to democracy can also be approached by means of the evolution of the media system as a whole or of one of the media components, which benefits from an individualized treatment, corresponding to the epistemological framework required by the objectives of the scientific approach.(...) The transition from the valet journalist to the objecting journalist was one of the realities that have marked the evolution of the Romanian post-communist press, especially in terms of quality.(...) The transition from the "persuasive- propagandistic" model - a transition within a transition – to the "communication-information" one occurred slowly and was due to the ethical and professional reflections of the journalists as well as especially to the public sanctions consisting in the refusal to consume such messages.(...) The Romanian press has become, since 1990, a means of support for the interactions between different social and political groups, stimulating the totalitarian institutions elimination process, the decommunization of the social communication and the development of the public sphere/civil society*."

The most significant development occurred, however, this century, by the emergence of the electronic mass-media. The first half of the century was marked by the advent of cinema and radio broadcasting, while the second was marked by the mass expansion of television (discovered in the third decade). What is really interesting is that no political party, social or cultural movement can win over large segments of the population without using the mass-media, just as the operation of the modern economies

[18] Sorin-Tudor Maxim ș.a., *Violența în sport*, Universitatea din Suceava Publishign House, 2006, p 215
[19] Marian Petcu, *Tipologia presei românești,* European Institute, Iași, 2000, pp 12, 15, 18, 36, 52, 274

can no longer be conceived without the guidance of the consumer through the media or just as the development and dissemination of culture in society in general can no longer be done independently from such cultural institutions. What is noteworthy is the fact that radio and television are the only means that can capture national attention.

Mass-media sociology is a sociology research area that seeks to analyze the manner in which mass-media works in society, as well as the social effects of the communication carried out by these means[20].

Several types of approaches, theories and issues regarding the **mass-media** have emerged and have been developed during the last few decades. Nevertheless, **two general paradigms** exist which are practically present in all researches. **The first** claims that generally **mass-media** has very strong negative effects, affecting the structures and mechanisms of social life, being active in relation to the individual or the society, while the social structures are relatively passive to its influences. **The second** paradigm claims that the influence of **mass-media** in society is relatively insignificant, that it is subordinated and not superordinated to the society, that it does not determine the choices and behaviors of the individuals, but is only guided by them, and that not only is its role not at all negative, but may even be therapeutic in certain circumstances[21].

A typical problem analyzed from the perspective of the two paradigms is the problem of **violence**. In the first case violence is considered promoted by the **mass-media**, which negatively affects the socialization of children, who can see up to 14,000 violent deaths on TV, in childhood alone, and, in general it can be claimed that this contributes to the increase of the number of deviant behaviors, in particular delinquency, in all its forms. The second perspective considers that **mass-media** does not manipulate the individual, who can actually use it as he/she thinks fit. Violence is actually requested, otherwise it would not be present in the TV programs, therefore it exists in the **mass-media** for the simple reason that it also exists in society. Those who watch such programs are prone to violence and do not become delinquents just because they watch TV (or go to cinema)[22].

Mass-media is a subsystem of the social system, viewed as a set of means of communication of the masses (radio, television, press etc.)

The manner in which mass-media operates in society and the manner in which it influences society has been studied more and more extensively during the latest decades:

"The role of mass-media is that of obtaining the information and making it move around. And since information can be found everywhere, the mass-media's role is to sort it, prioritize it and interpret it. The press (be it printed or broadcast) is the one that indicates what exactly is and is not important from the mass of events, processes, opinions and personalities. It is up to the mass-media whether to disseminate or not new ideas.(...)

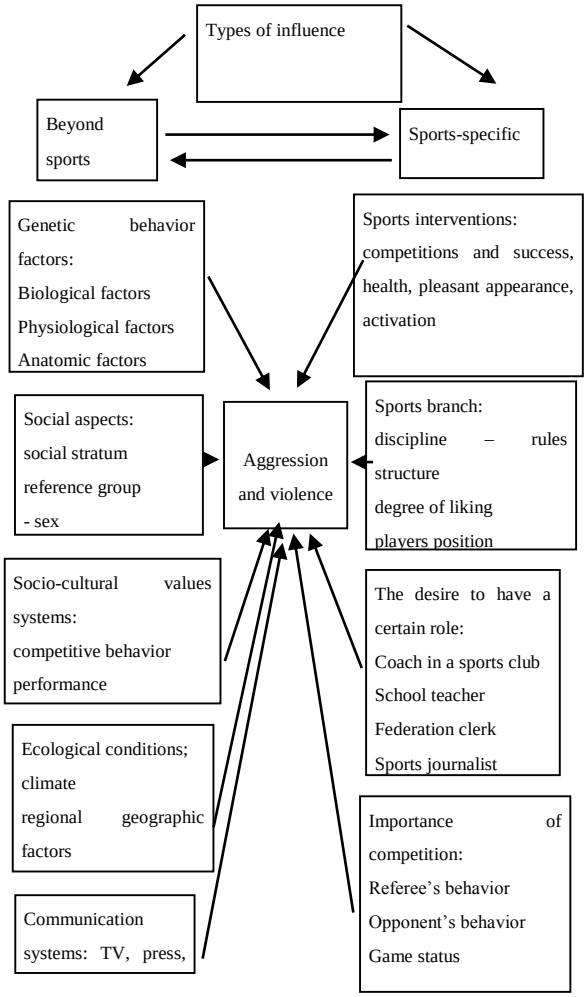
Some press institutions educated the public, especially by the popularization of science. But, as a whole, mass-media tells the public what to think and what not to think, what to do and what not to do: the traditional norms of society – to which the rules that are currently being developed are added.(...) Mass-media's role in modern society is clearly important. However, press is falsely attributed immense powers in numerous fields.(...) To a great extent, mass-media is and does what those running the economy and politics want. To an equally greater extent, it is and does what the consumers and citizens, namely all the inhabitants of the country, want."[23]

Once with the "Sports Revolution", which started in the 19th century, sport has turned into a mass phenomenon. It was democratized, it became accessible to the members of the society, it has been awarded major cultural meanings, it has material economic implications.

Mass-media has played an important role in the transformations suffered by the sports phenomenon. First of all the written press, printed materials, cinemas, radio, TV and, more recently, the internet have managed to familiarize the increasingly larger public with the sports events has contributed to the explosive development of new sports, has attracted many sportsmen and also non-sportsmen, and viewers respectively. But in reality there is a true symbiosis between sports and mass-media. Sports has managed to develop mass-media, by the fact that sports is of great interest for the public by its events, as well as by the fact that sports activities have become am extensive financial business, involving mass-media organizations as well. In what concerns the types of influence on sports violence, Sorin-Maxim Tudor has provided a very well organized structure.

[20] Cătălin Zamfir, Lazăr Vlăsceanu, *Dicţionar de sociologie,* Babel Publishing House, Bucharest,1998, p 340
[21] Idem
[22] Cătălin Zamfir, Lazăr Vlăsceanu, *Dicţionar de sociologie,* Babel Publishing House, Bucharest,1998, p 340
[23] Claude –Jean Bertrand (coordinator), *O introducere în presa scrisă şi vorbită,* Polirom Publishing House, 2001, p 6-39

Fig. 2. Types of influence on sports violence



(Sourse: Sorin-Tudor Maxim, "Violenţa în sport", 2006, p 202)

Various specialists have pointed put that mass-media, especially television, can have both a beneficial role as well as a negative one in what concerns sports violence.

The roles of television are the following:[24]

Informative role – The continuous flow of information around the world helps people find out the latest news;

1. Socialization (educational) role – Television receives and broadcasts messages that double the specific action of the social institutions which operate in the fields of education, culture, religion;

2. Entertainment role – Television bests meets the individuals needs' for recreation;

3. Social bonding role – Ensures the social connections in the individualist mass society;

4. *Status granting role* – Television confers status, importance, legitimacy and acknowedlegement to certain ideas, persons, organizations, social movements etc.

TV Dysfunctions:[25]

- *Message transience* – while a printed message can be read again or can be analyzed more slowly, televised messages cannot be fixed, as they disappear;
- *Time consuming* – according to the latest research, more and more people spend their time by watching TV. Consumption depends on production, but, at the same time, consumption determines production. It was established that dedicating excessive time to watching TV results in the cultivation of commodity, anomia, social isolation etc.
- *Effects of excessive TV watching* – watching TV programs excessively induces a sort of passivity in the reception of any type of message;
- *Drop of the cultural level* – Television determines the degradation of the artistic taste of the public by promoting cultural models that are way below the average level
- *Creation of false celebrities and events* – the purpose being that of winning audience and popularity;
- *Manipulation phenomenon* – dramatized information;
- *High costs* – employees, machinery, equipment, trips, broadcasts and other very large expenses;
- *Narcotic dysfunction* – television induces the emotional and individual isolation of the receptors, thus giving them the feel of real experiences;
- *Lack of feedback* – television does not provide the opportunity to directly contact the producers of the presented shows, and therefore the viewers do not have the opportunity to determine changes.

TV news **consist of information presented with the help of kinetic images, which have a certain impact both at rational as well as at emotional level; they can influence greatly many audience segments, being a sort of show where images are supplemented by gnoseological content, without repetitions, by combining three dimensions that characterize TV news:** image, word and sound.

3. Risk factors generating violence and aggressiveness on stadiums, according to the surveys made by the Ministry of Administration and Domestic Affairs

The professional experience of the public order officers in charge with the order on stadiums has offered us answers concerning the violence and aggressiveness from the perspective of the behavior of the supporters, fans or members of different galleries.

The main factors that generate a big problem on stadiums are alcohol, the attitude and behavior of the supporters, which differ from one gallery to another. Acting immaturely is another characteristic of the supporters, resulting in a disorderly behavior of certain members of the galleries. Most supporters claim that if

[24] Corina Crişan, Lucian Danciu, *Manipularea opiniei publice prin televiziune*, Ed.Dacia, Cluj-Napoca, 2000, p 24- 31
[25] Idem, p31 – 43

there is no conflict between them and the public order officers things cannot be fun.

Other important factors that public order officers mention are: a) lack of education; b) challenges; c) insults of other fans; d) the favorite's team poor performance; and e) possible frauds of the referees; i.e. when the supporters think they are entitled to penalty shots, which are not granted. Public order officers will have to handle their dissatisfaction.

Therefore, the main risk factors, from the point of view of the public order officers, are:

1. high consumption of alcohol and other prohibited substances
2. the team's play;
3. the referees' decisions;
4. the instigations of the other spectators;
5. the lack of education and common sense;
6. the lack of drastic punishments or the inconsistent application of the already existing ones
7. the lack of professionalism or superficiality of the employees of the security companies can be clearly seen in the bleachers, individuals gathered in groups or isolated ones do not have the same force or daring;
8. emergence of supporters who incite to violence;
9. suspicions regarding the professionalism of the players;
10. the correct playing of the games;
11. insufficient cooperation between the public order officers and the organizers;
12. the involvement of the officials or players in the implementation of certain measures for certain illegal deeds;
13. the copying of the disorderly behavior by the supporters;
14. the escalation of rivalry into violence, between the supporters of rival teams.

Public order officers noticed the creativity of the fans, their inventiveness in what concerns the methods of bringing prohibited items on the stadium or build their banners after they take their seats in the bleachers. The violent incidents in the bleachers are due to a high degree of freedom, to the permissive laws, lack of education, entourage, frustration, rivalry between galleries, alcohol consumption, the chairmen of the clubs. And there are also certain members of the galleries who come to the stadium only for making a scandal.

Other risk factors with respect to the diversity and extent of aggressive and violent events on stadiums in particular are listed below:

- the use of substances that stimulate a person's hyperactivity;
- the lack of sufficiently strict bodily checks at the entry on the stadiums and the lack of means of warning the supporters concerning the consequences of any violent actions;
- the insufficient involvement of the personnel of the clubs/competition areas to ensure the performance of the competitions in the spirit of fair-play;
- the desire of some supporters/players/other persons to show their dissatisfaction concerning the results of a game and the performance of the favorite team;
- hostile attitudes towards the rival teams/players, presented on social networks or in shocking comments presented on the media channels.

4. Conclusions:

The Olympic Movement and the international documents regulating the role of the international bodies and national Olympics committees are important for the prevention and control of violence in sports. The purpose of the Olympic Movement is to contribute to a peaceful and better world, educating the youth by promoting the practice of sports according to the principles and values of the Olympic Games.

The three components of the Olympic Movement are the International Olympic Committee (IOC), the International Federations (IFs) and the National Olympic Committees (NOC). The mission of the IOC is to encourage and support the promotion of sport ethics, the education of the youth through sports and the commitment to the values of fair-play, to collaborate with the public organizations and authorities to put sport at the service of humanity and peace in the world. Moreover, the Olympic Movement aims to constantly encourage the promotion of women in sports at all levels and in all structures, for the purpose of implementing the principle of equal opportunities and gender equality.

There is a great diversity of prevention programs: educational and social measures, improvement of the relations between the club and the supporters, the promotion of dialogue with the rival clubs, control of the spectators with the help of cameras, police interventions, infrastructure investments, reinforcement of the social role of the clubs, the organization of the ticket offices, appropriate legislation and many others. When a city hosts a sports event, everything must be based on a genuine hospitality policy: specialized structures for the access and accompanying of the supporters, ensuring the transport, meals and accommodations of the guest supporters, taking the required measures to make sure that the future competition does not make the members of disadvantaged neighborhoods or people who experience problems feel excluded (which are not accepted or do not find cheep game tickets). A few days or hours before the game a pleasant atmosphere must be crated in the district where the sports field is located, messages that ask people to keep calm and show fair play. It is also advisable to involved highly appreciated celebrities in events of this type. In Appendix 7 you will find the 11 principles of fair-play which supporters are encouraged to take into account for every football game or other sports event.

Please find bellow a few of the most important measures meant to control the sports violence

phenomenon that mass-media has noticed in our country.

Table 10. Examples of anti-violence campaigns between 2006 and 2014

No.	Action type	Source mentioned by the mass-media
1.	1. Anti-violence campaign carried out by the Public Order Division – "Say NO to violence in sports!" **Jan. 26th, 2014**	http://www.sighet247.ro/s/campanie-anti-violenta-derulata-de-jandarmerie-spune-nu-violentei-in-sport/
2.	**"Violence is not your roommate" Oct. 30th, 2013**	http://www.wowbiz.ro/e2809eviolenta-nu-este-colega-ta-de-camerae2809d_75501.html
3.	2. "NO HOOLIGANS ON STADIUMS: Law on the control of sports violence, passed by president Băsescu" **Bucharest, Jan. 5th, 2012**	http://www.mediafax.ro/sport/fara-huligani-pe-stadioane-legea-privind-combaterea-violentei-in-sport-promulgata-de-presedintele-basescu-9129364
4.	3. Law on the control of sports violence – passed; hooligans will see the football matches from a Police Precinct **Bucharest, December 15th, 2011**	http://sport.hotnews.ro/stiri-sport-10948949-legea-privind-combatarea-violentei-sport-fost-aprobata-huliganii-trebuie-vada-meciurile-sectia-politie.htm
5.	**Campaign "Racism spoils the game. Violence destroys lives" October 21st, 2007**	http://www.cncd.org.ro/programe/Proiecte-finalizate/Campania-Rasismul-strica-jocul-Violenta-distruge-vieti-3/
6.	4. Prevention and control of sports violence **Bucharest, April 8th, 2006**	http://jurnalul.ro/vechiul-site/old-site/arhiva-jurnalul/arhiva-jurnalul/prevenirea-si-combaterea-violentei-in-sport-23846.html#

Another type of measures that can contribute to the prevention of sports violence are based on the non-violence concept of great politician Mahatma Gandhi[26]. Please find below a short fragment of the work and manner of thinking of Gandhi:

"I coined the term Satyagraha in South Africa in order to give a name to the power with which the Indians there fought for a full 8 years (1906 - 1914). I spoke of Satyagraha in order to distinguish it from the movement then going on in *the United Kingdom and South Africa as Passive Resistance. Satyagraha is as far away from passive resistance as the North Pole is from the South Pole. Passive resistance is the weapon of the weak and, therefore, the use of physical pressure or violence are not ruled out in the efforts to reach its aims. In contrast, Satyagraha is the weapon of the strongest and it rules out the use of violence in any shape or form. (...) This law of love is nothing other than the love of truth. Without truth there is no love. (...) Satyagraha is also referred to as the power of the soul, because the certainty of an inherent soul is necessary, if the Satyagraha is to believe that death does not mean the end but the climax of the fight. (...) And believing that the soul outlives the body, man will no longer wait impatiently to experience the victory of truth within his present body. (...) And despite this, it has been said that the Satyagraha - as we understand it - could only be practiced by a chosen minority. In my experience, the opposite is true. When its basic principles are understood - hold on to the truth and stand up for it through one's own suffering - then everyone can practice Satyagraha. (...) At a political level, however, battle in the name of the people is primarily aimed at taking action against unjust laws. When petitions and all other attempts at persuading a legislator to recognize the injustice of a law have failed, then the only means left open to those protesters, not prepared to obey the law, is to force the legislator to abolish the law. This is done by breaking the law and bringing punishment and suffering upon oneself. Therefore, Satyagraha still appears to the public as civil disobedience or civil resistance. "Civil" should be taken as non-criminal action…"*

In order to respond to the requirements of prevention of the phenomenon of violence in sports, the concept initiated by Mahatma Gandhi can be followed by respecting the order of the ideas presented below:

- We reject the idea of violence, because the good obtained by means of it is not long-lasting; instead, the damage caused by violence lasts a long time.
- Violence is the weapon of the weak; non-violence is the weapon of the strong.
- The principle of non-violence is subject to a test when confronted with violence.
- Non-violence, in its dynamic form, means conscious suffering. This does not involve bowing our head before those who oppress us, but standing up, with our entire being, to the tyrant's will.
- A Satyagrahi (advocate of non-violence) is someone who has relinquished fear. He dares trust his enemy. Even if the enemy disappoints him twenty times in a row, Satyagrahi is ready to trust him for the twenty first time.
- My faith in the non-violence principle makes me very determined. There is no more room for cowardice or weakness.
- For those who make use of violence, there is still

[26] http://www.dadalos.org/rom/Vorbilder/gandhi/zitate.htm, accessed on Nov 10, 2013

hope that they will one day find their way to non-violence, which is not true for cowards.

- Perseverance consists in imposing ourselves voluntarily in order to make other people willingly accept our vision.

In addition to the moral and ethical role of the behavior of the individuals and subjects necessary in our contemporary society, what is also important is to enforce new legislative measures, such as resorting to the probation service. Year 2000 has marked the issuance of the first regulatory documents concerning the organization and operation of the services of social reintegration of criminals and of supervision of punishment execution in non-custodial conditions under Government Ordinance no. 92/2000, and then the passing of Law no. 211/2004 on certain measures for ensuring the protection of the victims of crimes, Law no. 123 and Law no. 356/2006 and other regulations in 2008 and 2009. The following key principles, presented by Gabriel Oancea, bear a special importance in the provisions of the legislation passed these last few years:

a) The waiver to the enforcement of a penalty or the delay of its enforcement subject to the fulfillment of a series of conditions

b) Control and social reintegration activities

c) Execution of the punishments, when they consist in administrative sanctions, by the performance of community service activities

d) Periodical assessment of the efficiency of the probation service[27].

A fourth set of preventive measures refers to the measures of protection and prevention of violent actions and security on stadiums, where the enforcement of the latest laws is vital for the control and reduction of hooliganism. To this end, we list some principles that are required and must be followed for all sports premises under construction or renovation:

- Elimination of the sources of flammable and hazardous substances located near the competition premises
- Protection of the administrative or recreational areas against fires or explosions, as well as the check of the fire extinguishers and the enforcement of firs risk mitigation measures
- Presence of well trained security personnel
- Ensuring a maximum seating capacity for the spectators, ensuring a smooth and quick circuit of the supporters for the top competitions, providing the ways and means for a rapid evacuation, as well as access to first aid means and medical services if needed
- A good coordination and communication between all involved services in order to act efficiently in risk or emergency situations, the preparation and periodic check of the emergency plans for exceptional situations (earthquakes, fires, explosions)
- Immediate enforcement of drastic measures against the supporters and athletes involved in acts of violence, doping or discrimination against other citizens

Furthermore, all educational bodies must continue their activity of educating the subjects, potential supporters or athletes, with respect to the principles of fair-play and of a balanced and fair competitive attitude:

- Physical and sports education in schools and clubs should include, at all levels, a strong component of ethical values linked to harmony of the human personality and the development of one's physical and mental qualities
- Encouraging students who are less gifted at sports to participate in recreational sports activities and encourage and supports their colleagues full heartedly and honestly
- Supporting the bilateral and multilateral programs and European cooperation programs by means of school partnerships and adult training programs
- Intensifying the anti-discrimination programs and activities and the active and preventive doping and violence control measures
- Encouraging the collaboration between the educational and sports institutions and sports tourism; the role of the media in the appreciation of the positive and correct attitudes shown by the supporters of different countries
- inclusion of light sports activities in the routine of private companies, encouraging employees to practice a sport regularly, stimulating communication and team work through sports
- Educational activities dedicated to supporting the elderly in practicing sports activities or in attending sports events as public and supporters, together with their family members
- A more active involvement of the employers' organizations and unions in the education and training of the local communities and the development of a civic attitude appropriate for the contemporary European area.

Given all the above, we can conclude that the phenomenon of violence in sports remains an area upon which researchers and specialists will focus their attention the years to come as well, regarding which the media channels will continue to publish news and articles, showing especially sensational and shocking aspects, and with respect to which the authorities and the civil society will try to act in order to control and prevent aggressive activities; we hope, at the same time, that Romanian supporters will start, and in time will succeed, in having a more controlled, moderate behavior, coming closer to the European standards in force. That is why it is very important for the team spirit to be supported actively by the educators, trainers and coaches of clubs across the country. Given the above, it is only fair to say that education is essential for controlling violence and that curricular

[27] Gabriel Oancea, *Probaţiunea în România. Evaluări normative şi sociologice*, C.H.Beck Publishing House, Bucharest, 2012, pp 115-169

and extracurricular educational programs have a basic role in the modeling of the future supporters interested in participating in and acting as civilized fans, regardless of the type of sports competition they attend.

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ROMANIAN YOUNG PEOPLE'S PERCEPTION REGARDING THE DYNAMICS AND EFFECTS OF INTERNATIONAL MIGRATION IN THE GLOBALIZATION ERA

Doina Elena NEDELCU*

Abstract

In contemporary society, the extent to which migration occurs, the multiple and diverse consequences that it generates have determined a deeper and interdisciplinary concern of researchers for the study of this phenomenon. However, some of the social, political and cultural values that migration implies have not been studied enough.

The present paper aims to analyse the young people's level of knowledge as regards the evolution and causes which trigger the migration phenomenon in contemporary society, as well as the social, political and cultural effects that it generates in the origin and host countries. In the present paper we also intend to reveal the Romanian young people's perception as regards the way immigrants are treated in the host country by answering questions like: are they discriminated?; if yes, are there categories that are more discriminated in comparison with the others?

Last but not least, the present research is meant to identify the degree of tolerance that Romanian young people have in relation to different emigrant categories.

Keywords: *migration, Romanian young people, perception, discrimination, tolerance.*

1. Introduction

Nowadays globalization is the framework within which the international migration process occurs and it triggers major effects on the patterns of our contemporary society. Globalization is the cause and the effect of international migration; it is a process which more and more defines the world we are living in through its dynamics and complexity. The statistical data that we are going to refer to illustrate the amplitude of international migration at present: in 2010, about 3.1 millions of people migrated into one of the EU member states. In 2010 the UK reported to have the highest number of immigrants (591, 000), followed by Spain (465, 200), Italy (458, 000) and Germany (404, 100); these four member states together comprised 61.9 % of all the immigrants settled in the EU member states[1].

The multiple and controversial effects induced by international migration over all the involved actors – source countries, destination countries and the immigrants themselves – have drawn the attention of a large and various number of researchers: sociologists, psychologists, economists, political analysts, etc. Migration and its effects sale are subjective concepts – according to Nazli Choucri – and their perception depends both on the subject that defines the terms and on the ones that benefit from the definition of these terms in a certain manner[2].

On the other hand, the way in which these concepts are conceived lays a mark on the present and future reality. In other words, even if international migration is rooted in the structural realities of the international economic system, the way in which migration is perceived influences its effects and evolution. Under these circumstances, it is fully justifiable to undertake a deeper and more complex research into this phenomenon and its effects. A part of the research which has been made so far points out that 76% of the Europeans consider that, for their countries, the increase of the immigrants' number is an important and highly important threat. This perception is reinforced by the feelings of uncertainty and anxiety which they have as regards their future and which may be identified throughout Europe - being mistakenly associated with immigration[3].

The present research attempts to analyse the Romanian young (aged 15-19) people's knowledge and perception over the phenomenon of international migration and its effects. We consider that such an analysis is fully justifiable since Romanians represent a more and more significant percentage of the total number of immigrants located in Europe. According to the data offered by Eurostat 2011, the group of foreign citizens that live in the EU and whose number increased the most during 2001-2011 was the one of the Romanians; thus, their number was eight times higher in ten years: from 0.3 million in 2001 to 2.3 million in 2011. The young people who are aged 15 -

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[1] Eurostat (migr_pop1ctz) and United Nations, Human Development Report (Raportul privind dezvoltarea umană), 2011.

[2] Nazli Choucri, "Migration and Security", in *Some Key Linkages,Journal of International Affairs*, vol. 56:1, p. 98-122, 2002.

[3] Marcel Canoy, Ricklef Beutin, Anna Horvath, AgnesHubert, Frédéric Lerais, Peter Smith, Myriam Sochacki, *Migration and public perception*, Bureau of European Policy Advisers (BEPA) European Commission, http://ec.europa.eu/dgs/policy_advisers// publications/docs//bepa_migration_ final_09_10_006_en.pdf, *apud*: Ionel Stoica, "Migrația Internațională și Securitatea - Noi Provocări [*International Migration and Security – New Challenges*]", in *INFOSFERA*, 2nd year, no.1, 2009, p.: 48-51.

24 form the most numerous group of Romanian immigrants. In 2012 the Romanian immigrants who were aged 15-24 amounted at 86, 020 men and 68, 741 women[4]. According to statistical data, about 4, 000 young people annually leave the country to further their studies abroad. 51% of the Romanian young people who are aged 18 - 30 have a job and 10% of them work abroad[5].

2. Content

The sociological research we have made in this paper is part of the project entitled: *"Let us talk globally about education for global development, migration and citizenship"* (Project: DCI NSA-ED/2012/280-770).

The purpose of the research is to analyse Romanian young (high-school students) people's perception as regards the features, causes and effects of the migration phenomenon in contemporary society.

The main objectives of the research are: identifying the degree to which high-school students are informed as to the characteristics and evolution of contemporary migration; young people's perception as to the degree of tolerance/intolerance that the host country manifest in relation to the different categories of emigrants; identifying the degrees of tolerance and acceptance that high-school students have in relation to emigrants; identifying the degree of involvement of the different socialization agencies in informing students as to the contemporary migration phenomenon.

The research **method** we have used in the present paper is the social inquiry and the instrument that we have used is the survey.

The investigated **population** includes high-school students from Romania, aged 15 – 18.

The high-school students selected to take part in the project are teenagers that were involved in the project: "Parlez-vous global..." and that come from the following areas of Romania: Bucharest area, Prahova are, Constanta area, Buzau area. The number of the surveyed students per affiliation institution comprises: 886 students from the "Mihai Viteazul" National College of Bucuresti, "Ovidius" High-School and Fine Arts High-School of Constanta, "Nichita Stanescu" and "I.L. Caragiale" High-Schools of Ploiesti, as well as the Fine Arts High-School of Buzau.

For accomplishing this study we have considered the following **hypotheses:** a) there is a positive correlation between the volume of information on the migration phenomenon and the tolerance level manifested towards emigrants. We have found that younger people who are better informed tend to be more tolerant in relation to emigrants in comparison with the young people who are poorly informed; b) the level of information is correlated with the residence environment: young people living in the urban area tend to be better informed as to the migration phenomenon in comparison with the ones coming from the rural area; c) young people tend to manifest different degrees of tolerance in relation to the different categories of emigrants; we suppose that tolerance is lower for the Roma emigrants; d) in our analysis we also appreciated that tolerance in relation to emigrants is different depending on gender (male-female). Girls – in comparison with boys - tend to be more tolerant in relation to all categories of emigrants.

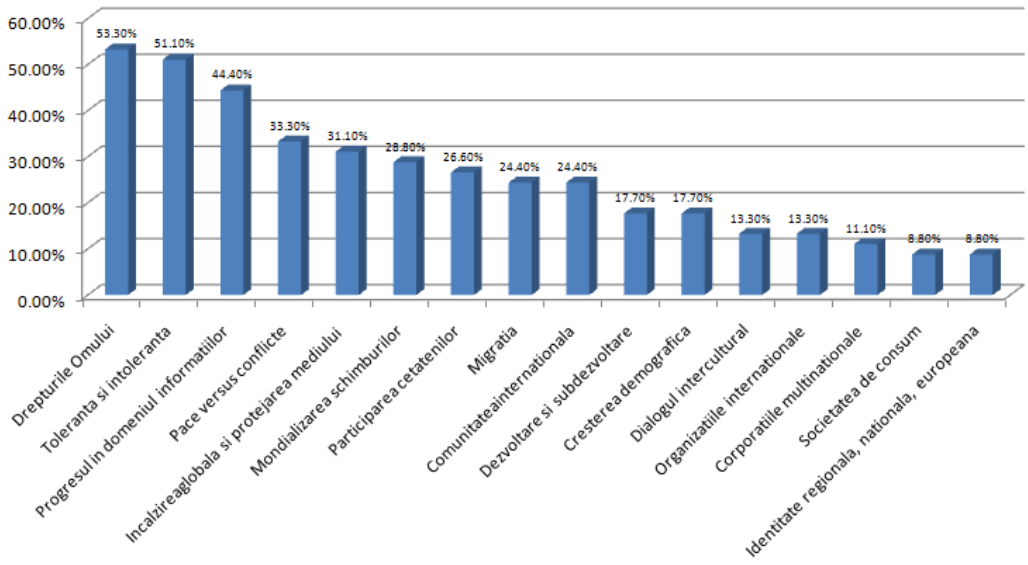
The statistical processing of the data collected on the spot – and presented below – reflects the level of knowledge, feelings and attitudes which Romanian high-school students have in relation to the international migration phenomenon under the present conditions imposed by the ever increasing globalization of the world.

For the beginning, we would like to bring into evidence the fact that high-school students have a sufficiently realistic perspective over the most important characteristics of globalization. Thus, according to the interrogated high-school students, the first 5 main characteristics regarding globalization, which are worth being debated upon, are (see Chart no. 1): the observance of human rights - mechanisms and institutions (53.3% options); tolerance and intolerance (51.1% options); progress in the area of information (44.4% options); peace versus war (33.3% options), global warming and environmental protection (31.1% options). The subjects gave a lower but sufficiently enough high score to the globalization of exchanges, of markets and of economic inter-connections (28.8% options), as well as to the citizens' participation in political and social life (26.6% options), the migration phenomenon (24.4% options) and the development of the international community, as well as of the world consciousness (24.4% options).

[4] http://www.insse.ro/cms/files/publicatii/pliante%20statistice/Migratia%20internationala%20a%20Romaniei.pdf.

[5] Popa, Mădălina, *Politica de migratie a Uniunii Europene- implicatii pentru piata municii*, Bucharest, Alpha MDN, 2013.

1. THE MOST RELEVANT TOPICS REGARINDG GLOBALIZATION – ACCORDING TO HIGH-SCHOOL STUDENTS



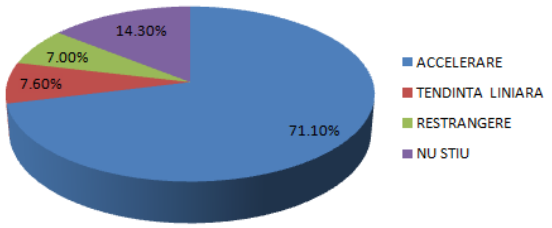
	TOTAL NUMBER OF ANSWERS %
Human rights	53.3%
Tolerance and intolerance	51.1%
Progress in information area	44.4%
Peace versus conflicts	33.3%
Global warming and environmental protection	31.1%
Globalization of exchanges	28.8%
Citizen participation	26.6%
Migration	24.4%
International community	24.4%
Development and under-development	17.7%
Demographic growth	17.7%
Intercultural dialogue	13.3%
International organizations	13.3%
Multinational corporations	11.1%
Consumption society	8.8%
Regional, national, European identity	8.8%

Most of the interviewed students (71.1%) consider that today, given the globalization of the world, the migration phenomenon manifests an accelerated growing tendency; only 7.6% of those interviewed consider that this phenomenon will remain within the same limits, while 7% appreciate that this phenomenon will come to a decline; the remaining percentage represents non-answers (see Chart no. 2).

In contrast, the provisions of the International Organization for Migration reveal that ever since 2010 migration will significantly decrease at global level.

2. OPINIONS REGARDING THE TENDENCIES MANIFESTED IN THE MIGRATION EVOLUTION

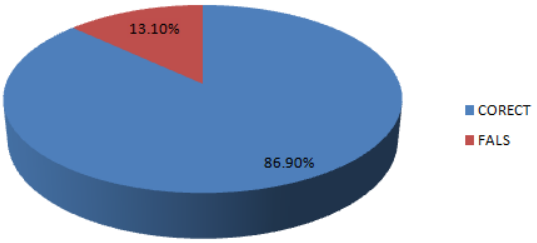
	TOTAL NUMBER OF ANSWERS %
ACCELERATED GROWTH	71.10%
LINIAR TENDENCY	7.60%
DECLINE	7.00%
I DO NOT KNOW	14.30%



Most of the high-school students (86.9%) know the meaning of the terms emigrant and immigrant. Only a small percentage, 13.1%, mistake the two terms for each other (Chart no. 3).

3. THE DISTINCTION BETWEEN EMIGRANT AND IMMIGRANT

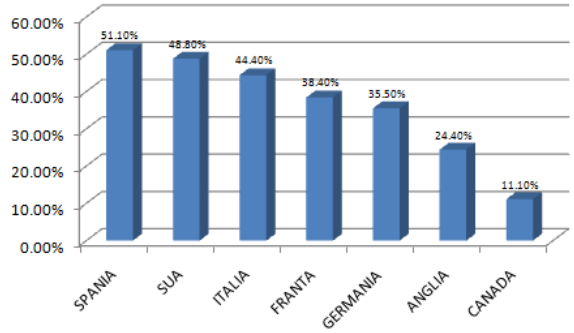
ANSWER	TOTAL NUMBER OF ANSWERS %
CORRECT	86.9%
FALSE	13.1%



Most of the interviewed subjects include the following countries in the category of states with the highest number of immigrants: Spain (51.1%), USA (48.8%), Italy (44.4%), France (38.4%), Germany (35.5%), Great Britain (24.4%) and Canada (11.1%) - according to Chart no. 4. Data recently published by the United Nations, according to Huffington Post, show that the first 8 countries with the highest number of immigrants are: USA (45.8 million), Russia (11 million), Germany (9.8 million), Saudi Arabia (9.1 million), the United Arabic Emirates (7.8 million), Great Britain (7.8milioane), France (7.4 million) and Canada (7.3 million). One can notice that there are certain inconsistencies between the opinions shared by high-school students and the real situation existing in the countries with the highest number of immigrants.

4. COUNTRIES WITH THE HIGHEST PERCENTAGE OF IMMIGRANTS (OPINIONS)

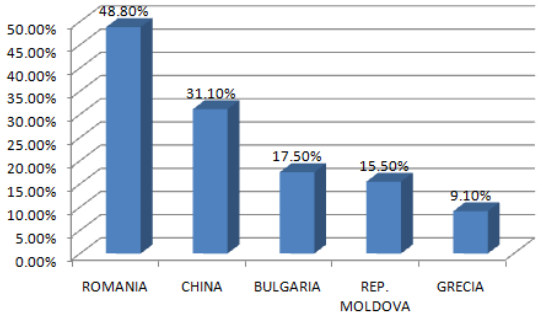
COUNTRY	TOTAL NUMBER OF ANSWERS %
SPAIN	51.10%
USA	48.80%
ITALY	44.40%
FRANCE	38.40%
GERMANY	35.50%
ENGLAND	24.40%
CANADA	11.10%



Most of the interviewed subjects (48.8%) consider that Romania is among the countries with the highest percentage of emigrants, being followed by China, Bulgaria, Republic of Moldova (see Chart no. 5).

5. COUNTRIES WITH THE HIGHEST NUMBER OF EMIGRANTS (OPINIONS)

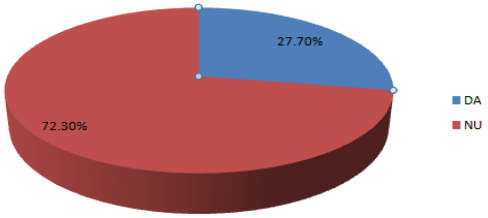
COUNTRY	TOTAL NUMBER OF ANSWERS %
ROMANIA	48.80%
CHINA	31.10%
BULGARIA	17.50%
REP. MOLDOVA	15.50%
GREECE	9.10%



High-school students have a low level of subjective knowledge as regards the situation of immigrants that exist in Romania. Most of the interviewed subjects (72.3%) declare that they do not have information on the situation of immigrants living in Romania; only 27.7% of them declared that they have such information. (See Chart no. 6)

6. DO YOU KNOW ANYTHING ABOUT IMMIGRANTS LIVING IN ROMANIA?

	TOTAL NUMBER OF ANSWERS %
YES	27.7%
NO	72.3%

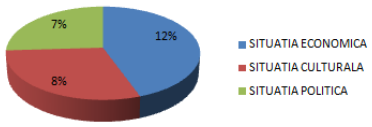


Of those who declared to have information on the immigrants living in Romania, over a half (i.e. 52%) stated to have much and very much information as to their economic situation. Less than a half of those who assess themselves as being informed have much or very much information about the immigrants' cultural characteristics (45%) and about their political situation

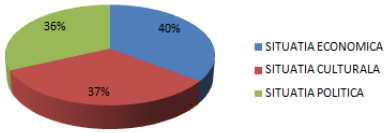
(43%); the other ones declared to know a little about this topic (Chart no. 7).

7. SELF-ASSESSMENT OF KNOWLEDGE AS TO THE IMMIGRANTS' SITUATION:

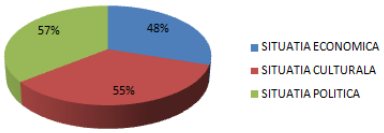
FOARTE MARE



MARE



MICA

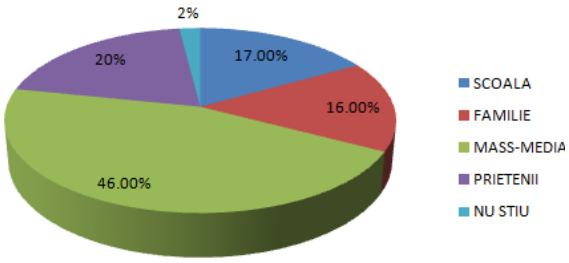


	VERY MUCH	MUCH	A LITTLE
1. ECONOMIC SITUATION	12%	40%	48%
2. CULTURAL SITUATION	8%	37%	55%
3. POLITICAL SITUATION	7%	36%	57%

According to Chart no.8, subjects who declared to have information on Romanian immigrants have mentioned the following sources as the main socialization agents that provided them such information: mass-media (46.0%), friends (20%), school (17%) and family (16%). The conclusion is that school should be more involved in the debate of these topics.

8. THE SOURCES OF INFORMATION ON THE SITUATION OF IMMIGRANTS

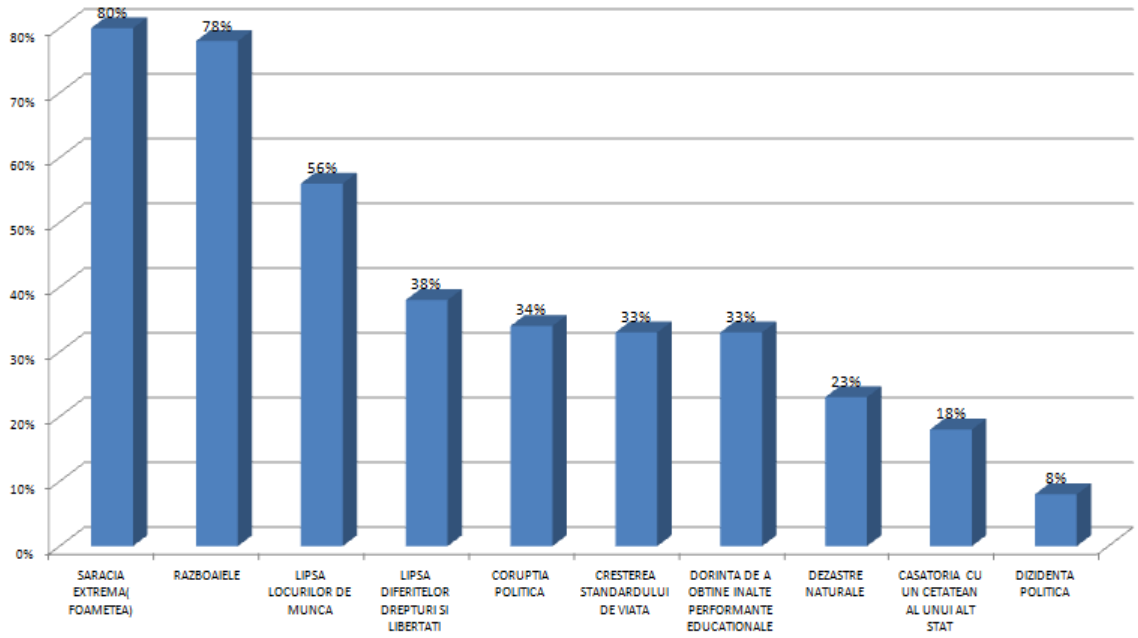
	TOTAL NUMBER OF ANSWERS %
SCHOOL	17.0%
FAMILY	16.0%
MASS-MEDIA	46.0%
FRIENDS	20%
I DO NOT KNOW	2%



According to Chart no. 9, most of the high-school students believe that the main 5 reasons (causes) that could determine a person to emigrate are: extreme poverty (80%), wars (78%), as well as: lack of workplaces (56%), lack of rights and freedoms (38%) and political corruption (34%).

9. THE MOST FREQUENT CAUSES OF EMIGRATION (OPINIONS)

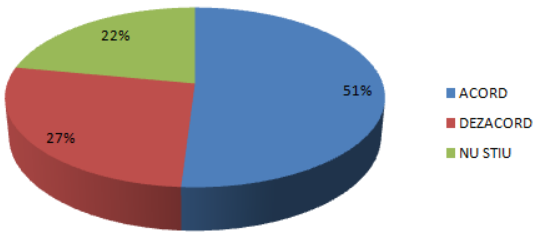
	TOTAL NUMBER OF ANSWERS %
EXTREME POVERTY (FAMINE)	80%
WARS	78%
LACK OF WORKPLACES	56%
LACK OF RIGHTS AND FREEDOMS	38%
POLITICAL CORRUPTION	34%
INCREASE OF THE LIVING STANDARD	33%
THE WISH TO OBTAIN HIGH PERFORMANCE IN EDUCATION	33%
NATURAL DISASTERS	23%
MARRIAGE WITH THE CITIZEN OF ANOTHER STATE	18%
POLITICAL DISIDENCE	8%



Over a half of the interviewed young people (i.e. 51%) appreciate that emigrants are discriminated in the EU; only 27% reject the existence of this phenomenon (Chart 10). The percentage of recorded non-answers is quite high for this question: 22%.

10. ARE EMIGRANTS DISCRIMINATED IN THE EU?

	TOTAL NUMBER OF ANSWERS %
AGREE	51%
DISAGREE	27%
I DO NOT KNOW	22%

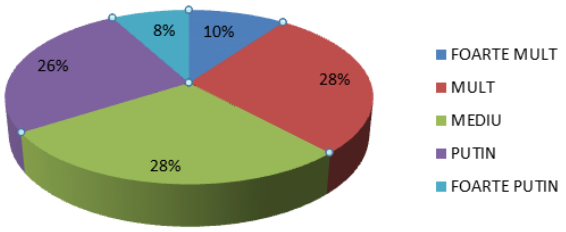


High-school students appreciate that the degree of discrimination to which emigrants are subjected in the host EU countries largely depends on the social and ethnical groups they belong to; this opinion is illustrated in Chart no.11. These students appreciate that the most discriminated category is the one of the Roma population. The subjects – who are 87% - consider that the Roma people are discriminated to a high or very high degree by the host population. They are followed by Afrikaans and Romanians who are also discriminated to a high or very high degree - according to 61% and 57% of those interviewed.

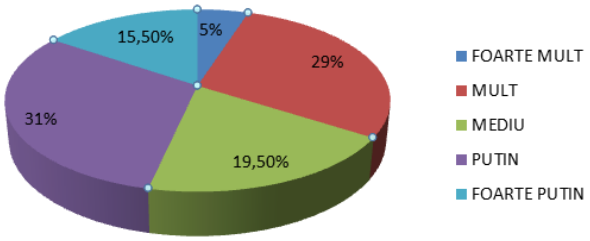
11. IMMIGRANTS ARE DISCRIMNATED (survey)

	VERY MUCH	MUCH	TO A MEDIUM EXTENT	A LITTLE	LITTLE
ARABI-ANS	10 %	28%	28%	26%	8%
INDI-ANS	10 %	34%	30%	14%	12%
AFRICANS	30 %	31%	16%	14%	9%
TUR-KISH	3%	9%	24%	44%	20%
RROMA	69 %	17%	7%	4%	3%
BULGARIANS	5%	29%	19.50%	31.00%	15.50%
RUSSI-ANS	4%	16%	19.50%	35.50%	25%
PEOPLE FROM ASIA	7.50 %	15.50%	27.50%	24.50%	25%
ROMA-NIANS	30 %	27%	21%	14%	8%

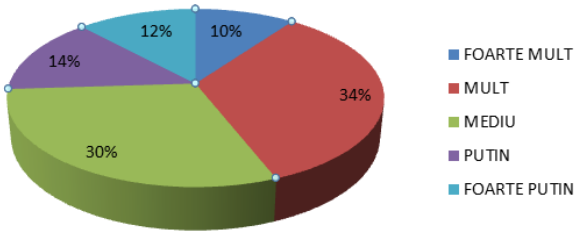
ARABII



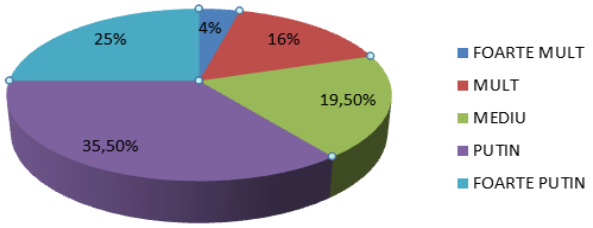
BULGARII



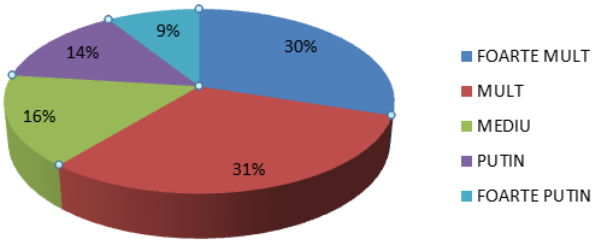
INDIENII



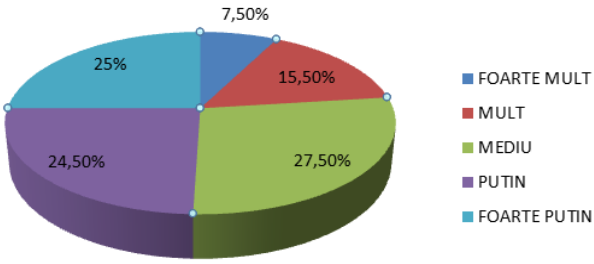
RUSII



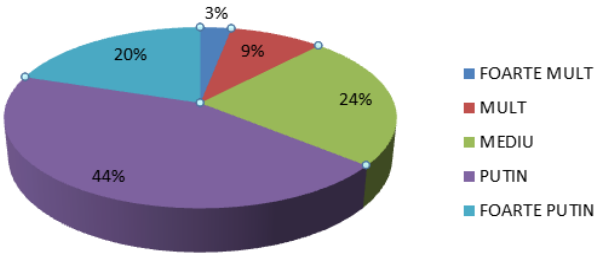
AFRICANII



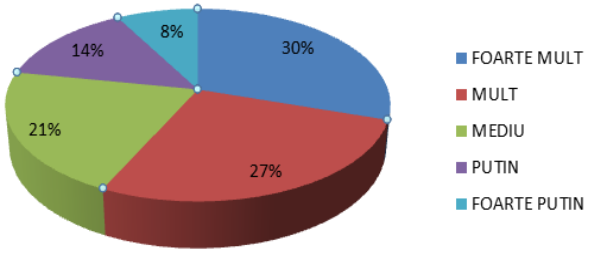
ASIATICII



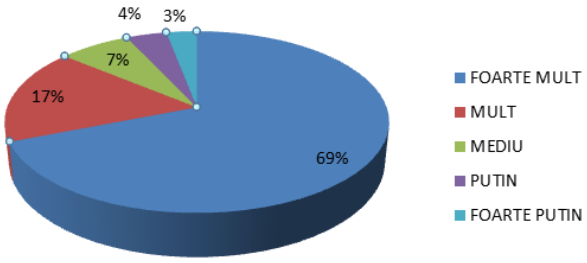
TURCII



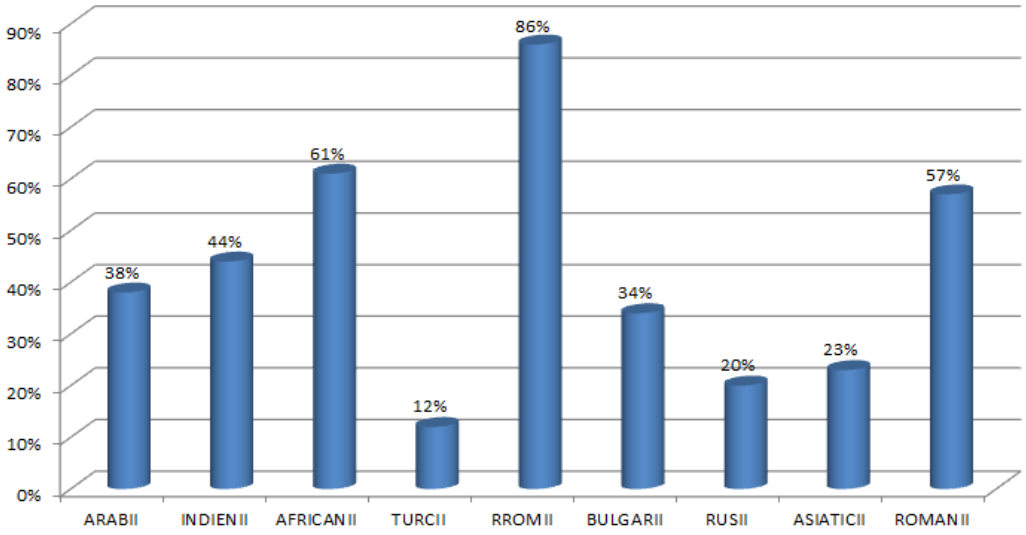
ROMANII



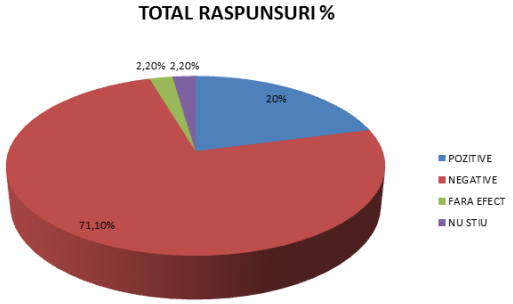
RROMII



IMMIGRANTS ARE DISCRIMINATED TO A HIGH AND VERY HIGH DEGREE (OPINIONS)



The effects of the parents' emigration over the children who remained at home – according to most of those interviewed, i.e. 71.1%, - are negative (affective problems, educational failure, etc.); a small number, i.e. 20% of the high-school students (Chart no.12) consider that the emigration phenomenon generates positive effects (increased living standard, the possibility to study abroad, etc.).



12. THE EFFECTS OF THE PARENTS' EMIGRATION OVER CHILDREN

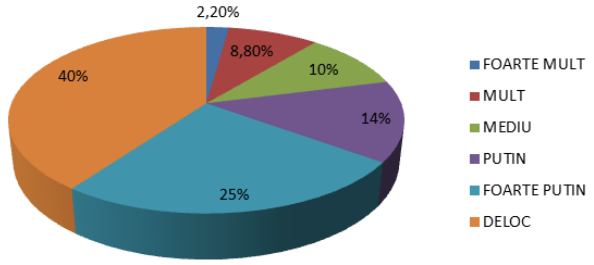
	TOTAL NUMBER OF ANSWERS %
POSITIVE	20%
NEGATIVE	71.1%
WITHOUT EFECT	2.2%
I DO NOT KNOW	2.2%

The data reflecting the high-school students' tendency to discriminate or tolerate immigrants are included in Charts no.13, 14 and 15. According to these charts, most of those interviewed declared that they would not be disturbed if their neighbour were immigrants, no matter their ethnical origin. There is an exception: the Roma population; being a neighbour with them is not accepted by an important percentage of those interviewed, i.e. by at least 37. 6% of those interviewed; only 12.8% declared to have nothing against being neighbours of a Roma emigrants' family (Chart no.13).

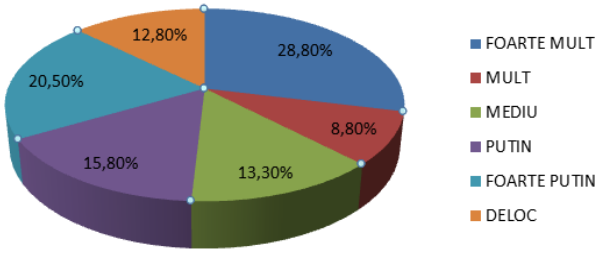
13. THE DEGREE TO WHICH YOUNG PEOPLE REFUSE TO HAVE AN IMMIGRANT FAMILY AS NEIGHBOURS

Origin of the neighbours	TO A SERIOUS EXTENT	MUCH	TO A MEDIUM EXTENT	A LITTLE	LITTLE	NOT AT ALL
ARABIANS	2.20%	8.80%	10%	14%	25%	40%
INDIANS	6.20%	6.30%	11.50%	9%	25%	42%
AFFRIKAANS	11.10%	2.20%	16.50%	18.90%	18.30%	33%
TURKISH	6.60%	4.40%	11.30%	18.80%	23%	35.90%
ROMA	28,80%	8.80%	13.30%	15.80%	20.50%	12.80%
BULGARIANS	2.40%	2.40%	10%	9.80%	27%	48.40%
RUSSIANS	2.20%	2.50%	13.30%	12.40%	22%	47.60%
ASIAN PEOPLE	2.50%	8%	14.30%	15.50%	25.40%	34.30%
ROMANIANS	4%	5%	4%	15%	12%	60%

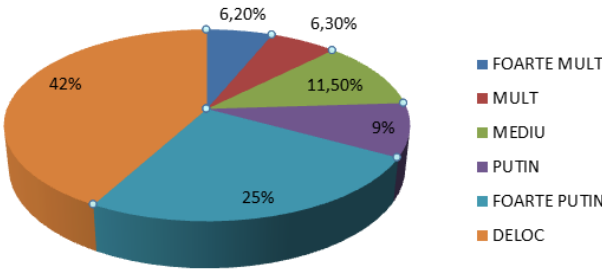
ARABI



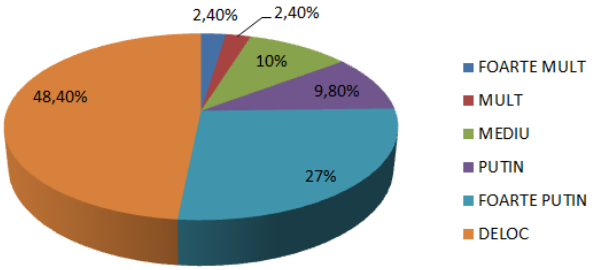
RROMI



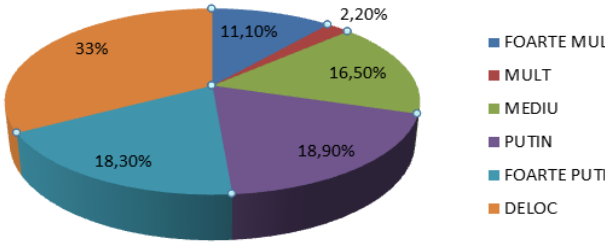
INDIENI



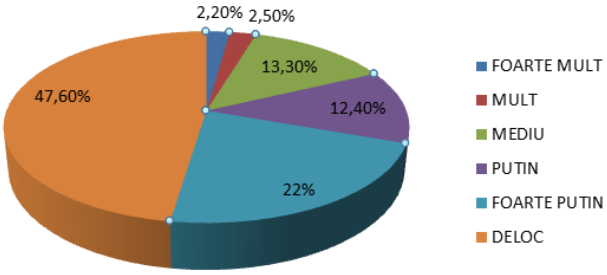
BULGARI



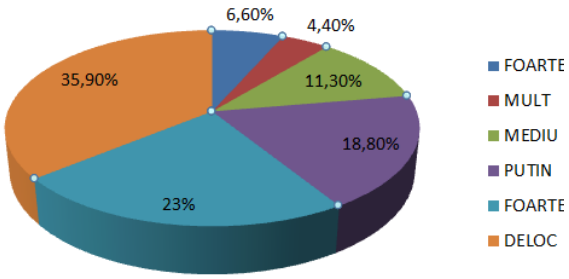
AFRICANI



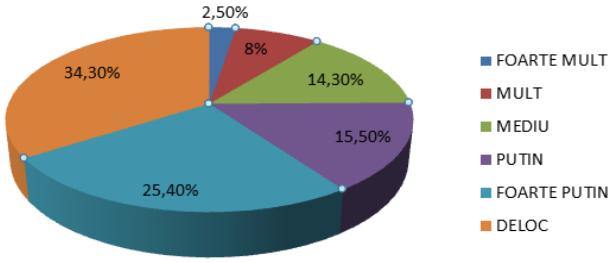
RUSI



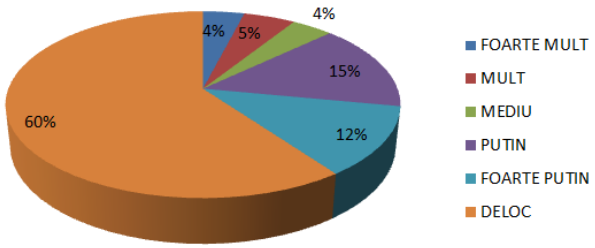
TURCI



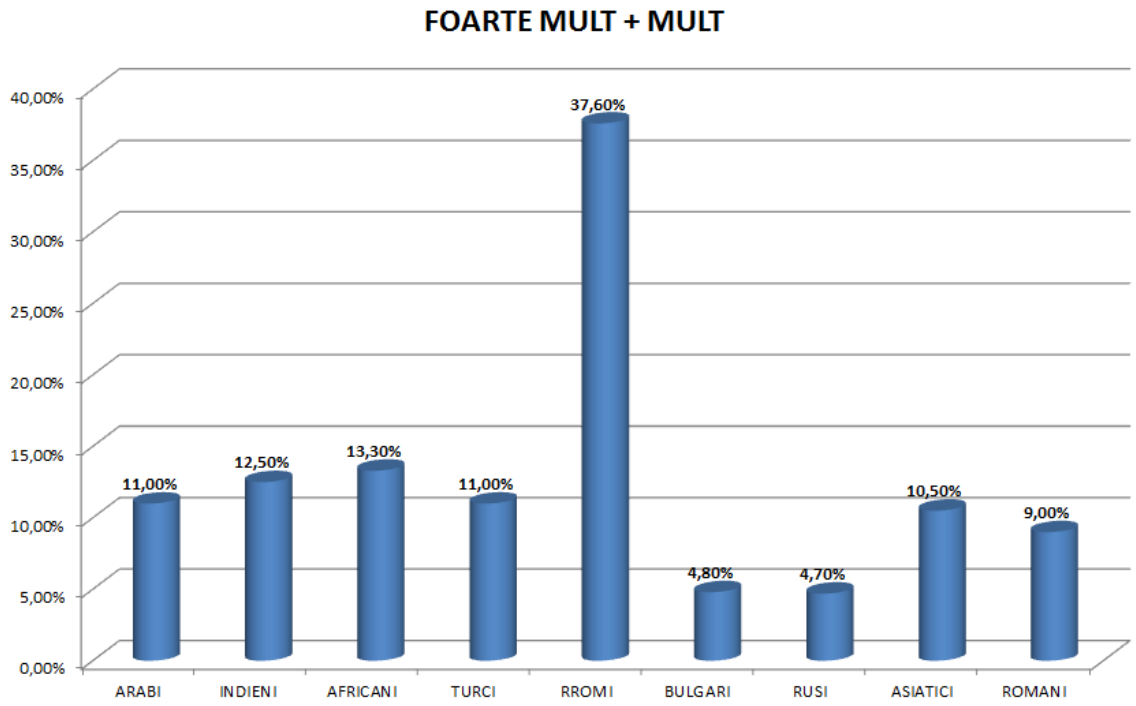
ASIATICI



ROMANI



YOUNG PEOPLE DO NOT ACCEPT BEING NEIGHBOURS WITH AN IMMIGRANT FAMILY

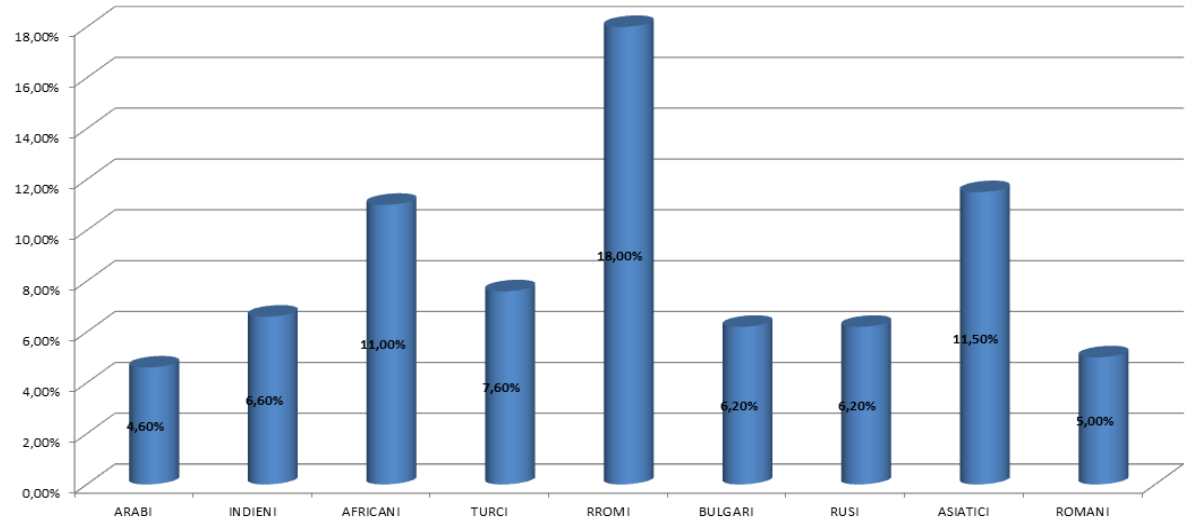


According to Chart no.14, a reserved attitude towards the Roma immigrants is less frequent than the reserved attitude manifested towards those neighbouring Roma emigrants. We can notice a higher degree of tolerance towards the Roma colleagues than to the Roma neighbours. We can notice that 18% of those who answered the questionnaire manifest a reserved or very reserved attitude towards the Roma colleagues in comparison with a percentage of 37. 6% subjects that manifest a reserved attitude towards the Roma neighbours. However, the Roma population is not preferred as a group of colleagues in comparison with other emigrant ethnical groups, on the contrary.

14. THE EXTENT TO WHICH A RESERVED ATTITUDE IS MANIFESTED TOWARDS IMMIGRANT COLLEAGUES

	VERY HIGH	HIGH	MEDIUM	A LITTLE	QUITE A LITTLE	NOT AT ALL
ARABIANS	2.40%	2.20%	13.30%	8.60%	23.30%	50.20%
INDIANS	4.40%	2.20%	15.50%	6.60%	23.30%	48%
AFRIKAANS	4.40%	6.60%	11.10%	8.80%	21.10%	48%
TURKISH	1%	6.60%	8.80%	10.10%	19%	54.50%
ROMA	8%	10%	11.50%	10.50%	35%	25%
BULGARIANS	2.20%	4%	4.50%	8.80%	17%	63.50%
RUSSIANS	2.20%	4%	4%	11.10%	17.70%	61%
ASIAN PEOPLE	2.50%	9%	14.30%	15.50%	24.40%	34.30%
ROMANIANS	2%	3%	4%	10%	14%	67%

THE TENDENCY TO MANIFEST A RESERVED ATTITUDE TOWARDS THE IMMIGRANT COLLEAGUES IS GREAT AND VERY GREAT

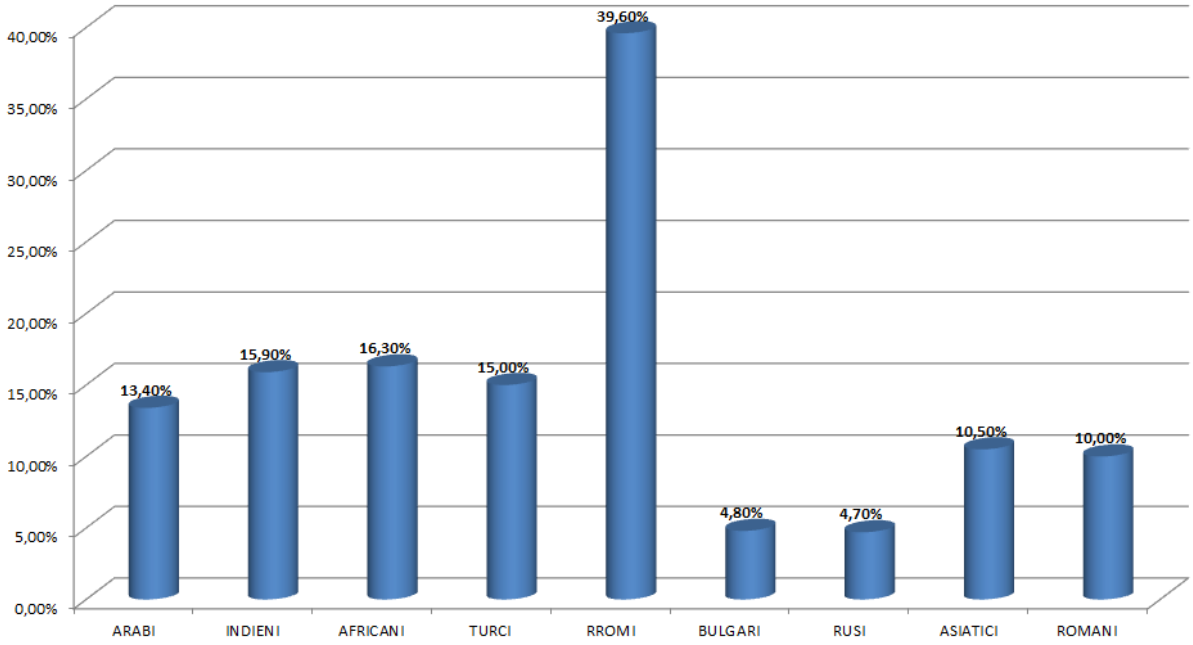


According to Chart no. 15, the data illustrating the rejection of establishing friendly relationships with the Roma immigrants are even higher than in the previous cases. The rejection of the Roma friends is manifested to a high and very high extent by 39.6% of the interrogated ones. An illustrative situation as regards the Romanians' level of solidarity is represented by the fact that a significant percentage of them, i.e. 10%, have declared that they manifest a reserved attitude towards establishing a friendly relationship with Romanian emigrants.

15. THE EXTENT TO WHICH ESTABLISHING A FRIENDLY RELATIONSHIP WITH IMMIGRANTS IS REJECTED

	VERY HIGH	HIGH	MEDIUM	A LITTLE	LITTLE	NOT AT ALL
ARABIANS	4.40%	9%	15%	20%	36.10%	15.50%
INDIANS	6.60%	9.30%	15.40%	17.70%	25%	26%
AFRIKAANS	11.10%	5.20%	15.50%	18.90%	29.30%	20%
TURKISH	8.60%	6.40%	16.30%	19.00%	25%	24.70%
ROMA	28.80%	10.80%	18.30%	16.80%	14.50%	10.80%
BULGARIANS	2.40%	2.40%	10%	10.80%	26%	48.40%
RUSSIANS	2.30%	2.40%	12.30%	13.40%	21%	48.60%
ASIAN PEOPLE	2.50%	8%	14.30%	15.50%	24.40%	35.30%
ROMANIANS	4.50%	5.50%	4%	15%	12%	59%

REJECTION TO ESTABLISH RELATIONSHIPS WITH IMMIGRANTS IS HIGH AND VERY HIGH

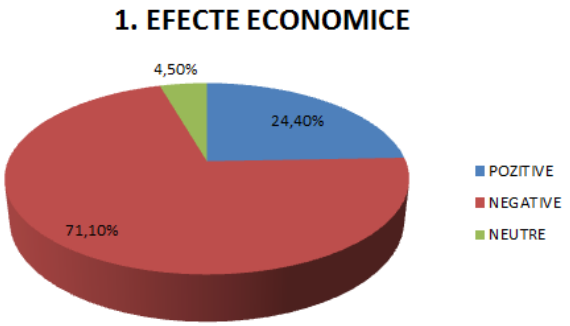


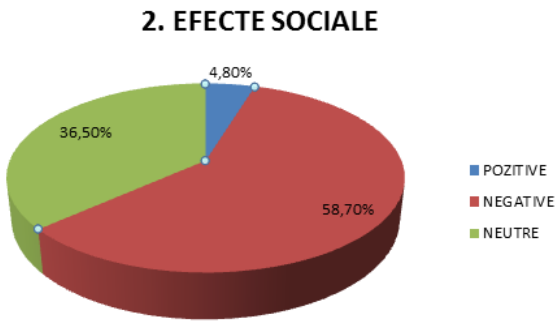
Most of the high-school students, 71.1%, perceive the effects of emigration over their country of origin in a

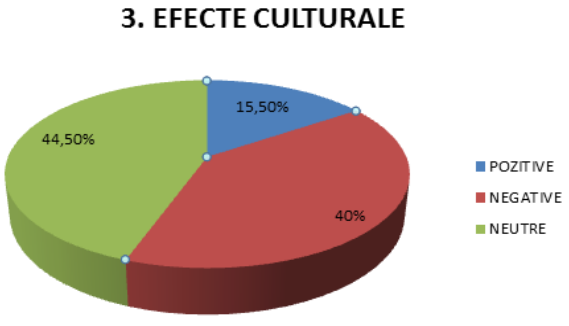
negative way. Massive emigration has even negative side effects on the country of origin, according to 58.8% of those interrogated. Most of the interrogated ones (62.1%) appreciate that political effects of emigration over the country of origin are neutral (see Chart no.16).

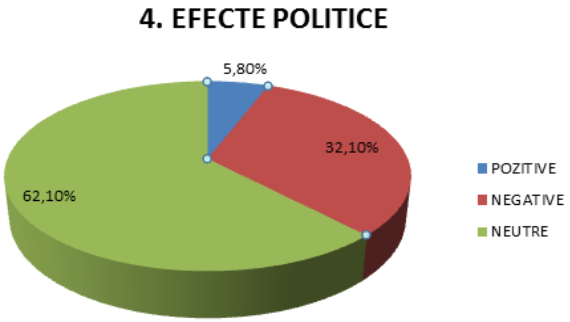
16. THE EFFECTS OF MIGRATION ACCELERATION OVER THE COUNTRY OF ORIGIN

	POSITIVE	NEGATIVE	NEUTRAL
1. ECONOMIC EFFECTS	24.40%	71.10%	4.50%
2. SOCIAL EFFECTS	4.80%	58.70%	36.50%
3. CULTURAL EFFECTS	15.50%	40%	44.50%
4. POLITICAL EFFECTS	5.80%	32.10%	62.10%





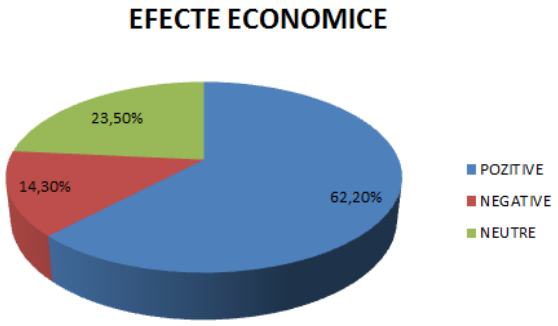


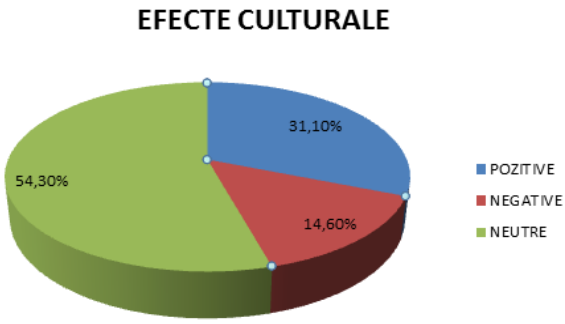


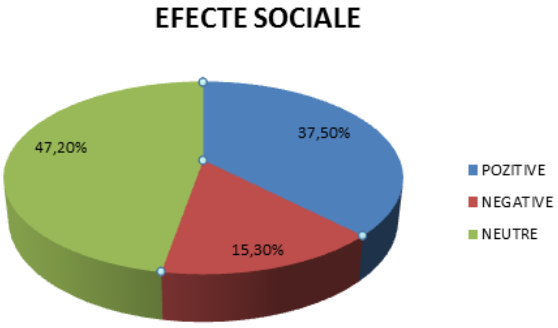
The effects of accelerated migration over the country of origin are negatively perceived, while this phenomenon is perceived in a positive way by the host country. Most of high-school students (62.2%) consider that the intensification of migration brings economic benefits to the host country. Most of the interrogated ones appreciate that migration generates neutral effects on social life (47.2%), as well as cultural (54.3%) and political life (59.7%) of the host country (Chart no.17).

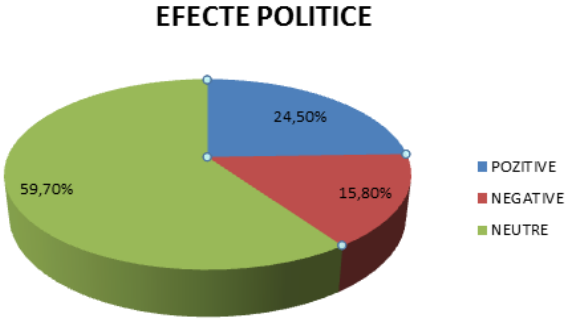
17. THE EFFECTS OF MIGRATION ACCELERATION OVER THE HOST COUNTRY

	POSITIVE	NEGATIVE	NEUTRAL
1. ECONOMIC EFFECTS	62.20%	14.30%	23.50%
2. SOCIAL EFFECTS	37.50%	15.30%	47.20%
3. CULTURAL EFFECTS	31.10%	14.60%	54.30%
4. POLITICAL EFFECTS	24.50%	15.80%	59.70%





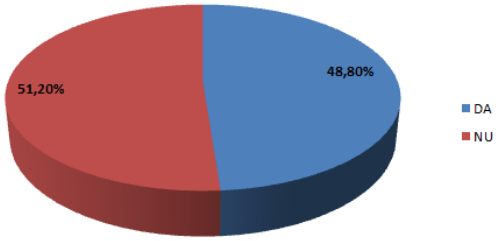




According to Chart no.18, more than a half of the interrogated high-school students (51.2%) declared that they do not have any contact with Romanian immigrants; in consequence, they do not know the situation of these immigrants directly.

18. THE PERCENTAGE OF THOSE WHO HAVE CONTACTS WITH IMMIGRANTS

	TOTAL NUMBER OF ANSWERS %
YES	48.80%
NO	51.20%



According to Chart no.19, high-school students who declared that they have contacts with immigrants mentioned that they established these relations through their friends (51%), through the school environment (27%) or mass-media (22%). In most cases, one can notice that friends represent the most important factor that made it possible for establishing a relationship between high-school students and immigrants.

19. AGENTS THAT FACILITATED CONTACT WITH THE POPULATION OF IMMIGRANTS

	TOTAL NUMBER OF ANSWERS %
SCHOOL	27%
FRIENDS	51%
MASS-MEDIA	22%

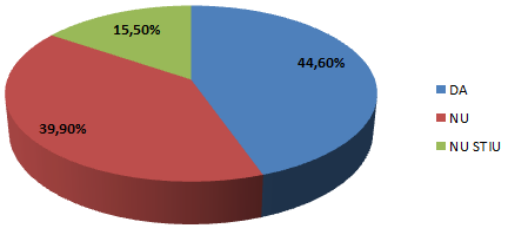
21. CITIZENSHIP SHOULD BE GRANTED TO IMMIGRANTS

	TOTAL NUMBER OF ANSWERS %
TEMPORARILY SUSPENDED	7.60%
LIMITED	60%
UNLIMITED	32.40%

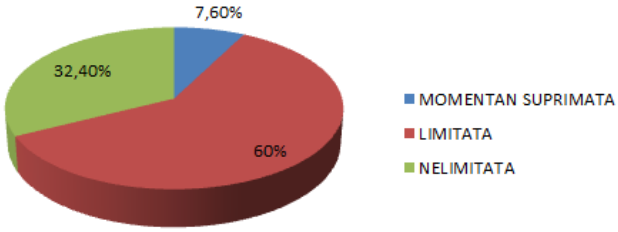
Chart no.20 illustrates the fact that in the opinion of most of those interrogated (i.e. 44.6%), the massive increase of the immigrants number leads to an increase of the criminality rate in the host country. One can notice the existence of significant percentage differences between those who appreciate that immigration generates negative social effects (15.3%) and those who consider that immigration leads to the increase of the criminality rate (44.6%). Somehow it is paradoxical the fact that not all 44.6% of those who consider that immigration increases criminality rate also appreciate that there are negative social effects in the host countries due to the intensification of migration.

20. MASSIVE INCRESASE OF IMMIGRATION FAVOURS THE INCREASE OF CRIMINALITY RATE

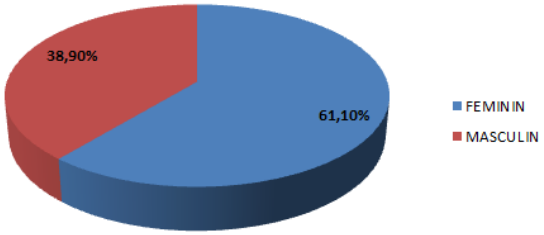
	TOTAL NUMBER OF ANSWERS %
YES	44.60%
NO	39.90%
I DO NOT KNOW	15.50%



Most of those interrogated (60%) appreciate that, due to the massive intensification of migration, host states should grant citizenship to immigrants within certain limits. On the other hand, according to 32.4% of those interrogated, citizenship should be granted to immigrants in an unlimited/unconditional way. A much lower number of interrogated subjects declared that granting citizenship to immigrants should be temporarily suspended (Chart no. 21).

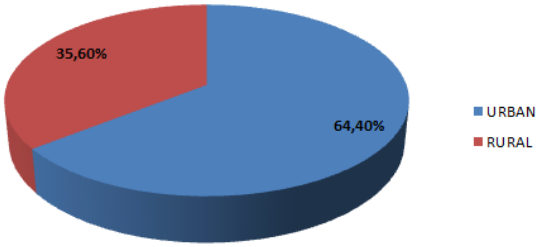


22. SEX



23. THE RESIDENTIAL ENVIRONMENT

	TOTAL NUMBER OF ANSWERS %
URBAN	64.4%
RURAL	35.6%



3. Conclusions

a) The level of knowledge that Romanian high-school students have as regards the process of migration during the globalization era

Firstly, I would like to mention that high-school students have a realist perspective as to the *main characteristics that define the globalization process*. In their opinion, the first 5 fundamental characteristics of this phenomenon – which should be debated upon by all socialization agents – are: observance of human rights - mechanisms and institutions (53.3%); tolerance and intolerance (51.1%); progress in the information area (44.4%); peace versus war (33.3%), global warming and environmental protection (31.1%). High-school students answered in high percentage in favour of other characteristics that define globalization, i.e.: globalization of exchanges, markets and economic exchanges (28.8%), citizen participation in social and political life (26.6%), migration phenomenon (24.4%) and development of the international community and of global consciousness (24.4%).

Most of the high-school students (86.9%) know the *meanings of the terms: emigrant and immigrant*. A small percentage (13.1%) does not make a difference between these two terms.

When asked about the immigrants' countries of origin and the host countries that they prefer, most of the Romanian high-school students enumerated the following countries as being *the countries with the highest number of immigrants*: Spain (51.1%), USA (48.8%), Italy (44.4%), France (38,4%), Germany (35.5%), Great Britain (24.4%), Canada (11.1%). The data recently published by the United Nations, according to Huffington Post, show that the first 8 countries with the highest number of immigrants are: USA (45.8 million), Russia (11 million), Germany (9.8 million), Saudi Arabia (9.1 million), the United Emirates of Arabia (7.8 million), Great Britain (7.8 million), France (7.4 million) and Canada (7.3 million). One can notice that there are certain inconsistencies between the opinions shared by high-school students and the reality existing in the countries which have the largest number of immigrants. Most of the interrogated subjects may have nominated some countries as having the highest number of immigrants because they thought of Romanian immigrants in particular and the countries which the latter prefer. This may be the reason why the interrogated subjects included in this category countries like: Russia, Saudi Arabia and the United Arabic Emirates.

As to the classification of countries which have the highest number of emigrants, most of the interviewed subjects (48.8%) consider that Romania is in the top, being followed by China, Bulgaria and the Republic of Moldova. Studies indicate that "we are not the nation which exports the highest number of emigrants, though we occupy a top position globally. However, we occupy an unhappy top position for the largest number of emigrants who have higher education studies, i.e. 18.5% of the total number of emigrants, in comparison with the European average of only 5%. Considering that Romania has the lowest number of university graduates, a fifth of them prefer to work for other economies."[6]

When asked if they know anything about the situation of immigrants living in Romania, the present study indicates the existence of a significant deficit. Most of the asked subjects (72.3%) declare that they do not have *information on the situation of the immigrants living* in Romania; only 27.7% declared the contrary.

Of the 27.7% who declared to have information on the immigrants living in Romania, more than a half answered that they had a lot or much knowledge of their economic situation. Less than a half of them perceive themselves as being informed to a high or very high extent as to the cultural characteristics of immigrants and their political situation (43%); the rest

[6] http://www.amosnews.ro/suntem-tara-care-export-cei-mai-multi-emigranti-cu-studii-superioare-2013-12-30#sthash.AYLqEbh8.dpuf

appreciated that they have little knowledge about this aspect.

In fact, more than a half of the questioned high-school students (51.2%) declared that they do not have any contact with Romanian immigrants; thus, they do not directly know the situation in which these immigrants find themselves.

High-school students who declared that they have contact with the immigrants in our country stated that they established these relationships through their friends (51%), school (27%) or mass-media (22%). One can notice that, for most cases, the group of friends played the most important role in the creation of such relationships.

The present research points out that the main agents of socialization who provided pupils information on the immigrants in Romania are: mass-media (46.0%), friends (20%), school (17%) and family (16%). It results that school should be more involved in debating these problems as to migration and immigrants.

We can conclude that the level of knowledge that high-school students had as to the actors and complexity of the migration process requires corrections and that it is necessary to get involved all socialization agents (from school to NGOs and mass-media) in accomplishing this objective.

b) Opinions, attitudes, feelings toward migration, immigration, emigrants

Most of the interrogated high-school students (71.1%) consider that under the intensification of the globalization process, migration will increase. Students appreciate that *the main 5 reasons* (causes) that could determine a person emigrate are: extreme poverty (80%), wars (78%), lack of workplaces (56%), lack of rights and freedoms (38%), as well as political corruption (34%).

A large number of students consider that the effects of emigration over the country of origin are negative from an economic point of view. According to the interrogated subjects, the effects of emigration on children and their parents are also negative.

Thus, the effects of emigration on the children who remain in their country of origin (according to 71.1% of those interrogated) are negative (causing affective problems, educational failures etc.). Only 20% of the high-school students consider that this phenomenon produces positive effects (the increase of the living standard, the possibility to study abroad, etc.).

Most of the high-school students appreciate that massive emigration, besides the negative economic effects which it produces, also has social negative effects over the country of origin (population ageing, lack of balance as regards gender, brain and talent migration, etc.).

Young people's opinions confirm the latest research in the area, which shows that "migration flows may more easily affect states that are already vulnerable (due to their non-performant economy, weak social cohesion, non-performant public institutions or an immature political system) in comparison with the ones that have a solid administration".[7]

The effects of accelerated migration over the country of origin are negatively perceived, while the effects of this process over the host country are regarded as generating positive effects. Most of the high-school students (62.2%) consider that the intensification of migration brings economic benefits to the host country. As to the other dimensions of the social system (the social, cultural and political consequences) most of the interrogated high-school students appreciated that migration generates neutral effects in the host country.

Young people's opinions as to the effects of migration over economy are realistic. Recent studies have revealed the fact that host countries are those that mainly benefit from migration. Migration does not have side effects on the economies of these countries, on the contrary: the value of the paid taxes is higher that the value of social services that immigrants receive from the host country.

Joakim Ruist, researcher at Goteborg University, has calculated the income-cost rate generated by immigrants for the Swedish economy (Bulgarians and Romanians have worked in this country since 2007), as well as for other 14 EU member states before the enlargement towards the former Eastern Bloc. "My conclusions – he states – clearly show that fears which currently manifest in other European countries as to the heavy burden that the welfare state would be obliged to carry due to the unlimited restriction of immigrants coming from Romania and Bulgaria are not grounded."[8]

The present study shows that a large number of young people (44.6%) consider that a massive increase in the number of immigrants would favour the increase of the criminality rate in the host country due to the intensification of the migration process.

As to the host states policies regarding the granting of citizenship to immigrants as a consequence of the massive increase in the migration process, young people have a reserved attitude. Most of the interrogated ones (60%) consider that host states should grant immigrants the citizenship of their state only under strict conditions.

High-school students positively correlated the intensification of migration both with the criminality rate and the frequent discriminatory behaviour in the host country.

Over a half of those interrogated students (51%) *appreciate that the immigrants' discrimination* is a

[7] Ionel Stoica, Migratia internationala si securitatea-noi provocari, **INFOSFERA,AnulI, Nr.1, 2009**.

[8] Imigratia din Romania si Bulgaria sunt contributori neti si nu reprezinta un cost pentru Occident - studiu suedez, 14 Ianuarie 2014, www.hotnews.ro/stiri-diaspora-16407492-imigratia-din-romania-bulgari.

reality in the EU countries; only 27% of them reject the idea that such a phenomenon exists.

Most of them consider that immigrants are discriminated to a different degree in the EU host countries, depending on their ethnical and national origin: the most discriminated ones are the Roma population. Subjects - 87% of them – appreciate that the Roma population is discriminated to a high or very high extent by the host country. This ethnical group is followed by Afrikaans and Romanians who, according to 61% and 57% of the interrogated subjects, are also discriminated to a high or very high extent.

Young people repeatedly include Romanians in the top of the most discriminated immigrants, after the Roma population and the Afrikaans.

c) Tolerance vs. discrimination in relation to immigrants

In the present study we have tried to identify the tolerance and intolerance degrees manifested by high-school students towards immigrants, while measuring the social distant attitude which the former manifest towards the latter. This research has revealed the extent to which young people manifest a reserved attitude towards their immigrant neighbours, colleagues and friends, who come from different ethnical groups or who have different nationalities. The present research illustrates a relatively low level of intolerance that young people manifest in relation to immigrants no matter the latter's origin. Thus, we can notice that most of those who answered the questionnaire declared that they would not mind having neighbours who are immigrants, no matter the ethnical group to which latter belong. However, there is an exception: the Roma population; the degree to which the idea of having members of the Roma population as neighbours is rejected to a high or very high degree, i.e. by 37. 6% of those who answered the questionnaire; only 12.8% declared that they do not mind having Roma emigrants as neighbours.

All in all, young people adopt a socially distant attitude towards their immigrant colleagues. High quotas of tolerance are recorded for most of the social and ethnical groups of immigrant colleagues. As regards the Roma immigrant colleagues, one can notice that there is a higher level of acceptance in comparison with the previous data referring to the situation of having them as neighbours. The present study illustrates that only 18% of those who answered the questionnaire manifest a high or very high degree of intolerance towards their Roma colleagues in comparison with 37. 6% of the subjects who would not tolerate to have them neighbours. The Roma population occupies a top position as to the non-preferred ethnical groups: either as a colleague or as a neighbour. Ethnical groups that are accepted (tolerated) as colleagues or neighbours are the Bulgarians, the Russians and the Turkish.

As regards the level of tolerance manifested towards immigrant friends, Romanians, Bulgarians, Russians and Asian people occupy top positions. The non-acceptance degree of a friendship relationship with the Roma immigrants is even higher in comparison with accepting them as colleagues or neighbours. Roma friends are rejected to a very high or high extent by 39.6% of those who answered the questionnaire. It seems that Romanians who live abroad tolerate the Roma population to a less extent in comparison with the Romanians who did not leave their country of origin. This situation may be related to a complex which has been induced by the public image that Romanian immigrants have acquired and by the way in which they are perceived by an important share of the host country population.

The present research has shown that 76% of the Europeans consider that a certain number of immigrants that arrive in their country represent a potential or important threat for their states.[9]

The famous publication *La Liberation*, in an article which it tries to present the most common prejudices related to the Roma population, mentions that - according to a survey that has been made this year by the National Human Rights Commission – two thirds of the French appreciate that the Roma population constitutes "a particular group".[5] I would like to conclude the present paper with another observation that is revealed by my research, i.e. the existence of a significant number of Romanian high-school students (10%) that prefer to adopt a reserved or very reserved attitude to the idea of having friends from among the Romanian immigrants; this fact seems illustrative for the Romanian community and their national pride, respectively for their self-esteem.

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[9] Marcel Canoy, Ricklef Beutin, Anna Horvath, Agnes Hubert, Frédéric Lerais, Peter Smith, Myriam Sochacki, *Migration and public perception, Bureau of European Policy Advisers* (BEPA) European Commission; http://ec.europa.eu/dgs/policy_advisers//publications/docs//bepa_migration_ final_09_10_006_en.pdf

[10] http://www.euractiv.ro/uniuneaeuropeana/articles%7CdisplayArticle/articleID_24630/Liberation-Nu-romii-nu-sunt-nomazi-plus-alte-4-clisee.html

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LOGOTHERAPY IN EDUCATIONAL SYSTEMS

Andreas SCHREIBER*

Abstract:

In modern knowledge societies knowledge and education have fallen apart. The educational systems are designed for efficiency in order to spill out very knowledgeable and efficient "working bees" for the highly sophisticated job market. In order to survive and succeed people have to learn more and more – especially useful, i.e., practical stuff. The result: a tremendous pressure on parents, teachers, educators, and those who suffer most: youths. Meanwhile, the education of personality and personal growth fell by the wayside. The consequences: an increase of desperation, frustration, and aggression among adolescents which may trigger social unrests. How to guide and develop juveniles in their personal growing for the sake of a healthy, peaceful, and fulfilling future society?

The answer lies in Viktor Frankl's Logotherapy and Existential Analysis. Its principles are simple, but the impact is huge. With its basic anthropological premises freedom of will, will to meaning, and meaning in life it enhances the person's ability to apply self-distancing in order to experience the "defiant power of the mind", and self-transcendence in order to strive for a higher meaning or task. Supported by this juveniles learn to make personal, free and meaningful, but highly (also social) responsible choices. If Logotherapy is learned and applied especially by teachers and educators, or if it would be implemented in the educational body and social care system, it will help transforming the actual knowledge system into an educational, hence a real humane society.

Keywords: *Logotherapy, knowledge society, educational system, freedom and responsibility, will to meaning.*

1. Introduction: Nowadays' education for the "rat race"

In modern knowledge-based societies knowledge and education seem to have fallen apart. The evolution, or rather revolution, of information and computer technology has fundamentally changed our social awareness and valuation of information based knowledge. In times of easiest accessibility of knowledge data, stored in the World Wide Web and steadily growing as well as, regarding its factual correctness, becoming more and more detailed by a more or less democratic process of self-regulating control and improvement, the reliability of and trust in such kind of knowledge has deeply changed in a way that nowadays it seems to be impossible to appear someway educated without having a tremendous stock of quantitative knowledge in mind or, at least, ready at hand. Thereby it's not meant that only encyclopedists are considered as educated, rather that especially these persons are very much acknowledged as educated who are highly crafty in the smart technology in order to always and everywhere immediately be able to present a vast amount of data which allows to have a more than comprising glance at so called facts in order to verify any kind of statement somehow spilled out by somebody. And this cloudily stored data knowledge is assumed nowadays as the basis of any education; hence it is considered as educated whoever is able to juggle with such kind of knowledge virtuosically.

It's not the intention here to claim that these days it's only knowledge or information by itself by which one is recognized as educated. For this would be only an inversion of the absurd idea, which nevertheless is rather common today, that alone the mere availability of knowledge is already the sole basic condition for education in general. In my opinion, both of these assertions are insufficient, as education is rather a balanced mixture of information gathering and a creative and rational handling of these information by inferring, deducing, drawing consequences, and prognosticating future situations in order to improve interpersonal relationships, hence social coexistence or communal life. But it seems that nowadays the concepts of knowledge and education have fallen apart exactly in the mentioned way of availability of information considered as sole basis for education and that education is interpreted in a very reductionistic quantitative perspective.

Yet, this quantification of education is under consideration of postmodern, especially liberal economical, democratic societies an inescapable consequence of the capitalist system. First, the steady developing progress of labor division, production, and productivity is based on this form of knowledge. Second, exactly this quantification is necessary in order to make productivity measurable and hence economically exploitable, i. e., transformable into capital. The consequences are fatal and already to a wide extent observable: This pervasive quantification, which reduced the appreciation of education to mere knowledge, has already also struck us humans who are living in such societies, mainly the growing up kids and juveniles.

This systemic primacy of applicability by quantification requires from youths a certain approach to education, learning, and even personal development which in the future ensures the best and most efficient exploitation of the learned, as well as of themselves as

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individuals, in order to survive as long as possible in a system of absolute competition without dropping out too early. In short, the educational system of capitalistic Western societies is conceptualized by highest possible efficiency in order to supply a job market which is highly know-how oriented with knowledgeable, highly efficient "worker bees".

In order to survive and succeed in such described circumstances people have to learn more and more – especially useful, i.e., practical stuff. They need to get specialists, so called nerds, with highly developed special skills, and they need to continue to actualize their knowledge in the given pace of renewal. This demand is called "life-long learning", which is not bad in general and is already done by most of the people naturally, though in different subjects, profoundness, and pace. But in contemporary work-life the content of additional, life-long learning is more restricted to practical, applicable stuff, and the pace is fairly high, because our world-wide knowledge doubles almost every 15 years, as de Solla Price once claimed.[1] Even when de Solla Price is not right in his assumptions and information knowledge grows much slower than predicted, it is still increasing fast and in such a quantity that keeps people extremely busy to catch-up, especially those who work in technical and natural science fields. And in my opinion the demand for life-long learning under these harsh and speedy conditions is not only a by-product of the evolution of modernity and postmodernism, but has an intention, inherent to the system, that holds the ordinary living people in their situation of "worker bees", or in other, harsher words, of capitalistic slavery.

The result of such societal situations is easy to determine: There lies a tremendous pressure on lots of people, especially on parents, teachers, educators, and those who suffer most: youths. Parents, teachers and educators have to provide a steadily increasing, already vast amount of information and knowledge in order to properly prepare the young generation for their tasks as good, hard workers for the capitalistic system. They need to get fed with appropriate applicable stuff in order to have best chances for their start of the "rat race" in the treadmill of regular employment. While the education system makes available such applicable knowledge, the education of personality and personal growth falls by the wayside. In order to catch-up with the pace of knowledge increase the youth hasn't got much time for muse, for exploring different ways of interests and learning, or for experimenting with different working biographies resp. careers. But such freedom for experiments would build a kind of educated, matured personality with lots of experiences, a proper sense of judgment, and responsibility. And as a consequence of not being able to experiment with one's own way of life due to entering and competing the rat-race people may develop some more or less crucial frustrations, a kind of existential emptiness and vacuum, which may lead through dissatisfaction over boredom, maybe also desperation to a certain kind of aggression. This aggression could be directed against oneself or against others. If such aggression among adolescents will conspire together it potentially can trigger and lead to social unrests, at last. And this would be a result which is unwanted by society as well as by juveniles themselves, and will be very difficult to get under control again once it started to get a social movement.

The question may arise, how to guide and develop juveniles in their personal growing for the sake of a healthy, peaceful, and fulfilling future society – without being ethically dogmatic or restrictive?

In my opinion, the answer lies in Viktor Frankl's *Logotherapy and Existential Analysis*.

Its principles are simple, but the impact is huge. With its basic anthropological premises *freedom to will, will to meaning, and meaning in life* Logotherapy enhances the person's ability to apply self-distancing in order to experience the "defiant power of the mind", and self-transcendence in order to strive for a higher meaning or task. Supported by this, juveniles would learn to make personal, free and meaningful, but highly responsible choices (individual as well as social). They wouldn't just run after a promised career and jump voluntarily, but headless into the treadmill of an only consume oriented working life. Rather they would consider actualizing some more meaningful goals which are more beneficial to the whole of society.

But before dreaming too much of such an idealistic scenario, we have a closer look at what is meant by this logotherapeutic approach to the youth's education, hence to change, or better enhance our current educational system.

2. Principles of Logotherapy and Existential Analysis

"Logotherapy and Existential Analysis"[2] is founded by Viktor Frankl, a Viennese neurologist, psychiatrist, and psychotherapist who lived from 1905 till 1997. Logotherapy is Frankl's answer to reductionism and nihilism in human and medical sciences of his days and was meant as bringing back humanism into the field of psychotherapy.[3] In the context of European history of psychotherapy

[1] Extracts of Derek J. de Solla-Price, *Little Science, Big Science* (Frankfurt: Suhrkamp, 1974), accessed March, 9, 2015, **http://www.ib.hu-berlin.de/~wumsta/infopub/price/price14.html**.

[2] In the following this extended term is mostly used either in its short-term: Logotherapy, or with the abbreviation: LthEA.

For a concise understanding of these two terms we may briefly summarize: *Logoherapy* is a certain method of psychotherapy which focuses on the noetic human dimension in order to elicit the meaning in life; *Existential Analysis* is the anthropological theory of the former which focuses on the human way of existence.

[3] See Viktor Frankl, *Der Mensch auf der Suche nach Sinn: Zur Rehumanisierung der Psychotherapie* (Freiburg: Herder, 1976).

Logotherapy often is recommended as "Third Viennese School of Psychotherapy", succeeding Sigmund Freud's Psychoanalysis and Alfred Adler's Individual Psychology. In the American context it can be placed between humanistic & existential psychology and transpersonal psychology.[4] Frankl's Logotherapy attempts helping people in their existential and essential search for meaning in life in order to overcome nowadays existential sufferings like frustration, boredom, and emptiness. The therapeutic approach (i.e., Logotherapy) is based on a particular philosophical theory (i. e., Existential Analysis) with a set of assumptions and a stringent anthropology.

As mentioned above there are three core assumptions in LthEA which will be explained below.

The main assumption is that man has freedom which allows him to exert his will. Logotherapy doesn't follow Sartre in his statement that we are even condemned to freedom. Rather, we are free but simultaneously also restricted and determined by other forces like our physiology, health, familial and social situation, historical and contemporary political circumstances etc. Frankl called these restrictions our "facticity". Nevertheless he highly valued freedom as the key prerequisite of being human, while not denying the determinants and limitations of phenomenal life. That's why Frankl always emphasized the *positive freedom* in contrast to the negative one. The latter means "being free *of* s.th.", whereas the former signifies the "freedom *to* s.th."

The usual and daily understanding is rather bound to the negative freedom whereby people try to get rid of, e.g., burdens, sufferings and socio-political restrictions. But first, we cannot be absolutely free, i.e., we always will have limitations and determinations. Second, after achieving such a wished state of being, so that no restrictions exist anymore, man needs to have an idea of where to go to resp. he needs to aim at a goal. And this goal, according to Logotherapy, should be meaningful. Such an aim or purpose is envisaged by our faculty of willing, because will always has to address oneself towards something. Hence, the character of will is to be intentional. And as long as we do have a will we cannot not willing.[5] So the question arises what will essentially intends. The answer lies in the second principle of Logotherapy and Existential Analysis:

Man is driven by the *will to meaning*. This assumption may puzzle, because normally people do have different wishes where their willing is going to, for example more health or wealth, this or that object (like cars, jewelries) etc., especially more power and/or acknowledgement. But at the very end what only counts is the fact that all these purposes need to make any sense, need to be meaningful, or have any significance for the person. Conceded all the other will objectives, but on the highest level of abstraction or the deepest level of psychological yearning willing aims at a reasonable and comprehensible meaning for all the person's dimensions of being-in-the-world. To illustrate this point of view Frankl often cites Nietzsche, that if man has a "why" for his living he is capable of bearing almost every "how".[6] Hence, from a logotherapeutic point of view man has quite good chances living a satisfying and successful life, as long he is able to recognize or detect in principle the possibility of a reason for ones sufferings, or a "whereto" resp. a purpose for ones actions. And it is exactly this, so this second assumption, what man only and ultimately wants to achieve with his whole power of striving. As Frankl asserts, the *will to pleasure* (Freud) and the *will to power* (Nietzsche, Adler)[7] are only derivative will powers which gain their superiority only and foremost once the *will to meaning* is frustrated and not being fulfilled for a longer time.[8]

The third logotherapeutic principle answers to the now arising question, whether it is generally and in concrete possible to find meaning in spite of often experienced situations which seem rather meaningless and far away of any possibility for meaning.

Although it is often mentioned as the assumption of "meaning in life", we can formulate this third logotherapeutic principle as follows:

Life itself, always and ever, has meaning, however bad the circumstances may be.

And this is the touchstone of all Logotherapy, and can be considered as its most fundamental dogma. For Frankl there was no doubt about the residence of meaning in life, and he stated that even in the worst and most adverse situations man is still able to *find* some meaning, because life itself is meaningful. This assumption is considered as the main one of LthEA, as the whole therapeutic way wouldn't function as Logotherapy, if it is not believed in this dogmatic assertion.

To summarize, Frankl stated that for human beings it is totally essential and natural to ask for meaning, that even man's will ultimately longs for meaning, and that there is meaning in life. But, it is to

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[4] See Ann V. Graber, *Viktor Frankl's Logotherapy: Method of Choice in Ecumenical Pastoral Psychology* (Lima (Ohio): Windham Hall Press, 2004), pp. 171 – 177, esp. figure 8, p. 176.

[5] This description may function for an attempted explanation of the phenomenon that human nearly cannot cease his willing, unless with hard disciplinary and meditative work on renouncing the world and human's rationality. But this may be also an illusion, if Nietzsche's saying is true: Man rather wants to will nothingness than *not* to will. ("…und eher will er noch *das Nichts* wollen, als *nicht* wollen."; Friedrich Nietzsche, „Zur Genealogie der Moral." In *Jenseits von Gut und Böse. Zur Genealogie der Moral*; KSA 5, ed. Colli, Giorgio & Montinari, Mazzino (Berlin: De Gruyter, 1999), pp. 245 – 413, here p. 339; italics in original)

[6] Viktor Frankl, *Die Psychotherapie in der Praxis* (Wien: Deuticke, 1975), p. 51.

[7] With these slogans Frankl characterizes the fundamental differences between his theory and the other powerful psychotherapies of his days which simultaneously have been his psychotherapeutic parentage. That Freud's Psychoanalysis as well as Adler's Individual Psychology has been more complicated as expressed in these slogans was well known to Frankl.

[8] Viktor Frankl, *Der unbewusste Gott: Psychotherapie und Religion* (München: dtv, 2006), p. 72.

ask, what is this meaning, what makes our being meaningful, and how can we discover and fulfill it?

Meaning is an idea of something that gives our lives some good reason to be lived, that gives us orientation for living in order to make good choices in the realm freedom with its multitude of possibilities, and hence not to lose track and waste our precious life-time. As such meaning is associated with the idea of a purpose or goal in each one's life which makes it worth living for. However, as everybody will know by own experiences, it's not always easy to recognize one's own, great and maybe single life task. Then we keep on searching right and left, experiment with this or that offer of life's possibilities, but possibly still cannot find it. Meanwhile we commit with some societal goals like getting rich, making a great career, staying healthy or whatever, but feeling still empty and frustrated because we haven't found our single and own purpose. Or given that we've found it and now want to achieve it, but far too often we nevertheless deviate from chasing after it due to the many other attractions which hit us on the way and distract us, or even due to some strokes of fate which renders us incapable to follow our purposes. How to deal with such daily situations, especially in our current capitalistic society, logotherapeutically?

The answer of Logotherapy is rather simple, though it knows that its actualization is quite complicate. Logotherapy starts from the experience of ordinary people. Asked what makes their life meaningful the average and natural answer is that being engaged in more or less creative activities, experiencing some wonderful natural or interpersonal moments or great art like music or paintings, or overcoming personal adversities like strokes of fate, illness, personal losses etc. by changing the inner perspective or attitude makes life meaningful. We also will get answers like "being yourself", "staying up-right", "being honest, faithful, and authentic". These answers reflect the logotherapeutic assumption that meaning is fulfilled by actualizing one's own values and – with respect to the multitude of possible values – by the three mentioned ways of actualization: creativity, experience, and change of attitudes.[9] This so called meaning-triad also has its inner order and logic of prioritization. The most important value to actualize is that of creativity. It's not meant by this that one has to be creative in a strict, artistic sense. Rather creativity means to act into the world. As long as man is able to and the situation is suitable for, one should act upon one's own inner value system and at least try to contribute to the world with his or her engaged action. The value of creativity asks for what one has given to the world and to others. Of course, there are times to relax and refrain from doing by your own, but rather to enjoy and receive the contributions of others or of the world, so as to listen to other people or other people's work, experiencing nature's gifts like a wonderful sunset or a soft breeze in spring time. The value of experience hence asks for what one has received and still can receive from others or the world. And the third value of changing attitude, which comes last in the hierarchy of actualization, but first in respect of dignity, asks for the manner of dealing with situations where it's absolutely impossible either to act upon or experience something positive from. In situations where nothing else can be done any more, where there's no beauty to be recognized and experienced it is asked for the highest faculty man is capable for, namely to take a stance on it by rather heroically bear the situation and try not to lose dignity. To change one's own attitude to be able to endure adverse strokes of fate is one of the most difficult, yet most dignified tasks one can master in his life. Logotherapeutically spoken, suicide is no solution.

Regarding the power of such an attitudinal change it is often referred to a saying of Jerry Long who only later, quite a while after his accident, came across with Logotherapy, and eventually lectured with Viktor Frankl and got a psychotherapist himself. When Long was a young guy just finishing high school he suffered an swimming accident by jumping vigorously into shallow water and got a quadriplegic for the rest of his life. But his attitude towards life was so strong that he partly recovered and coined an impressive and illustrative saying: "I broke my neck, but it didn't break me!"[10] – This is a highly demonstrative story of what is meant by the value of changing one's attitude towards unchangeable fateful situations and supports in concrete to explain the logotherapeutic assumption of the "defiant power of mind".

Before explaining this, let's get back to the meaning-triad. It should be clear now that the change of attitude is one of the hardest, but dignified tasks man can ever fulfill, and this is reserved for really unchangeable situations. All other situations – which actually are the majority of our lives – are to be handled by either creative or experiential values, dependent on the situation itself. We mentioned already that there are times for creation, and times for recreation. But how can we figure out what's the actual demand of this or that situation? This question brings us back to the above quest of how to recognize meaning. Frankl is focusing on the so called "meaning of the moment". As every situation and every individual person is singular and unique, and regarding the whole of history also important and irretrievable, we need to listen to every moment's situation in order to recognize what ought to be done in especially this or that single case. It may sound difficult and exhausting to listen every single moment closely to what is to be done in order to fulfill meaning and probably weave on the fulfillment of the meaning of all man's history. This requires a rather unbearable

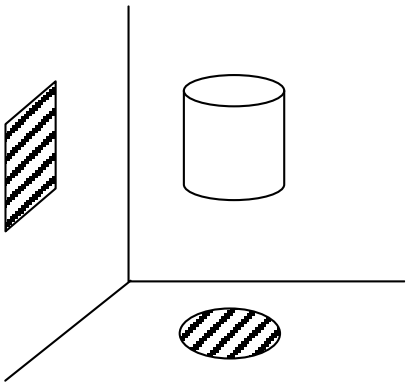
[9] Viktor Frankl, Ärztliche Seelsorge: *Grundlagen der Logotherapie und Existenzanalyse* (Wien: Deuticke, 2005), pp. 91 – 95.

[10] See the impressive interview of Viktor Frankl and Jerry Long: "Frankl – I broke my neck, but it didn't breake me", accessed March 9, 2015, https://www.youtube.com/watch?v=1_lmMl4P7cQ

responsibility, one may argue. First, it is not that complicate to listen to the demand of the momentary situation as we do have our inner voice, our conscience which is the integral of our personal value system and which tells us – in a very peculiar way – what ought to be done. Second, yes, it requires a huge amount of responsibility, but this is not unbearable, rather it is a kind of uncomfortable in usual common life. Responsibility is the faculty of response-ability, i. e., we do have the ability to respond to circumstances. Additionally we do not only have the ability for that, but rather the duty as responsibility is the rear side of freedom. As we have the freedom to will, which means to have choices, we also do have the duty to make responsible, hence meaningful choices.

To summarize, we explore and experience meaningfulness by actualizing values. Abstractly there are three ways of actualization which are called in Logotherapy the creative values, experiential values, and the value of change of attitudes. All these values are highly situational and require recognizing the meaning of the moment, which means to cognize that what ought to be done in this special and singular moment. This is possible by listening to the voice of conscience which integrates all experienced and adopted personal values and shows by exclusion what would be (or at least: would have been) the right and responsible decision. The response-ability is a faculty of human being which is closely interwoven with the presupposition of freedom and the core feature of willing.

With the latter we now come to the explanation of the above mentioned "defiant power of mind" and the presentation of the LthEA underlying anthropology. With the topic of meaning we could already recognize the emphasis on the situation and its uniqueness. Likewise man is considered as an individual and unique person. Moreover, Frankl interprets each individual not only as *undividable*[11], but also as *whole* and *complete*. This is explained by Frankl figuratively in the so called *dimensional ontology* where he emphasizes the wholeness and completeness of man.[12] Like a three-dimensional object, which cannot be fully captured by addition of its projections into lower dimensions, man must be taken always and ever in his three-dimensional totality. In the figure below we see a cylinder which is projected from the side and from above. One projection shows a rectangle or a square, the other a circle. If we want to understand the cylinder out of the combination of the two two-dimensional figures we will greatly fail.



Source: Graber, 2004, p. 69

Frankl hence applies this example as analogy for understanding man. We do recognize three phenomenal dimensions of man which are: the body (*physis*), the *psyche*, and the mind/spirit (*nous*). There are still virulent difficulties in sciences, namely in philosophy, to fully explain their interrelation, especially that between body and mind. Commonly the era of dualistic theories, commencing with Rene Descartes' dualism of *res extensa* and *res cogitans*, is over, but still there lacks a sufficient and satisfying explanation even in monistic-materialistic theories of how the immaterial mind interacts with the body, specifically with the brain.

Letting these highly sophisticated debates aside, Frankl's solution is quite practical and for a certain extension convincing. The interpretation of these three phenomena as dimensions gives way to focus on each separately – like physicians mostly treat the bodily dimension, whereas psychotherapist intervene in the psychic one and for example philosophers address mainly the noetic one – by keeping in mind that only all together constitute man. Only as such the wholeness is guaranteed and perceivable. The idea of Frankl's *dimensional ontology* is the essential inseparability of these dimensions; they cannot be abstracted from each other, i. e., being isolated or extracted one from the other. If an object is three-dimensional, then there is nothing to add on or subtracted from. Another advantage of the dimensional perspective is its attributive character, which means that we do not necessarily need to take the mentioned issues as objects or substantially, but rather as attributive descriptions, like "bodily, psychic, and noetic".

Coming back to human beings, we now can state that exactly this exceeding third noetic dimension discerns man from animal. Sure, man also inhabits the physical and psychic dimensions which both are mutually interdependent, influencing and determining,

[11] Cf. the Latin origin: in-dividere = not (to) devide.

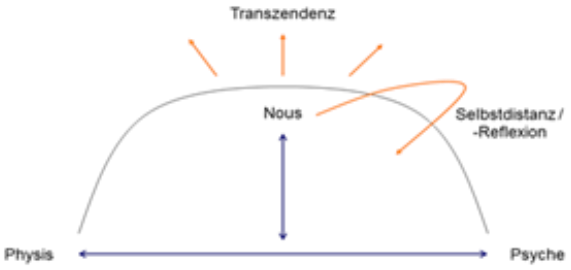
[12] Regarding the wholeness Frankl doesn't consider it as a completed perfection, but rather it develops into such only with the end of life resp. in the death. But Frankl assumes man already and in every second of his life as complete and whole, so that he stresses that the essential feature of "existence" never could be literally analyzed, i.e., dissected, but rather be illuminated as a unitary phenomenon. Whenever we dissect the spheres or dimensions of man, then we do this only for methodological reasons in order to make it descriptive and for being able to communicate about it. (See: Viktor Frankl, „Grundriß der Existenzanalyse und Logotherapie [1959]." In *Logotherapie und Existenzanalyse: Texte aus sechs Jahrzehnten*, by Viktor Frankl (München: Piper, 1987), pp. 57 – 185, here pp. 63 – 73).

but the specific feature of humanness lies in the dimensionally different faculty of the noetic, i.e., the freedom of will to meaning wherein such phenomena like freedom, responsibility, love, willing, thinking, reasoning, consciousness etc. are dwelling. Frankl describes this difference as the *psycho-physical parallelism* on one hand, and the *psycho-noetic antagonism* on the other.[13] Especially the latter provides two types of freedom according to two human core features which constitute the essence of man.

The first is called *self-distancing*. Man noetically has the freedom to behave either along his physical and psychic (pre-) conditions, or against them. He can take a stance on them, he can decide whether he wants to react on their signals instantly and as usual, or first reflect about it and make a mindful decision how to react upon it. As man is free, he is not bound to repeat always his reactions, but can say "No" and act different. This power was already mentioned above as "defiant power of mind". Once Frankl demonstrated this faculty in one of his many tv-interviews, which I cannot exactly recall which one, when he was asked on top of his favorite mountain Rax, near Vienna, how he became such a passionate rock climber, although he suffers vertigo. His answer was stunningly simple: "I don't need to take any nonsense from myself."[14] What he means is that although there is the real and tremendous anxiety of height he still can attempt to willingly overcome it by trying his best in climbing, especially as he loved to be in the mountains and hanging off a rock. For usual daily life this example will show us that we don't need to react upon any situation as one usually is supposed to do, but take a how small ever hiatus between stimulus and response in order to consciously decide how to respond to this or that situation.

The second core feature of man is called *self-transcending*. Besides the ability of taking a stance on the situation man is situated into, he also is able to totally abstain from himself in order to address something that lies completely outside of his own mental and physical vicinity – for example another person, another living being, another item or task which transcends totally the own self-centered wishes, goals or aims. With this faculty man is able to fully transcend oneself, go out and beyond his own interests – which literally means "to exist".[15]

And it is especially in this possibility of *self-transcending* where Frankl positions the quest for meaning. Man will find a real meaning, a significance which justifies the whole of the individual's wholeness, only if he transcends, if he steps out of himself in the direction towards others, if he forgets or loses one's self by serving other persons, a beloved one, or a higher purpose.



Source: Andreas Schreiber

To summarize, in Frankl's logotheory man is considered as singular, unique, indivisible, and hence phenomenally appearing as wholeness, whose structural elements are *self-transcendence and self-distance*. These basic features lie in the noetic dimension which discerns man from animal and which, though not only surpasses the dimensions of the physis and psyche, but also pervades them as it were as their inner pivot. The constitutive moments of the nous are particularly the basic conditions of freedom and the will to meaning, which pervades humankind as its motivational force. And as stated above, the power of will always is directed towards meaning that dwells in every situation as well as in the totality of the individual life.

3. Conclusion: Benefits of Logotherapy for educational systems

For now it should be made clear what the principles of LthEA are. It emphasizes the individual freedom which lies in the noetic dimension in order to transcend one's self towards something meaningful and take a stance on one's own reactions in order to not only follow them mechanically and half-conscious, but with full awareness of one's own "defiant power of mind" to make meaningful and responsible choices. The aim of Logotherapy is helping people in self-development in a way that these persons are no longer blaming others or circumstances for their own situations or even failures. Rather it's aimed at strong, conscious and self-responsible persons who make their decisions based on their own and inner value system according to the objectively demand of what ought to be done resonating with their conscience.

Applying LthEA in educational systems would help juveniles to grow up with more self-respect and respect of others, with a higher awareness not only of their personal freedom of acting out their individuality, but also of their responsibility for their choices and deeds, and for their self-education. The latter means that each person is responsible by himself for developing his own character and personality by self-reflection and self-awareness. The attitude of hanging

[13] Viktor Frankl, *Grundriß*, p. 62.
[14] Frankl, Viktor: "Ich muss mir doch von mir selbst nicht alles gefallen lassen!"
[15] Cf. the original meaning of Latin: ex-sistere = stand forth, "Online Etymology Dictionary", accessed March 9, 2015, http://etymonline .com/?term=existence.

loose and/or only following the mass opinion is not supported or tolerated in LthEA.

If it could be implemented in contemporary educational systems, hence into the whole educational body and even social care systems, it will help transforming the actual knowledge-based society into an educated, real human one. For this it might be necessary to first teach the teacher and educators, so that they can act and react therapeutically whenever the situation requires it. Second, it might be also necessary and helpful on the long run to instruct also the juveniles in Logotherapy's body of thought. It is not that all should become therapists by that. Rather people who get in touch and even involved with LthEA experience already a change of attitudes towards the logotherapeutic core assumptions and anthropology, and gain a different, more self-reflected and responsible perspective on fellow humans and the world in general.

On the long run of implementation of LthEA in the educational body it is to expect that more and more people will reject to enter the capitalistic "rat race" and follow more their inner of conscience in order to actualize meaning.

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THE PSYCHOSOCIOLOGY OF THE DELINQUENT WOMEN IN ROMANIA

Mirela Cristiana NILĂ STRATONE*

Abstract

As a general definition, the personality is all psychological traits of the person, an assembly of the integrity, correlated with the unity of social roles of the individual who accompanying them the course of life.

The personality is both object and subject of individual development.

It is primarily a concept related to epoch, country, group, organization which it belongs the individual throughout his life.

Also, one can state that the personality is formed and evolves once with the action of external factors of environment, she does not exist aprioric thereof,and they are not strangers to the determinations of personality: this puts its mark on the environment, both categories coexisting.

This analysis represents an important segment of the study on the women offender profile in Romania. Social need of the knowledge of such a is clear profile accented of the dangerous character wich it represents the woman offender in the Romanian society.

The aim of the present study consists in researching about the social and psychological profile of criminal women.

Keywords: *personality traits, bio-psycho-socio-cultural system, biopsychological components, social components, relapse.*

1. Introduction

The personality is, to the integral human level, a bio-psycho-socio-cultural system, which is fundamental under the conditions of the existence and activity in the early stages of individual development in society."[1]

The human personality contains specific traits. These traits distinguish him from the behavioral point of view, of other individuals.

"In the defining of the personality, is frequently resorts to the formula: *the personality is unique and unrepeatable.* And the attribute of individuality attached of the personality, emphasizes this signification; the essence of the personality resulting from its particular features and their original articulation. And is manifested in the behavior of the individual, in his actions and interactions."[2]

The personality, along with the temperament, the skills, the character and the creativity, make up the system of the personality.

„The majority of the personality researchers have put _ into focus the relationship between structure and her conversion in behavior, emphasizing certain properties, traits, internal dynamics or characteristic factors which determines the individual behaviors. The trait itself may not to be directly measured, was resorting to the assessment of the behavior, reaching to identify the personality with the pattern of behavior."[3]

For the study of criminogenesis, it was concluded that is needed a research of synergistic type.

Considering the fact that in terms of the basic characteristics of the personality of the delinquent there is no fundamental differences between sexes, the synergic perspective from which it is studied the personality of the delinquent involves[4]:

a) the clinical research for the reconstruction of the personal and patological antecedents of the subject;

b) the paraclinically examinations having as main role the proof and the objectification of the clinical diagnosis, as well as the deepening of the etiopathogenesis some disturbances;

c) the biogenetic investigations having as premise the role of hereditary factors in the structuring of personality, and as aim the identifying concretely of the factors of heredity;

d) the neurofiziopathologycal interpretation for the explaining the causality of aggresive behavior manifestations with social resounding, related biopsychological conditions that exacerbate or trigger them;

e) the sociological research, which has two objectives: primarily, for the reconstitution of the delinquent structure personality and of the way in which was framed in the social environment, of the conflictual incidents and how they were solved and

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[1] Banciu D., Rădulescu S.M., Teodorescu V. – *Tendinţe actuale ale crimei şi criminalităţii în România,* (Bucureşti, Lumina Lex, 2002), p. 144.

[2] Neculau A.(coord.) -*Psihologie socială*, (Iaşi, Polirom, 1996), p. 154.

[3] *Ibidem.*

[4] Mitrofan N., Zdrenghea V., Butoi T. -*Psihologie Judiciară*, (Bucureşti, Şansa, 1992), p. 48.

secondly, for the orientation of the possibilities to rebalancing and social reinsertion;

f) the medical-legal resolving, namely the providing of the medical-legal objective data, on whitch basis is concluded on the state of imputabilitate (awareness, discernment).

Such a transdisciplinary approach of deviant behaviors plays a crucial role in the avoidance of the judiciary errors and contributes to the penitentiary treatment also past-executional, so at re-socialization and reintegration.

The personality components and the personality types make up two basic perspectives in personality analysis.

2. Content

Biopsychological components

In the book *„Psihologie judiciară* " (op. Cit.1992) N.Mitrofan, T. Butoi and V. Zdrenghea, they considered the qualities and deficiencies of a person as being determinants in the constitution of personality. Thus, we can talk about positive or negative issues concerning to the person's health and his physical appearance. The physical appearance matter very much to women, the basic condition is to be a proper health. A deficiency in this sense creates frustrations, which could lead in many cases to deviant behaviors. There are known cases of murder or causative of death blows, with author women who use such acts out of jealousy or envy. Frequently, the inferiority concerning health or physical appearance appears compensated in activity. This one takes shape as a "revenge" and falls within the criminality sphere. This one does not mean that men do not support inferiority complexes in case the major deficiencies of the body prevents them to be happy.

In terms of the temperament of the women who arrive in the situation to execute a custodial punishment, it should be noted that in most cases studied, this present lability. The psychic life of the prisoner women suffers multiple and brutal transformations, starting with the placement into prison and continuing up to the end of its life. She will support rapid changes from a peaceful inner state at a agitated state, and each of these statuses can operate sometimes more, sometimes less. Everything is as a disorder, which can lead to the abnormal statuses which enter frequently in the pathological area.

The relation attitudes-aptitudes is conditioned by the aptitudinal endowment of the personality. In the case of the delinquents we find talented, skillful, intelligent womens, who decided that the area of their activity is prohibited, thus manifesting itself socially negative. We encounter womens as economist or accountant, lawyer or doctor by profession etc. in whose case, the talent in the profession practiced was the nucleus on which to build a criminal career: embezzlements, frauds of public documents or private, funds embezzlement, biased decisions and sometimes the refusal to exercise the profession without receiving in advance illegal benefits. In any situation, the talent, intelligence, skill, are dependent on individualy attitude who can orient their efforts on a positive or negative track of social point of view. The result is weighed until at a certain moment, on a case by case in illicit gainings and freedom.

Social components

The essential features that are retrieved permanently in the work of the individual and not support significant changes, make up the character, a personality's structure that emerges as an effect of the social environment action, the education, with a decisive role in shaping the behavior.

The behavior models imposed by society forces the person to choose some attitudes both towards self and towards others, work, life, etc.

It can be said that the attitude as the foundation of the character, contribute to the formation of the personality, balanced or deviant, as is oriented the activity: in a positively or negatively sense.

Personality traits

In the book *„Psihologia comportamentului deviant"* (op. cit., 1994), the psychologist Ruxandra Rascanu starts from the idea according to which the personality traits are variable, they evolve lifelong of the individual, due to the influences which it receives from the environmental area, with which are in constant contact.

In this process, the personality suffer emphasis of the existing traits or impairments and their improvements, and the acquiring of new traits.

Regarding the characteristic traits of the individual's personality, they appear as trends of reaction, relatively permanent.

The traits can be cause but also effect of individual behavior. A mother who abandons her child (behavior) is immoral (trait). The cause of her behavior is located in immorality, but also this trait is it accentuated due to the act committed.

An individual has a lot of traits, positive or negative, but his personality is formed depending on some features. These acquired supremacy over the others, becoming dominants and giving specificity his personality.

Personality types

The superior organization of personality we encounter it in form of type or style.

The first to have separated the personality types was Hippocrates (sec.V î.e.n.). He „chose as a criterion of its typology, the predominance of one wich the four humors of the human body (blood, black bile, yellow bile, phlegm), stipulating therefore, the existence of

four fundamental temperamental types: sanguine, melancholic, choleric, phlegmatic."[5]

Another typology of reference in history is determined by C.G. Jung, who starting from purely psychological premises, finds two personality types namely: extroverts and introverts. Both attitudes are found to every individual, but depending on case, only one orientation is dominant and conscious, subordinating it the other. These types are found to extreme one of each other. Jung tries to explain the existence of a third type, ambivert, that it lies between the two extremes, but he characterized so rigid each of the two types, extroverted and introverted, so that creates the sensation of template, of pure type that does not finds its correspondent in reality.

Another idea that emerges from Jung's typology is that the extroverted person is generally a person with negative traits, willing at social deviance, while the introverted is present to the opposite pole.

H. J. Eysenck is trying a similar typology with Jung's style. He explains which are the characteristics of each of the two categories, the extraverts and the introverts, separating them, placing them in completely separate groups, but still recognizing that geographical space offers surprises, in the sense that the delinquents have different characteristics depending, among others, of area.

Most interestingly, the most widespread, and most difficult to studied remains the intermediate type of personality (ambivert).

Of metaphysically point of view, the personality typologies helps us to study deeply the criminal behavior, but remains essential the reference to individualization, as in case for punishment granted for offense.

The psychology of women offender

The psychology of the detained person, as a result of collective social action; In contrast, the deviance that doesn't come in the form of the individual personality, but at the level of groups, through the social behaviors unsupported by the community, presents itself as a group phenomenon.

First, the expression of a mental illness on an individual level has its origin in the manifestation and the influence of a community.

Secondly, the deviance refers to the person as a social actor, the study being realized customized. The prisoner who will have some degree of mental illness is not considered deviant by the origin of her disorder, but through their membership (solidarity, socialize, sodalite) considered deviant to the group. The manifestations to such a group should not always reach criminal situations, staying in the uncriminal deviance area.

Therefore it can be stated that the group effect exist and it manifests previously the individual mental debility, largely resulting the action, sitting right at its origin.

Mostly, the prisoners located in the Romanian prisons, motivate their act as a result of the discrepancy between their goals (for which, in Romania, increasingly concerns to a decent living standard or even below) and the resources that society gives to achieve those goals.

In *„Psihologie penitenciară"(*op. cit.2001), Gh. Florian presents the deviance among others, as a result of the crisis of inadequacy, calling the Merton's theory: „the deviance results from the dissociation between social structure and the methods to which the person can call to achieve goals".

The entry into the prison, for a woman means deep estrangement who was not prepared for ever. It is as if that would enter through a black hole into another dimension, but instead of meeting the fascination, the unknown suspect just from the reading fiction, she meets all that is grotesque for a woman: the lack of privacy, new rules for hygiene (a certain hygienie, that she needs to learn and accept), the slang in the most trivial forms.

The personality of the newly detained will suddenly become strong vulnerable amid the disharmony in front of an explosion of the frustrations coming from behind. placed face to face with lack of defense vis-à-vis the new rules imposed of the quarantine, which will be decisive in the new social networking.

The shock manifests at all levels of personality, the lack of affection generating bitterness, the lack of esteem leading to the undue need for esteem, all on the background of prison overcrowding, a phenomenon that underlies the feelings of anger, hatred, contempt, revenge, etc. It is necessary to specify that the overcrowding arises at the time of the exceeding the possibilities for accommodation in penitentiary institution.

But the phenomenon is present even in the cells where are unoccupied beds: the lack of the intimate space from home, the lack of hygiene, comfort and nourishment of which the individual has benefited before submitting in the detention space, the presence of strangers, and special conditions not yet accepted (for some people the conditions offered by the prison can not be accepted in full never by the end of the sentence), the presence of foreign and unpleasant smell, does not differ much from situations where all the seats in ceell were occupied.

All this will be added to an inevitable psychological collapse that will generate more aggressive causing emotional intolerance towards the detention environment.

However, on the psychic prisoners will act "the walls complex": the owned will become more withdrawn, supporting a strong process of restraint, and if she won't have enough resources to remain in

[5] *Ibidem*, p. 53.

this state, she will exteriorize, adhering to the condition of prisoners, finally socializing at the prison culture.

Along it's the prison includes:

- the adaptation phase, when the perso lodged in prison feels fear and the need to obey, amid the feelings of loneliness, abandonment from those left out, helplessness;
- the adaptation stage is the stage in which the prisoner passes through the process of socialize in the prison subculture, internalizing both desirable rules of prison custody, that will try to exploit them in the interest, by blackmailing, streams, spreading rumors, lies, etc. as well as the norms and values promoted by the group of detention in part, aiming also personal interests;
- the participation stage, where the prisoner feels no longer alone, but much more self-confident; there is already a network of interpersonal relations between her and the rest of prisoners on the one hand and between her and prison staff on the other;
- the integration stage, when the owned strongly feels the need of membership of the group to which it belongs, adhere to common goals and has a particular status within the group (social integration); psychosocial, the prisoner support easier the stress, tensions will annihilate largely (psychosocial integration); as representative of the group detained in which is part of, it will be the bearer of basic personality characteristics, will represent a "sociotip" bearer of valence group (subcultural integration); from this step it starts to the reintegration, or vice versa, to the repetition: some women realize their benefits if they make efforts to re-socialization - work, participation in rehabilitation activities, participation in training courses - and are preparing for release, because they want and favors them and other realize that is more comfortable to live in prison and they integrate to way of life so well, that after serving their sentences will return knowingly in the prison environment where the shock of the submission in the quarantine won't exist, they being already "hardened" for what they expect.

The psychological changes and the disharmonic manifestations of the prisoners personality, we encounter throughout the prison process, whose steps will be detailed in terms of prison treatment in the last chapter of the book.

The psychosociology of the relapse in Romania

I have shown above what the shock effects of the submission in the prison are, particularly for a woman serving a prison sentence. However, some of them relapse, so occurs the relapse.

The relapse exists and gives major problems due to the failure treatment of the prison, more exactly it is a symbol of the impotence of resocialization work in the prison.

For perfecting the prison treatment methods, many experts have classified the recidivists in: casual and marginal, pseudo-offenders, ordinary offenders, offenders of habit.

There are two types of theories among the criminal: retributiviste theories aiming a proportional relation between punishment and unlawful act for which it will be applied also the utilitarian theories, oriented to the results and long-term effects of punishment.

Regarding the application of the punishment, this is part of some models of penalty: occasional female offenders to whom it aplies usual treatment of intimidation, those considered suitable for straightening, that receive a reeducational sentence, dangerous delinquents that requires a large penalty which include neutralization.

One aspect that is worth taking into account is the one of explaining the situations of prison failure treatment, which mostly lead to relapse, but especially the investigation of the contemporary causes from the Romanian criminal area.

Thus, the social factors have acquired a special scale in the today Romania regarding to the criminal causation and the relapse versus with psychological factors, on which has been focused so far, as those on which action must be taken.

The prison treatment focuses primarily on psychological counseling, rehabilitation programs are limited to spatial temporality prison, reintegration being only a theoretical aspect shy introduced in records and without the ability to be used, on the one hand because of the shortcomings of the existing legal framework and on the other hand because pf the social workers – the sociologists, social workers - who are undervalued at the prison and not only, for psychologists, seen as a "do-totum", asking them to resolve all the problems, and finally they support the the criticisms of the failures on psycho-socio-cultural plan.

The social factors are the ones that lead some women to achieve immediate goals through illicit means, Romanian company offering quite difficult living conditions for women, mainly due to the difficult economic situation.

There are certainly women who relapse of mental causes, but their number is illustrative for us to focus for the most part on psychiatric or psychological researches.

Of course, it is necessary the departure from the psychological analysis of recidivism, but it is imperative the sociological analysis, so a further research by highlighting all the social factors that contribute to the etiology of the crime by setting concrete goals and aspirations of former prisoners under today Romania's concrete conditions and through the revaluation of the methods and the the possibilities of achieving these goals.

Obviously, it will lead to the precarious economic situation, the social protection system and legislative deficiencies, too.

Last but not the least, it appears the need to focus in the context described above, on a reconsideration of the concept of reinsertion, as well as a review of the current dimensions of reintegration of the persons released from prison, but particularly women, major or minor, being repeat offenders in smaller numbers than men and minors back in the detention.

At the same time, it requires a forecast regarding to the reintegration, through it offering to the prisoners, among others, during treatment resocialization, some clarity on the future, which will inevitably lead to trust and hope, problem elements within the group of detention, as already has been pointed out in this paper.

3. Conclusions

Following studies conducted by researchers who initiated this area, which I would call without mistakes, founders, and the study carried out by me personally in Romania, we can conclude:

- the components of the personality of women offender are in interdependent relationship;
- the society provides the appropriate framework for the commission of offenses;
- the society is the product of human awareness, of the human individual character, it is the result of our development throughout history.

„Regardless of the type of society we have absolute relationships, fixed, in terms of the human personality. This does not mean that everything is absolutely, constant. Of course, we have variable elements, but they refer in particular to the types of expression of delinquent behavior, attitudes and interpersonal relationships.

Scholars who reject any biological explanation and explain the numerical sex differential purely in terms of social conditions are more numerous. Still other researchers have concentrated on the study of certain characteristics of female offenders such as health, intelligence, exposure to economic pressure, and an unfavorable home environment.

We concludes that the amount of female crime has been greatly underestimated by traditional opinion and that the criminality of women reflects their biological nature in a given cultural setting."[6]

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THE INFLUENCE OF PARENTING STYLE ON PSYCHOLOGICAL DEVELOPMENT OF PRESCHOOL CHILDREN

Cristina ȚÎMPĂU*

Abstract

Basics of mental development of the child are placed in the family. Social environment influences the child first begins to develop proved to be crucial for the further development of which is the subject of education. Studies in this area have shown the importance of family environment for the development of the child's personality, you can print a family atmosphere becoming child, depending on its quality.

Interaction fundamental factors determining a certain level of mental development there of in the day care with which different but as soon as the warm family environment kindergarten.

The work done by children, teacher age and individual peculiarities respect thereof. As we developed the preschool stage reveals individual differences existing intellectual and socio-emotional. Of course, these differences are visible in previous substages, supported by the fact that, yes, every human being is unique and original, but every parent building by means of a specific personal relation to their child in education exercised on it, makes these differences even more visible.

Parenting style adopted child's education has an impact on the development of its mental, behavioral main areas that define the cognitive and social-emotional one. It is true that talking about parent-child interaction are taken into account the influences of parents on children and the children's parents. The influence exerted by both sides can take the form of a "spiral" relational continuity which depend upon the effectiveness of parenting style. It is one of the factors that influence the quality of parent-child interaction.

One aim of the present work is strictly theoretical guidance for parents and future parents. It is believed that the practice of educational style, balanced or less balanced prints parent-child relationship a specific character, positive or negative. Therefore, it seeks ways of structuring information to guide their parents to adopt appropriate educational strategy, adequate own child.

Keywords: *environment kindergarten, social environment, parenting style.*

1. Introduction

This paper aims to:

- study the relationship between parental education and preschool sociability peculiarities;
- study the influence of consensus (parent-teacher) education on preschool sociability;
- designing activities that involve children and parental involvement in order to improve parent-child interaction.

Knowing and demonstrating the consequences of adopting a particular parenting style can occur to form and even educating parents. This optimization parent-child relationship, promoting the idea of an appropriate parenting style and the improving effects of practicing inappropriate parenting.

Early intervention in parent-child relationship, the more efficiently it can prevent the occurrence of mental development problems, to adapt to the social environment in relationships with others who can hardly or not at all can be solved with time.

However unlikely it may seem to some, parent education children greatly influence their lives as teenagers, young adults. And not so much the content of education, and especially the manner of achieving it.

The theme of the work has implications both theoretical and practical. The latter occur strictly educational plan, targeting both the family education and formal education. More specifically, it is about increasing the effectiveness of these forms of education for social integration of children, in short, to meet the educational ideal.

Interdependence informal formal education is more than obvious, both forms being one for the other as a basis for education and content.

Family atmosphere varies greatly from one family to another. The manner in which it affects the child's personality is undeniable. It is considered that a broader in scope than a family atmosphere has family climate. Family climate is defined as "very complex formation psychiatric disorders, involving all the moods, interpersonal relationships ways, attitudes, level of satisfaction which characterizes the family group for a longer period of time" (Mitrofan, 1991, p. 72). It acts as a filter between educational influences exerted by parents on children and their personality. It has a complex structure, with common features that parents should take into account in their educational activities.

Family climate determines the behavior of the child, starts its mental development. You can not talk about a positive family environment than in terms of understanding the child as a person that needs

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consideration and recognition, love, guidance, support and respect. Emotional security, harmony, play roles in the family, the level of integration of the family in society are factors that contribute to ensuring high quality uniui family environment.

Type of family interaction and behavior of each of the members is more important than the presence or absence of one of the parents or brothers and flexibility play an important role with the family.

Emotional climate is a condition of fulfillment of educational success exerted by parents.

The most commonly used size analysis and characterization of climate conditions are: • acceptance-rejection;

- permissiveness-restrictiveness;
- Heat-affective indifference.

However, these criteria are taken into account in determining parenting styles.

Osterrieth (1973) states that "a child means accepting embraces burning desire to explore and make attempts with his hands, to accept the effort of discovery and invention which starts right from the cradle and never ends" (Osterrieth, 1973, p. 69).

Accepting children by parents benefit the social behavior of the former. Facilitating positive interactions, self-confidence, easy communication, integration much easier in groups, appropriate social behaviors manifest in all circumstances.

Unlike accept children of parents who feel their rejection is characterized by emotional instability, irritability, lack of interest in school, social antagonism, charging authority as harsh and hostile. Moreover, these children often exhibit aggressive behavior, rebellion, hostility, propensity to vagrancy and theft (Symonds cit. In Dumitriu, 1973, p. 48).

The second scale - permissiveness-effects restrictivitate- particularly is important in shaping attitudes and behavior of children since the early ages.

Permissiveness refers to the possibility given to the child to act without constant fear of punishment from parents to living varied experiences. Permissiveness effects are to develop initiative, courage, independence, self-confidence.

Restrictiveness limits the child's interaction with the environment by imposing restrictions, the world outside the family is considered to have negative influences in child education.

Protection of the little exaggerated distrust will facilitate the development itself, building a false image of society. In terms of social behavior, children are withdrawn from the field of social relations, are passive, dependent on another.

Important consequences in terms of mental development of the child has emotional heat-size indifference. Suggestive in this regard are the words of Osterrieth (1963) emphasizing the importance of manifestation and expression of love. He believes that it must speak with a clear language but not a language that consist only of words.

The different ways of expressing the emotional heat (quality of care, tenderness daily contacts pleasure playing with baby, goodwill, interest they show father to his works, which enshrines the daily play, communication and joint actions with the child) provide security emotional and psychological development of the child's favor. Ross Campbell (2001) states that "a proper fulfillment of emotional needs" is the cornerstone of effective education (p. 16).

By dwelling less on "adequate fulfillment," it points out that each parent must show concern for the child, directing the activities and conduct. The question supratutelării child and the effects of its development plan. These are often opposed a practice that parents' expectations.It should be known and respected by any parent that "any aid given to the child is unnecessary obstacle to its development" (Montessori, 1991, p. 29)

Family is the first environment in which the child is loved and thus learn to love others, to give love. Therefore, the family is a real "school of feelings; In this way, the family shapes its basic personality dimensions "(Osterrieth, 1973, p. 51).

Since the early days, child development is dependent on the quality of the relationships established between it and the parents. The child will be able later to answer the questions "Who am I?" (In order to discover self-identity), "What am I doing?" "With whom?" "With which tools?"

No matter what causes it, indifference of parents towards children has multiple results, negative: disorientation, uncertainty in the manifestation of behavior, lack of self-confidence in people due to lack of parts, tend to make emotional attachments to persons outside the family but on the basis of lack of discernment.

Family environment is viewed as a "democracy at the smallest scale" (International Year of the Family, UN, 1994) you need to really work on recognition and mutual respect.

Two opposing theses have been written on the exercise of family education in contemporary societies developed. The first expresses the idea that there is education conducted in the family. This for two reasons: either dispossession family privilege to educate in a court outside profit or "demisonarea" the family responsibilities.

The second sentence emphasizes the importance of family education, exerted especially before birth and during the first years of the child's birth. Its role is overwhelming that creates a kind of determinism future trajectory.

However, the role of education in becoming members of his family, is not only one, but none minimum, a simple belt lacks initiative. Family environment is not simply a refuge, but by nature and diversified private emotional bond that unites members, it can play a necessary maturation secure children.

The key question,developed in the last decades, of the degree of responsibility of parents in the psychosocial development of their children or, conversely, (self) exclusion from it, thanks expansiuniii school education, was a pretext for the development of various conceptions of the role of family in education.

In Volume I of the paper "Sociology of Family Education" Stănciulescu (1997) have developed mezosistemul Montandon Jean Kellerhals and Cleopatra in 1991. This mezosistem is defined by setting the various interactions between microsystems. At its center lies the family, and depending on the specific competenţelor- axes or difuze- and of how family involvement in children's activities are established its four operating models:

- The opposition - in this model, the family court does not recognize other than very specific skills and does not consider it necessary to intervene in the action that they exert on the child.
- The delegation - according to him, the family recognize other servants diffuse skills, competence similar to that exerted itself. Parents do not consider appropriate action towards correlating actions.
- The mediation - specific powers of courts to recognize educational and parents involved in the child's relationships with other educational factors.
- The cooperation - in this model are recognized by family, educational comprehensive powers of all courts and need to coordinate their actions.

The family is the "core fundamental tool of larger social structure, meaning that all other institutions depend on its influences" (Stănoiu & Voinea, 1983, cit. In Stănciulescu 1997, p. 11).

Educational styles adopted by parents in the education of children contributes to creating a family atmosphere more or less beneficial to the child's personality development.

Therefore, family atmosphere will lead to the choice of parental attitudes (often unconsciously) in different moments of raising a child. How parents react to events strongly differentiates child development child in the family. To support this claim, Kaye (1984, cited in Birch, 2000, p. 39) made a number of recommendations to parents:

- the need to meet at birth physical and emotional needs of children to prepare them for communication and networking with peers;
- providing protection;
- guiding the process of acquisition of new behaviors;
- strengthening and confirming proper behavior and manifested learned by children;
- providing models for action, affective relationships and communication;
- Encourage children to establish relationships with people outside the family.

These recommendations may be considered parental functions according to their achievement settling positive or negative nature of the emotional climate.

In the above plus the set of Kari Killen (1998):

- Ability to perceive the child in a realistic manner;
- Ability to accept that it is solely the responsibility of adults to meet the needs of the child and not vice versa;
- Ability collaboration realistic expectations of the child;
- Ability to positively engage in interaction with the child;
- The ability to have an empathic relationship with the child;
- Ability to prioritize basic needs of the child;
- The ability of the parent to master their pain and frustration without it reflects on the child.

The characteristics of these functions relate to their dynamics, can be strengthened or weakened by various social or psychological situations. On the other hand, they aim basic needs of the child and the emotional side of the parent-child relationship.

The family can be both a positive factor and a negative factor / child education. Ideally, the family should be the aim of enhancing the positive influences and reduce negative influences. This is because the family, as no other special institution can not bring so much harm in children's education. Purchases Childhood retain throughout life, in her child's personality placing the bases. Family is the first factor that contributes to structure the basic components of the child's personality. This is due to the richness and diversity of interpersonal relationships and behavioral patterns that you furnizeză.

Trying to explain the mechanism by which this occurs parental influence on children's mental dezoltării finds that the facts of daily life, adult interactions are perceived and learned by children. On the other hand, the manner in which parents respond to the needs of the child, is another factor.

Relevant is the point of view of Birch (2000), which emphasizes the importance of securing emotional child by the mother, establishing a strong emotional ties between the two. Thus the foundations of social behavior later, the child taking easy, gestures, movements, facial expressions, verbal structures, attitudes and social behaviors. The author states that "from a very early age, children orient their attention, especially the physiognomy and human voices" (Birch, 2000, p 38).

We must not lose sight of the meaning of parent-child interaction. If long been targeted educational influence unidirectional manner from parents toward children, with time to recognize the influence of the parent child. The notion of "interaction" indicates reciprocal influence between parents and children. A defining characteristic of this type of relationship is that the intensity of the relationship between parent and child both age ranges. Maintaining desirable relationship involves providing continued parental attitudes and practices in the mental development of the child reached. It is the need for a permanent

adaptation of parenting style to the specific age of the child. Of course, this adaptation is desirable to develop within certain limits so as to not become inconsistent or uncertain educational actions that might confuse the child and, more influential in the negative.

It is well known the importance of the environment to meet basic needs and fundamental assembly. Deficiencies emotional, social, cognitive and ethical expression is almost always a difficult past, the primary narcissistic wound caused by a poor relationship. Pourtois (2000) considers that Deficiency Syndrome is facing serious and difficult.

One example given by the same author illustrates well the vital need for acceptance of the child and the attachment to parents. "My parents love me because I come to say goodbye when you are in bed." This is just one of the multitude and variety of behaviors that parents can manifest to express affection. If for some adults, it may seem trivial to the child, his mental development, has a beneficial effect with multiple resonances in cognitive and social-emotional scope thereof.

For some adults, evidence of care and affection can be a way of wasting time, considering the professional interests as being on the forefront. Interestingly, what is useless for some parents, the child would be a great asset in its development plan.

Parental investment appears as a founding element of feeling positive existence. It also constitutes a central element in the child's identity formation.

Parent-child relations participating in the game closely overlapped part of socialization and customization. Millet (1987) AFIM that parents and grandparents are "carriers purposes". Goals, intentions, children meet for a function pushers representations to the future, currently supporting and buoying of the possible. In other words, these underlying psychological development of the child's behavior is influenced by parental intentions.

Child's mental and social identity is constructed according to its relationship with the parent, thus making a connection in which "collide" and experience needs (re) cognition and personal sense of unity.

Pourtois (2000) summarizes in a quality plastic expression importance of parent-child relations, considering them a "melting pot within which operates a profound alchemy" (Pourtois, 2000, p. 3).

Strengthen or weaken the emotional needs of cognitive and social needs. The author stresses such wealth transformations occurring in child development, qualitative aspect of which is dependent on the quality of interaction with the parent.

The family remains the basic court society, in which are experienced and organized individual growth process. The family crucible formed psychological and cultural identity of the individual.

A paradoxical function of the family is to allow the child to take both, both the presence and absence of the other. The family becomes a melting pot of symbolization. Function enables the production of meaning and facilitate the child's adolescence crisis will increase. We emphasize practical needs affection and autonomy of the child to be met both in relationships with parents, significant others.

Another function of family education aimed at developing the capacity for autonomy of the child to freely define their own guidelines to decide according to his own ideas and a hierarchical value system. In other words, the education received in the family contributes to the socialization of children, but also helps to build their own identity, to define and strengthen their feelings, beliefs and own ways of action.

Block (1971, 1980) proposed a typology based on the existence of groups of parents whose educational strategies were reviewed, and those of their own parents.

The first group corresponds lax individuals who do not exercise control. Most of them were careless and indifferent parents who have invested in parenting are in disagreement with them. The second group consists of individuals rigid hiperverificatori. The environment in which they grew was authoritarian, less cheerful and binding. The parents of this group are conservative and inhibitors. Penalties imposed child to complete a task are numerous and regular. One can say that it is a "override" exercised at early ages. The third group is the self-confident individuals. I am loving mothers from families, patient, encouraging change, both parents share the same values education.

The study demonstrates the existence of a process of reproduction practical styles to a child who has a parent in turn. On the other hand, some authors contradict this hypothesis, stating that a sentence accompanied by a rational explanation allows suppression effects and future imitation authoritarian behavior.

Some authors have highlighted the limits of authority love parenting styles. They believe that the adoption of a style or another, depends on many other variables, such as: the effect of social origin of these strategies, the child's sex.

In other words, every family system is practiced specific ways of communication between the child and parents. Each family member is actor socialization and educational strategies involving different.

Research on social interaction outside the family tend to show that patterns of family interaction affects interactions in other situations. Depending on the context of education, adolescent development will be modified outside the family, influencing interactions with unfamiliar people and those of her age.

Depending on parenting practices, developing autonomy will be different from teenager. Authors like Cicognani and Zani (cit. In Pourtois, 2000, p. 103) studied parenting styles and adolescent autonomy. I believe that gaining independence is not achieved without conflict. Posting ability to make their own

decisions, to be real and live alone, tend to reactivate bases family or even to put into question.

Harter (1983, 1985, 1993, 1997 cit in Pourtois, 2000, p. 96) in his studies on self-esteem building, analyzed the influence of parental educational strategies on child and adolescent development. He evokes diverse research that emphasizes self-directed attitudes and behaviors that are formed by autonomous interaction with others. The first children are interacting with parents; by their behavior, they develop attitudes that children according to Winnicott (1958), they will use later. A parent is considered to be adequate if their support, help and encourage the child.

Macoby and Martin (1983) states that the family is a system whose elements are mutually dependent and whose interactions cannot be confused with the characteristics of its parts.

In a study on the impact of divorce on preschool attachment, the authors found that secure attachment relationship is mediated divorce, parental style. Mothers of complete families tend to adopt more authorized style / democratic than divorced mothers. Another conclusion reached by the authors of this study, Hira Nair and Ann D. Murray, was that that style directly influences parental attachment security.

Marital dissolution is associated with maternal mental health, the latter affecting the quality of parenting style and thus providing the security of attachment. The theoretical contribution of this study is to develop a conceptual model that the parenting style was adopted according to a number of variables. It's about demographic variables (marital status, maternal age, education), which influence the mental health of the mother and child- variables related to gender and its temperament.

The results of this study are consistent with observations that the style of Baumrind authorized achieves positive outcomes for children. These results suggest that described by Baumrind democratic style was associated with secure attachment in children. The author describes mothers of preschoolers democratic accountable as emotional, loving, supportive and creative environment for children in the building.

They were shown a series of effects democratic style, considered to be the most beneficial compared to other educational practices. As an example, the authors concluded offers DESLANDES & Royer (1994) in their study that teenagers in schools, states that democratic style seems to be the most favorable adolescent development and that, in several aspects: self-esteem, independence and social and academic competence. Steinberg, Lamborn and Darling (1992) share democratic style three factors that compose socialization: parental engagement, parental supervision and encouragement of autonomy.

Students from families permissive show the weakest results (Dornbusch et al. 1991). Doucet's studies (1993) and his DESLANDES & Royer (1994) show that parenting styles authoritarian or permissive are both associated learning difficulties experienced by students in middle school. On the contrary, the democratic parenting style is associated with academic success and positive commitment to young school.

Recent Canadian studies based on longitudinal survey data on children and youth, stresses the importance of parenting style as a determinant of child health.

The authors research "in the family: the simultaneous parenting style and child behavior" Burton, Phipps and Curtis, takes a slightly different approach from that of other studies. The latter assumed that the direction of causality is parent-child- parenting styles "good" child- good results in one of the strategic consequences that may improve outcomes in education and health of children, improving parenting practices.

The research objectives were formulated in agreement with literature data, personal interest related to children and their social development.

They were concerned that:

- study the relationship between parental education and preschool sociability;
- designing activities to involve, on the one hand the participation of parents, on the other hand, their interaction with their children, in order to improve their relationship;
- knowledge level of children in group social research;
- identify issues of integration of preschool children according to kindergarten;
- highlighting the degree of socialization in the context of relationships with colleagues.

Research hypotheses are:

I. social level assessed by teachers, significantly correlates positively with the social rated by parents;

II. Education level assessed by teachers, significantly positively correlated with the degree of sociability in preschool;

III. Education level assessed by teachers, significantly positively correlated with the degree of sociability rated by parents of preschoolers.

Variables are in a mutual dependence in Pearson correlation, which we used to obtain the results.

In order to fulfill the objectives were set variables involved in the present research work as follows: sociability preschoolers, defined as adaptation to the social environment, the surrounding world, group, collective, cultural and ethnic patterns;

Target indicators for social-affective behavior of preschool are:

- Autonomy and initiative in dealing with their peers in the game and other activities (training and educational and recreational);
- Liaising with the teacher and other adults in the immediate environment;
- Adequate manifestation of the child's emotional-expressive behaviors depending on the specific activities involving (view shows theater / circus games-dramatisations, recitations, stories, song interpretation);

– Personal sense of order in the arrangement of things.

2. Data analysis research

Following data collection and obtaining results through statistical processing, confirming the hypothesis cercetarii.Încă methodological approach described at the beginning of the research was launched research hypotheses:

Î.I. Rated social level of education, significant correlates positively with the social rated by parents;

I.II. Education level assessed by teachers, significantly positively correlated with the degree of sociability in preschool;

I.III. Education level assessed by teachers, significantly positively correlated with the degree of sociability rated by parents of preschoolers.

This was confirmed with the results obtained by calculating the Pearson linear correlation coefficient, resulting in a positive correlation.

The main condition for calculating the Pearson correlation coefficient is that the variables involved are measured on the scale of interval / ratio (along with the existence of a form of distribution not severely deviates from the normal curve).

A test score is an interval scale, so from this point of view fits Pearson correlation. To test I did as distribution chart Scatterplot showing that indeed form distribution does not deviate from the normal curve.

The first hypothesis, Pearson coefficient $r = 0.79$, $p < 0.01$, which means a positive correlation. (Annex 4) As r is close to 1 even approaching a perfect correlation. This result shows that sociability is equally appreciated by both teachers and parents.

As mentioned, all the children attending kindergarten involved in research for at least two years. The results of the beneficial influence of the environment is valued kindergarten teachers valuing the activities with the children, their cognitive potential, developing skills and abilities specific form of preschool age. It has been shown that even children attending community positively influences sociability in the sense that it is better and more harmonious.

Beyond the fundamentals are other factors whose knowledge allow a proper understanding of individual sociability. It is the general cultural level and health of the family and kindergarten. Kindergarten was present research, the main factor in the relationship between parental education preschool and sociability, the more so since the condition that consensus-kindergarten educational family.

After statistical processing of the results of the second hypothesis appears Pearson coefficient $r = 0.86$, $p < 0.01$, again a positive correlation, almost perfect. So we have confirmation of the second hypothesis, and as you can see from the chart, the shape distribution curve does not deviate from normal. Education teacher assessed correlates with the degree of sociability that you have preschoolers research participants.

The influence exerted in the kindergarten education can be positive, as long as there is between them and the family unit in terms of the requirements that are placed in front of the child. With the entry into kindergarten exceeded the restricted family, child new environment before putting new applications, different from the family, which is little better respond to them.

There is a tendency to exploit the role of the teacher in kindergarten, which can be joyful or raise questions. First, it appears that the activity of the teacher is not only to work with children and working with their parents. These are just some of the wishes pursued, but now, the teacher plays a role in increasingly complex. It takes her to explain to parents that communicate the role that plays in the preschool institution and to convince them that together have a common goal: the good of the child. Hence, the need for relationships with the family is not unequal duration and consistency different from the kindergarten environment.

The child spends less time than domestic kindergarten, which is a more stable environment. The question is though, how stable? The fact that preschool is more at home than in kindergarten, can sometimes be a disadvantage for it, in terms of loss of earnings acquired in kindergarten. Family climate, parent education, por be disruptive role factors whose effect is confusing the child.

At preschool large, it is estimated that the education gained from kindergarten increase in intensity until it becomes dominant. Conversations with the teachers in the group which included children assessed, supported and strengthened while the results confirm the second hypothesis of the research. On the one hand, this is, indeed, the awareness of the importance of kindergarten parents psychological and socio-affective development of the child; on the other hand, it is total trust of adults in this environment, the teacher's work, especially because they travel professional overload them as adults. Parents do not have sufficient time to devote to their child, accept and follow the advice of the teacher, often acting as directed. It is the parents who have children in kindergarten for at least two years.

Confirmation of the third hypothesis is given to us by Pearson coefficient $r = 0.74$, $p < 0.01$, resulting in positive correlation that we can see from the chart Scatterplot,. And this time we have confirmation that there is a significant link between parental education teacher assessed the degree of socialization of preschoolers.

Considering the data obtained, it can be said that parental education determine differences in the social-emotional behavior of preschool children. In other words, the manner in which the father of her child is related to the education afforded to it, has an impact on how the child integrates relate to them, follow the rules of game in which they participate, has initiative,

organizational skills, is active in communicating with peers and teacher, mainifestă organizational skills. Moreover, remains appropriate emotional experiences according to the situations that take part. A child looks at recreational programs and not laugh or enjoy disliking another, which is bored in the activities of modeling, mosaic, household activities, considering them a burden and lack of interest, raises questions of terms of its social-emotional behavior.

In this regard was made in the table that had been scoring results of the questionnaires responses of parents and the teacher, which shows deep connection between parental education as assessed by teachers and parents and the degree of socialization of preschoolers lowest score = 54, the highest score = 94.

It is assumed that childhood is a cheerful, "gold". Children live intensely every moment and enjoy it. Parents have a fundamental role in teaching children how to enjoy moments of childhood memories that will be rich in adulthood.

In the family, the child grows and develops under the influence of family environment modeling. In it, the child get acquainted with the first models to relate the pattern of relations will be later. He relates to adults, relate to him. Whose interaction is positive or negative meanings are given and parental education.

Unlike girls who were described by teachers as shy, distrustful, lacking courage, boys were rated as lack of interest in educational activities, games preferring aggressive, often entering into conflict with colleagues, taking their toys without asking for permission. Regarding emotional experiences often enjoy unpleasant events experienced by colleagues.

It should be emphasized that, in terms of differences between boys and girls, they are based on a purely qualitative criteria. It consists of the teacher's comments. There has been no statistical approach in this regard. Considering the differences between children, grouped by gender, may be certainly one of the future directions of research this topic.

Returning, we found that preschool children whose parents are permissive, exhibit selfish behavior, provide toys other colleagues are not interested in educational activities, are intended to be informal leaders are lazy when it comes to achieving self-service skills, often not comply with the rules of the games, want to impose their own "laws". In the case of non-acceptance by others retire, but not for long because his insistence resume, getting a low score evaluation.

Social-affective behavior depends to a great extent on the establishment of fair relations between family members. The way in which each parent to their child reports to be afforded to education is influenced by upbringing in turn as an adult, education level, values, attitudes and worldview and its life. As noted in the first part, the parents begin to wonder about the effectiveness of educational methods adopted when encountering problems with children.

It would be absurd to deny parental love. Every parent strives to do more for the child, to show him the love he shows to him. It sometimes happens that some parents love to show excessive, suffocating, saving your child any effort. I am satisfied every whim, not imposed rules, receives everything as he wants without being asked anything in return. Experience shows that where children are exempt from any responsibilities and efforts specific to their age level, they become selfish, not even offer help reaching their parents. In addition, not being accustomed to respect certain rules, could not join the groups, with the claim that all take place as they want. Since reality is different, if you are not willing to change, hardly could integrate into social groups, have difficulty adapting. In keeping with the theme present neintegrându into the group of children, adapting to the school environment would be difficult, the child was forced to make further efforts to meet the demands of school.

The relational model provided by the family can be an inhibiting factor for the development of social-affective behavior of the child when it is authoritative.

Accepting the hypothesis is an additional argument to reflect on the impact that parental education has on social-affective behavior of the child. Start of harmonious development, social integration is given by parents, preschool further development is influenced by family foundations made. Hence the need for foundations to be made with love and control, father striving to fulfill an important goal for his child's life: balancing the two dimensions involved Love and Control.

One of the aspects that should characterize relations between parents and children relate to consistency and unity demands that we make parents to children. The literature reveals that educational nonsense can manifest itself in two forms: the first refers to the fact that parents adopt complementary educational styles (permissive-democratic, authoritarian-democratic), and the second relates to the fact that parents adopt styles Educational opposite (authoritarian-permissive).

Ideally what it claims to be the father of the child held by the parent and vice versa. The differences highlight the fact that nothing can be more damaging to a child's mental development than the differences between the requirements placed upon the child's parents. The lack of consensus on child education confuses you do not know what to think of all that is communicated; he tries to please both parents try to respect those issues that agree or parent to respond to the more imposing.

However, in total freedom offered by a parent and rigorous control are huge differences that are reflected in the social-emotional development of the child, derutându it due to lack of landmarks that a parent should provide. The child needs to be focused, directed, encouraged, especially since the first impressions about the world and life, the family environment are received.

The absence of family education unit, prevents the development of activities that stimulate children's language, explaining the meaning of its causal relationship, stories that allow acquisition of knowledge, training representations, language development and thus the child's cognitive development.

The parents of the child is observed and imitated, which recognizes both parents democratic authority and manifestations of affection and tenderness they express towards him. Balance educational requirements are reflected in the socio-emotional development of preschool, kindergarten, he had to face the demands of the environment, respecting the rules of the games involving, knowing how to lose, to have initiative. He has confidence, actively participate in educational, show their emotional experiences according to specific situations involving, is expressive and emphatic. Lack of support points with guiding role of social-emotional behavior, a parental model has an impact on the development of preschool sociability with great difficulty or not at all meet the requirements of adaptation to the kindergarten environment, with all that it implies.

It is important that each parent to meet the educational role of the other to achieve a complete education that side of the child's personality to develop in harmony. In essence, each designed to comply with the other parent and his own purpose. Added to this is the need to fulfill its educational role at any price. In addition, as the following wording would seem fine, it highlights a fundamental aspect: the child shall be deprived of love, which is necessary as food and water. When not understand this elementary education will fail, no doubt. Ideally, to secure the love, support, guide the child, not to seize.

The need for socialization derives not only for social reasons but also individual reasons. It is one of the important conditions for the formation of man as a member of society. Basics of social behavior are made in early childhood, quality adaptation and social integration of future adult depending on the manner in which these bases are made by parents and others.

According to experts, the child's social sense or instinct is innate but further research contradicts this view unilateral and trenchant. Socialization is a process that relies solely on outside influences, but there are some internal springs that mediate and requests.

Education is not imposed from outside, with violence (or at least it should), but rather there is a deliberate social adaptation. This explains the fact that the entourage adult child feels well, waiting and wishing their presence, and hence the rules imposed by adults.

Housed in an obvious parental addiction, child needs a process of education and socialization to be done deliberately and toward the gradual assimilation of socio-cultural patterns accredited by the social group to which it belongs. In the absence of adults, this process is not performed as it should, taking the wrong direction.

Even relatively well integrated children and apparently balanced, emotionally speaking, there is an impoverished developing essential feelings and difficulties in establishing social contacts.

3. Conclusions and recommendations

The topic is a hot topic no matter what time it is questioned. There will always be children, parents and adults there will always be preoccupied with the efficient education of their children.

The objectives of the work based on the study of literature, were subsumed purpose of showing that between parental education and preschool sociability, there is a profound relationship according to its specificity.

Following statistical processing performed by applying the tools of investigation, relevant results were obtained considering, finally, that the objectives of the work were satisfied:.

It thus draws attention to the need for close cooperation family-kindergarten, both areas having decisive influence on sociability and psychological development of preschool children. We must not lose sight of the fact that kindergarten is the first step in the education system. Most of coordinates teaching can be influenced by a good start in relations at this level.

In what follows it will be discussed issues kindergarten-family partnership, the need for unity educational requirements of the two environments, and finally be exemplified types of activities in which parents can be involved in order to improve their interaction with children endorsed the style adopted for adult education in educating the children.

One of the objectives was Popu and designing activities and suggestions for improving the relationship between kindergarten and parents. Involving parents in kindergarten issues relates to building positive relationships between family and kindergarten and a unified system of values and requirements relative to the child. This can have a positive effect on children when they see the teachers are working and advising parents and involve defusing problems before they become uncontrollable (Vrasmas, 1999).

On the basis of collaboration and effective cooperation between kindergarten and family is communication between the two educational agents. Parents are constantly involved in kindergarten activities, not just when problems arise.

Teacher-parent communication can take place in meetings, daily meetings be scheduled periodically or permanently. To these may be added a voluntary system which can involve parents or grandparents in direct support of activity in kindergarten. Also, through these meetings, the teacher knows more about the specifics of child and parent interaction with it that

often, the teacher communicate, how they relate to their own education afforded to it.

The teacher often can identify based on conversations held with parents, their communication with children in her presence, the observations made on the small practice some parenting. Negative or beneficial effects appear very soon, so that the teacher can intervene with explanations, arguments in conversations with parents. Of course, this in an elegant manner, with tact and care so that some parents do not feel offended. Also, everything will undertake teacher will consider the harmonious development of the child, taking into account the particularities of individual age and coplilului. The latter are required not only hereditary endowment of the child, but also educational activities exerted influence on his parents and, especially, of how adults educate their children.

In order to inform parents about the effects of a more than adequate and efficient education of their child interaction with children, Vrasmas E. (2000) propose several types of activities needed with parents, the most important categories are:

- ice-breaking activities are primarily meetings with parents to achieve a lasting and effective communication;
- informing parents about: educational program activities conducted in kindergarten and in the group; their child; other topics (child nutrition, education, health);
- pedagogical counseling in problem solving situations with their children, and preventive activities and removing any risk situations.
- orientation fathers to regular or permanent support services;
- discussion and exchange of ideas and experiences between parents.

Of course the above activities involving teacher-parent relationship, but much more in line with the theme of the present work, we can question the activities that involve both parental involvement and their children, the teacher acting as coordinator and mediator. These in order to improve parent-child relationship.

It often happens that parents because of the extremely busy time, do not know what you know and what you do not know their child. It is possible that the parent about the child image may not correspond to the real meaning either underestimation or for the purposes of overvaluation. To avoid such a phenomenon that could lead to the adoption of an inappropriate educational style, the teacher can organize activities involving both parents and children.

For example is given:

- assisting parents of educational activities carried out daily in kindergarten;
- undertake activities with children and parents, the latter being organized in groups that involve both competition and cooperation parent-child;
- participation of parents with children in extracurricular activities.

A comprehensive program based on partnership relations with family consists of CRP- Parents Resource Centers, defined as structures built in the kindergarten consisting of engagement activities, information, education, counseling, guidance and volunteer parents. CRP is actually synthetic expression of the activities listed above.

CRP requiring a space specifically trained to provide the best environment and positive optimal communication between teachers and parents. The informative activities can call into question various topics such as "Family Education", "effects on child development parenting style." Informing parents can cause early adoption of appropriate educational style peculiarities child education avoiding mistakes that could have consequences difficult to repair the child's personality development.

Hence the need for agreement between the parents regarding educational strategies practiced, educational requirements made by the family unit and nursery, any imbalance in education, either in the family or family-kindergarten level collaboration is taking a toll on children's psychological development plan.

Bowlby show, referring to institutions that succeed maternal figures that if this type of caregiver provides sufficient interaction between adult and child social sensitivity of the latter can develop.

Of course, the present paper presents some limitations. Some of them are:

lim- subjective assessment of the teacher;

In conclusion, parental education affects child sociability positively or negatively, depending on its specifics. It is one of the determinants of child personality development, requiring a certain level of socio-affective thereof.

This paper can be both a continuation of studies that focused parenting practices, but also a beginning, meaning substantiation of future research. You can study the influence of strict parenting styles on personality traits, in training of preschool children and differences between girls and boys imposed parenting styles, within certain parts of their personality. Given the complexity of human nature, the importance of family in shaping child's behavior can be identified various investigative branches from the topic of this paper. This is particularly so since the completion of any research is not an end but a beginning clearly to conduct other studies.

Given those presented in previous pages, it can be seen that information and solutions to optimize parent-child relationship exists. It needs the goodwill of parental responsiveness and awareness of the model provided and education influence exerted enormous further development of the child, contributing to its success in life as a man.

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INVOLVEMENT OF LANGUAGE IN THE DEVELOPMENT OF NUMERICAL REPRESENTIATION AR PRESCHOOL CHILDREN

Cristina ȚÎMPĂU[*]

Abstract

In recent years, one of the questions that developmental psychology has tried to answer is related to the origin and how our cognitive system development. A significant impact on trying to find an answer to this question have been research conducted on numerical skills of children, and as a consequence of this interest, the development of phylogenetic and ontogenetic perspective numeracy skills, has become studied one of research topics most intensively.

Based on the failure of the model approach in the context of "object files" at the preschoolers numerical skills, motivation of this paper refers to the attempt to provide a numerical approach to basic skills correspondence, ordering or numeracy in the context of transition from numerical representations to verbal and preverbal role that language plays in supporting performance, while taking account of how children numerical concepts and changes implemented strategies they use at different ages. If until now it is clear that language development is a mediating factor in the reorganization of numerical knowledge is needed in-depth approach of how procedural skills affect solving numerical tasks and the extent to which models originally developed to describe numerical skills of children under one year of preschool children can be applied in the context of language development.

Keywords: *numerical skills,numerical representations, numerical concepts and changes, language development.*

1. Introduction

In recent years, one of the questions that developmental psychology has tried to answer is related to the origin and how our cognitive system development. A significant impact on trying to find an answer to this question have been research conducted on numerical skills of children, and as a consequence of this interest, the development of phylogenetic and ontogenetic perspective numeracy skills, has become one of research topics most extensively studied (for summaries, see Carey, 1998; Wynn, 1998; Gallistel & Gelman, 2000; Geary, 2000; Feigenson, Dehaene & Spelke, 2004).

Recently, the development of experimental models such expectations violation (violation of expectation) revealed the existence of numerical skills even in children under 1 year (Wynn, 1992; Simon, Hesp & Rochat, 1995; Uller et al., 1999; Feigenson, Carey & Spelke, 2002). Although innate or acquired origin is still debated numerical representations (Simon, 1997; Carey, 1998; Gallistel & Gelman, 2000), the literature is remarkable consensus phylogenetic continuity in the development of numerical skills. The methods of cognitive neuroscience have revealed the behavior in a number of primate species (Brannon & Terrace, 2000; Sulkowski & Hauser, 2001; Nieder & Miller, 2004), birds (Emmerton, Lohmann & Niemann, 1997; Emmerton 1998 ; Xia et al., 2001) or rodents (Dalrymple-Alford & Breukelaar, 1998; Leon & Gallistel, 1998), which are considered antecedents of nonverbal numeracy skills.

These studies in humans and infrahuman have led to two models. First, the object model files, which holds that each element of a set of distinct representations are created, stored independently in working memory (WM) (Trick & Pylyshyn, 1994; Simon, 1997; Leslie et al., 1998; Uller et al., 1999). On the other hand, the model battery (accumulator model) proposes a mechanism that allows the representation of an amount in proportion to the number of elements quantified (Xu & Spelke, 2000; Chiang & Wynn, 2000; Xu, Spelke & Goddard, 2005). Conclusion The studies validating these models was that these models suggest descriptions of similar phenomena, but rather distinct. The object files requires a precise numerical representation, which however is limited to 3-4 elements (in tasks such as "1 + 1" or "2 vs. 3"), while the battery model produces inaccurate representations but claim discrimination larger sets of objects (in tasks such as "8 vs. 16"). Furthermore, studies of cultural anthropology (Gelman & Gallistel, 2004; Gordon, 2004; Pica et al, 2004) and the bilingual subjects (Spelke & Tsvirkin, 2001), suggests that at least accurate mathematical calculations are dependent on acquiring mathematical symbols and their verbal referents, while inaccurate calculations are independent of language. A possible interpretation of these results is that the language support numeracy skills, but once they are acquired, the language no longer has a central role in the activation of knowledge. The theoretical perspective that supports this idea is known as the weak hypothesis of language (language weak hypothesis), but which was insufficiently tested by experimental studies on preschool children. Except Houde (1997), who adapted for children 2-3 years of experimental model

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Wynn (1992), no other research in this age group didn't seek validation of the model object files in these tasks, the more since the claims that its content is accurate numerical representations, with language acquisition, partially dependent on it (Simon, 1997; Gallistel & Gelman, 2000).

A second aspect related object model files found in studies in humans and infrahuman was sensitivity to continue properties (continuous properties) such as density, size or length that seem to interfere with the numerical size (Scholl & Pylyshyn, 1999; Uller et al., 1999; Feigenson, Carey & Spelke, 2002). Numerical representations to the interference susceptibility was explained by the absence of sufficiently developed capacities inhibition in children under 7 years (Temple & Posner, 1998) and were found both in correspondence tasks (Houde, 1997) and in the ordering (Mix & Clearfield, 1999; Brannon & Van de Walle, 2001). The main limitation of these studies is that the use of methodologically designs pretest-posttest type that can highlight the learning rather than actual skills of preschoolers. A positive aspect, however, is conferred by trying to establish a link between numeracy and performance in the two types of tasks. The results so far support the hypothesis poor language and numeracy development suggests that support performance, but between the two variables cannot establish a causal relationship. Continuing the relationship numeracy-language approach to a deeper level of analysis, particular attention was paid gestures function in implementing the concept of cardinal value (Alibi & DiRusso, 1999; Graham, 1999), but so far the model proposed by Alibi & DiRusso (1999) has not yet replied.

If until now it is clear that language development is a mediating factor in the reorganization of numerical knowledge is needed in-depth approach of how procedural skills affect solving numerical tasks and the extent to which models originally developed to describe numerical skills of children under one year of preschool children can be applied in the context of language development.

Based on the failure of the model approach in the context of object files preschoolers numerical skills, motivation of this paper refers to the attempt to provide a numerical approach to basic skills correspondence, ordering or numeracy in the context of transition from numerical representations to verbal and preverbal role that language plays in supporting performance, while taking account of how children numerical concepts and changes implemented strategies they use at different ages.

The purpose of this paper is to highlight how language mediates access to accurate numerical representations, especially given that this relationship was poorly investigated. First, from the model object files propose adaptation based on the experimental model of expectations violations carried out by Houde (1997), testing assumptions related to the successive transformations of this model is subjected to a sequence in which the multiple objects.

Further, it will investigate the second assumption of the model object files interference exerted on continuous variables on performance in tasks of correspondence and ordering. Also, it will track the extent to which these skills are supported by numerical numeracy capabilities. Finally, we intend to test the proposed model assumptions & DiRusso Alibi (1999) on the role of gestures in numeracy and replication procedure proposed by the two authors.

The overall objective of the three experiments suggested further relates to the implications of object files and the models proposed by Alibi & DiRusso (1999) on numerical representations in children preschool or the impact that has on the acquisition Limaj numerical representations. Next, we detail the reasoning underlying the three proposed experiments

2. The role of language in the number representation systems

A number of surveys conducted by Amazonian tribes whose language lacks words to denote numbers, have brought the issue of the role of language in the development of numerical concepts (Gelman & Gallistel, 2004; Gordon, 2004; Pica et al., 2004). The question this study sought to answer is whether the use of certain mathematical concepts is impossible due to lack of lexical reviewers. These studies have considered three types of hypotheses about the relationship language - numerical skills. The first is "strong hypothesis of language '(strong language hypothesis) proposed by Benjamin Lee Whorf, that language determines the nature and content of cognition. The main criticism of this relation deterministic concerns on the one hand that eliminates the possibility of any kind of reasoning, and hence the numerical animals or children whose language is not sufficiently developed, and on the other hand offers no explanation on how exposure to a particular language could generate concepts and representations that support it. The second hypothesis considers irrelevant language (language irrelevant hypothesis) to develop mathematical concepts as people, animals also possess innate nonverbal numerical skills, selected along evolution and allow processing without symbols numbers (Dehaene, 2001; Feigenson, Carey & Spelke, 2002). A third category of theories based on the assumption poor language, nonverbal numerical representations acknowledging irrelevance hypothesis postulates language, but believes that the development of numeracy skills undergo a profound transformation once children acquire language for the numerical symbols (Simon, 1997; Carey, 1998; Dehaene et al., 1999).

Analyzing the three theoretical orientations in terms of empirical studies of cultural anthropology offered by comparing the performance of Amazonian tribes with those of Europeans, were derived two

conclusions: 1) approximate numerical representations are identical to those of the Amazonian tribesmen people from cultures possessing a number system, which provides evidence of the assumption that this power is acquired independently of language (language irrelevance hypothesis); 2) Unlike approximation, exact numerical representations are affected by lack numerals, which supports the hypothesis that language plays an important role in the emergence of representations accurate population (weak hypothesis language). Otherwise we said, we can distinguish two basic systems for representing numbers: one for the accurate representation and one for repezentări approximate whose main features have been detailed above (for summaries, see Carey, 1998; Wynn, 1998; Gallistel & Gelman, 2000; Feigenson, Dehaene & Spelke, 2004). As shown the two systems are activated by different stimuli in different experimental tasks ("2 <3" accurate depictions and "8 <16" for accurate representations), plus operate independently and are limited to representing numbers natural (Gallistel & Gelman, 2000; Feigenson, Dehaene & Spelke, 2004; Fias & Verguts, 2004).

Recently, a number of neuroimaging and neuropsychological studies have revealed the cerebral substrate of the two numerical systems. Approximate representation system is best characterized and is associated with activation of the inferior parietal cortex (ICC) intraparietal sulcus and (SIP) (Dehaene, 2001; Dehaene et al., 1999; Feigenson, Dehaene & Spelke, 2004). These studies are confirmed by neuroimaging studies in subjects with lesions of cortical areas involved in language, which still retains relatively intact numerical representations (Varley et al., 2005). This would suggest that the degree of specialization of these cortical areas is quite pronounced at least in adults, and thus determine their relative independence of other neural circuits (Dehaene, 2001).

In addition to studies of fMRI (functional magnetic resonance imaging) and injuries (Varley et al., 2005), electrophysiology studies conducted on monkeys showed preferential activation of the emergence of numerical stimuli of neurons in the prefrontal cortex, the ICC and SIP (Nieder & Miller, 2004). Unlike the system of representation, the exact representation is ill-defined. Except for a few neuroimaging studies that have shown the involvement of extrastriate cortex, the data are still inconclusive due turn, prevents the representation of objects is essential to the process of perception and prevents the development of control tasks required in fMRI, the target system must be inactive.

For the two systems of representation of the number two explanatory models were formulated: the battery for the system object model representations approximate and exact representations model files. Next we intend to present experimental evidence adduced in support of the two approaches, from studies in humans or infrahuman.

3. The research and results

In the experiment, investigate numerical skills development focused on highlighting the resilience to interference in verbal output tasks for sets of small objects. The specific objectives were:

1) to test model predictions object files that the number is not relevant stimuli when non-numeric variables interfere in its acquisition of explicit knowledge about verbal numeral system; Unlike previous studies performed on infants will assess verbal output in numerical tasks skillful correspondence and ordering;

2) construction of correspondence and ordering tasks, the application of the two concepts to be evaluated in terms of interference number / length

3) highlighting changes with age in the strategies and how they allow resistance to interference number / length;

4) highlighting the relationship between performance on tasks of correspondence or ordering, and the ability to provide answers cardinal.

The experiment was designed to highlight the extent to which the relevant number is a dimension pre-school children conditions that interfere with the perceptual dimensions such as the length of the row of objects. To test this prediction model was chosen task object files of correspondence and ordering two sets of objects. Based on data demonstrating the failure of children 3 years of correspondence tasks (Houde, 1997) and the success of the same age group in tasks ordinal (Brannon & Van de Walle, 2001), it was inferred that probably reduce interference number / length tasks correlation occurs at a higher age. Thus, interference number / length will affect greater performance than children 3 years of the 5 years due to reduced ability to inhibit irrelevant perceptual schemas, and will affect a greater burden than the correlation of ordering.

The experiment aims to test the following hypotheses:

1) the number of correct choices of subjects for 5 years is influenced by age and type of task;

2) the number of correct choices for ordinal skills is significantly higher than for the mapping;

3) the number of correct choices is significantly higher than the age of 5 years to 3 years.

Also for pregnancy How many? a task assessing numeracy ability to respond cardinal, following predictions were made in order correlations:

1) ability to provide answers cardinal is a predictor for success in the task of ordering;

2) the ability to provide answers cardinal is a predictor of performance in the task of mapping.

Investigation revealed indices of central tendency obtaining differences both between the ages of 3 and 5 and between the two tasks, correspondence and ordering. Thus, the burden of ordering 3 years M = 2.68 (SD = 99) is greater than the correlation of the load F = 2.36 (SD = 1.22), while at the age of 5 years is distinguished same pattern of results, the

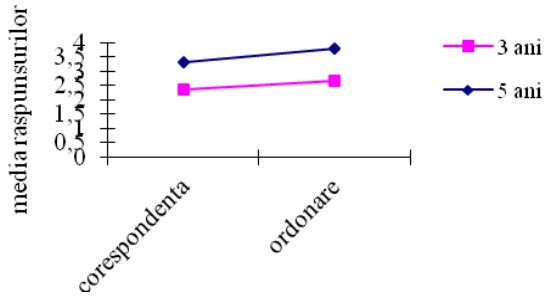
performance of the task of ordering M = 3.80 (SD = 40) are superior to task correspondence M = 3.32 (SD = 74).

Distributions of the age of 3 are symmetrical, but its proximity distributions environments maximum 4 to 5 years old za share index was calculated skew (each distribution is under 30 subjects). For ordering load distribution z = 1.32, where z <2.68 ns, while the task of correspondence z = 3.45, where z> 2.68, which means a negative asymmetric distribution.

In order to establish the relationship between the type of task and verbal numerical skills measured by How many numeracy task, the Pearson correlation coefficient was calculated to yield significant correlations between correlation and numeracy average r = 0.42, p <.01, respectively between ordering and numeracy, r = 0.47, p <.01. Removal of subjects who failed to provide even a correct answer in numeracy task (sample 8 children 5 years), amended such correlation coefficients, r = 0.47, p <.05 for correspondence relationship, numeracy and r = 0.31, p <.05 for relationship-numeracy ordering.

To verify the hypothesis, we chose repeated measures ANOVA because they fulfilled all criteria stated in the previous experiment, including the value Mauchly's W test, statistically insignificant. We have shown the following results: for the interaction effect F (1, 24) = 28, p> .10, ns, a significant effect of age variable F (1, 24) = 26.60, p <.001, and and a significant effect of task type variable F (1, 24) = 6.90, p <.01 (Fig. 4), which confirms the assumptions made for the main effects of age variable.

Fig.1 Media correct answers are higher than age 5 to 3 years, but significantly higher than in the task of sorting mail



Based on the significant effects of the two variables, comparisons were performed Bonferroni post-hoc type. Results showed a significant effect of age, children 5 years with 3 years of superior performance, Bonferroni t = 5.14, p <.001, while ordering task performance are significantly better than those in the correspondence Boferroni t = 2.63, p <.01.

Statistical analyzes also revealed in terms of age, that between the ages of 3 to 4 years, no significant differences between the means of the two groups in charge of correspondence t (24) = 1.24, p> .10, ns (M = 2.68, SD = 1,18 to 4 years), but significant differences in pregnancy ordering t (24) = 3.46, p <.001 (M = 3.36, SD = 0.63 4 years).

4. Conclusion

In a first analysis of data necessary following conclusions: 1) for both types of tasks is highlighted standard deviations higher in group 3 years, this high variability in performance indicating heterogeneity of responses at this age, and 2) reducing this variability in 5 years old, it becomes apparent convergence towards systematic response patterns. In addition, the strong negative asymmetry in pregnancy ordering supports the assumption that with numerical skills development, access to knowledge facilitates performance even in tasks where there is perceptual interference.

These conclusions are reinforced by inferential statistics, confirming on the one hand improve the ability to cope with non-numeric interference with age, and on the other hand maintaining a dichotomy between the performance of the task of ordering, which are superior to task correlation.

For the first observation, a possible explanation is offered even object model files, which claims that the number is not an obvious characteristic especially when there are perceptual correlate of type string length interfering with the latter, and the experimental data confirms the results of Huntley -Fenner & Cannon (2000) and Van de Walle & Brannon (2002) and the Clearfield & Mix (1999), Feigenson, Carey & Spelke (2002) on children under one year. Unlike the results of Huntley-Fenner & Cannon (2000) and Van de Walle & Brannon (2002), correlations between ordering and numeracy remain significant even after excluding cases of children who have not even given a correct answer, but the average value of the correlation coefficient, might suggest that susceptibility to interference under ordinal relations number / length is only partially dependent on the ability to deliver a cardinal. By contrast, if the load correlation, the correlation coefficient while remaining average is higher under exclusion of subjects who did not meet the minimum criteria of at least one correct answer in numeracy task. This would indicate, at least for this task relevance numeracy skills for performance.

These data are the first source of explanation of the differences in performance between the two tasks. A second source is the type of strategies that children use to solve the task, ie the extent to which they rely on a numerical strategy. Unlike previous studies that only have inferred the possibility of using different strategies (Sophianos, 1997; Brannon & Van de Walle, 2001), in the present study were followed children's answers on how they solved the task or prosecution gestures and mimic accompanying their answers.

Their responses were classified into two categories: 1) answers that reflect the use of digital strategies, and 2) answers that reflect the use of a non-numerical strategies. The first category of answers that

were part of the child demonstrate the ability to use explanations like "3 is greater than 2" or more index string with Mickey, saying "there are more" (for the task of ordering) or "are all 3" and "are as many Mickey" (for load correlation). Also, children who were unable to provide metacognition observed nonverbal behavior, gestures or vocalizations or delivery in a low voice of numerals. This category of respondents were part especially children 5 years in some cases even recorded spontaneous reactions to explain the answer.

In the second category of responses were included explanations like "here are the pairs Mickey" (task correlation) or "here is a matchless Mickey", which reflect the use of the strategy set by the experimenter. In addition, children were considered pointing gestures using a strategy similar to that presented by the experimenter. The inclusion of responses in one of two categories based strategy type detected by comparing with the ability to respond correctly in numeracy task. We assumed that children who have not given an explanation for their answer nor proved numeracy skills, perhaps never implemented such a strategy. Accordingly, strategies have been quantified at least one REPLIES correctly. With the exception of three children of 3 years which gave wrong answers to all tests, both in charge of ordering and in the correspondence, all children have managed at least one correct answer.

If most answers correct to 3 years non-numerical strategy reflects a 82% (36 of 44 responses) at age 4 strategies numerical percentage increase from 18% to 46% at 4 years of age (23 responses from 50) and at 78% at 5 years (39 of 50) (Fig. 2). In addition, constant numerical strategies are adopted more frequently than the tasks of mail ordering, 14% vs. 23% (3 and 5 Responses) of 3 years (Fig. 3), 48% vs. 60% (12 and 15 replies) to 4 years (Fig. 4) and 64% vs. 92% (16 and 23 response) at 5 years.

Fig 2. Percentage of numerical and non-numerical strategies used compared to the three ages.

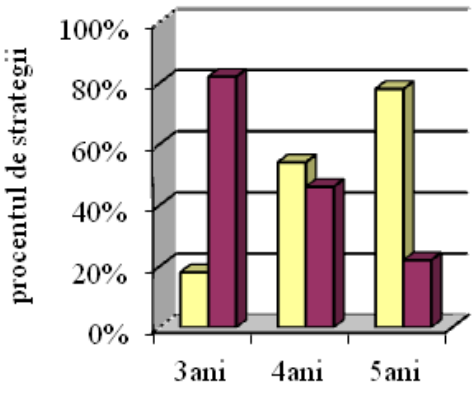


Fig.3. Percentage of non-numerical strategy is superior to 3 years of numerical correlation in both tasks and ordering.

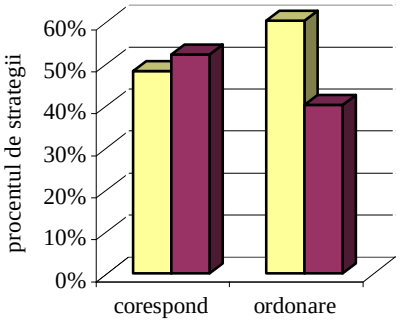
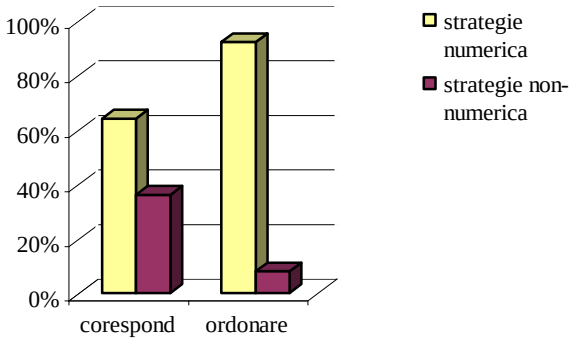


Fig.4. The percentage of non-numerical strategy is prevalent in charge of correspondence, but the numbers are prevalent in charge of ordering the age of 4 years.



Together these results lead to the conclusion that performance in these tasks is the first result numeracy skills, but the most relevant aspect is given the ability to implement this knowledge as a strategy for solving the tasks of correspondence and ordering (Sophianos, 1997 Brannon & Van de Walle, 2001). Once the numerical strategies are applied by default and the ability to solve tasks of interference increases. It is therefore obvious that the age of 4 years knowledge of numeracy begin to be implemented as a strategy and consequently improves performance in these tasks. Unlike children 4 years, 3 years that the knowledge about verbal numeral system, fail to transfer in solving non-numerical worded, these results are strengthened by previous research (Houde, 1997; Huntley- Fenner & Cannon, 2000), but not by Brannon & Van de Walle (2001). Possible differences between the data presented above and those obtained by the two authors, could be even opted for the method in this experiment. Thus, unlike the study by Van de Walle & Brannon (2001), who investigated the interference resistance to surface / number of children 2-3 years in terms of a learning phase, this experiment aimed to evaluate the knowledge that children have already and how they are able to use them in practical situations.

In conclusion, with language development, children are able to transfer this knowledge to the tasks of correspondence and ordering while the number is not an obvious stimulus. The numerical

implementation of a strategy to support resilience inteferenţa number / length, which thus can be countered. Based on the importance of knowledge for verbal numeration system performance tasks and interference due to obvious changes seem to occur around the age of 4 years in terms of implementing this knowledge, we aimed to investigate the model proposed by Alibi & DiRusso (1999) strategies that children of this age they use numeracy.

The purpose of this research was to investigate how numerical representation in the context of language acquisition in preschool children, and the relationship between the number and type of the strategic skills implemented.

The experiment indicated that children's performances are influenced by changes continue properties, namely the interference number / length. These results confirms the predictions of the model object files, as well as previous research (Houde, 1997; Huntley-Fenner & Cannon, 2000; Brannon & Van de Walle, 2001). Furthermore, the performance is influenced by the type of load. Ordering seems to be easier for children than correspondence, probably for two reasons: first, the wording of ordering task in terms of "gain" is working scheme that facilitates identification of the correct answer even in interference (Sophianos, 1997), and Second, the task of the correlation, which requires the identification of equivalence relations is more difficult to apply. The latter involved a comparison interitemi strategies that would require more sophisticated numerical knowledge, but is not yet sufficiently clear whether such a strategy could be applied to tasks of ordering. Another aspect is given by the relationship between the two tasks and numeracy skills, although not fully confirms previous results (Brannon & Van de Walle, 2001), they suggest a correlation between the average performance experiments and numeracy tasks, indicating that between numerical knowledge and skills children there is a deterministic relationship.

However, the relevance of knowledge about numeracy strategies is evident that children utlizează. With 5 years of age, subjects explanations focuses mainly on numerical relationships (eg "there are more, because 4 is greater than 3" for ordering, "here are 3 and here are all" for correspondence) and less than those that involve the application load in the way that was done by the experimenter.

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THE EUROPEANIZATION OF THE NATIONAL POLITICAL PARTIES THROUGH THE GENDER COMPONENT. CASE-STUDY: THE DEMOCRATIC LIBERAL PARTY IN ROMANIA'S 2014 EUROPEAN ELECTIONS

Ioana Antoaneta DODI[*]

Abstract

The aim of this paper is to analyse if the national political parties experience an Europeanization process through the harmonization of their principles and practice with the ones of the European political groups they are part of. In this regard, I shall use the gender dimension as an Europeanization factor. I choose the Democratic Liberal Party as a case study because it is the biggest right party in Romania, because it is affiliated to the Group of the European People's Party (the biggest political group in the European Parliament) and because of the ideological premises that a right party would be reluctant to change and to the increase of women's political participation. An interesting aspect is also the merge of the DLP with the National Liberal Party just after the closing of the 2014 European elections. The analytical approach will be focused on if and how the Democratic Liberal Party's political behaviour regarding women's access to political participation changes when it interacts with the Group of the European People's Party. More precisely, I shall correlate the ideological position of the Democratic Liberal Party, its political behaviour when it comes to elections at the national level, on one hand, and European elections, on the other hand. The main elements of the case study will be the gender dimension of the selection process for the party's candidates for the elections and of the professionalization of the proposed candidates. The theoretical framework of the paper is represented by political representation theories and the ones regarding the Europeanization of political parties.

Keywords: *Europeanization, political parties, gender equality, political representation, women's political participation, elections*

1. Introduction

The research area of the proposed study is the political science one, so this will be the lens through which I will analyse the Europeanization level in political parties' electoral behaviour with respect to women's nomination as candidates for electoral processes.

The importance of the proposed study resides in the fact that it creates the possibility of measuring the Europeanization phenomenon upon Romanian political parties. This can only be made throughout the comparison of the results of the two analysis of the changes that the European political family induces in the electoral practice of the national political parties, especially since "the impact of Europeanization is typically incremental, irregular and uneven over time and between locations, national and subnational" and since there is no study that regards the DLP-EPP interaction, this paper comes to fill in the void of the analysis of the biggest Christian Democratic Party in Romania, making it possible to make a parallel to the analysis of the biggest Social-Democratic Party[1].

The objectives of this paper are to observe if the European political family of the Democratic-Liberal Party (DLP), the European People's Party (EPP), produces effects upon its national component in terms of promoting gender equality.

The methodology I shall use in this purpose is based on comparing the political behaviour of the DLP in national and European elections, in order to see if the supranational influence is visible only in the supranational context or it becomes internalized even in the absence of supranational elements. I shall use the analysis structure in *The Europeanization of the national political parties through the gender component. Case-study: The Social Democratic Party in Romania's 2014 European elections* article because it is important to have the same parts in order to better highlight resemblances and differences between the Europeanization degree upon the highest scored left and right parties in Romania.

The theoretical framework I use in this paper is a mixture of studies in the fields of Europeanization, women's political representation and political science.

This analysis will be a novelty for the domain because on one side, the scientific literature deals with the topic of Europeanization of political parties leaving aside the gender perspective and on the other, because it takes into consideration mainly the situation from parties belonging to Western member states.

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[1] Ioana Antoaneta Dodi, *The Europeanization of the national political parties through the gender component. Case-study: The Social Democratic Party in Romania's 2014 European elections*, submitted for evaluation at the "Challenges of the Knowledge Society" 2015 Conference

2. Europeanization of national political parties. Case-study: DLP in Romania

Harmsen and Wilson give a wide set of definitions of Europeanization, outlining it as: 1) "the emergence of new forms of European governance", 2) "adaptation of national institutional structures and policymaking processes in response to the development of European integration", 3) "policy isomorphism (…) concerned with the degree of convergence in substantive policy areas", 4) "problem and opportunity for domestic political management", 5) "modernization, taken to imply a series of structural transformations intended to bring these countries back into the European mainstream, defined with reference to the economic and political models which prevail in the more prosperous and influential 'core' countries", 6) "joining Europe (…) in the context of EU enlargement", 7) "reconstruction of identities (…) in a manner which relativizes -without necessarily supplanting- national identities" and 8) "transnationalism and cultural integration" between citizens in everyday life[2]. In this paper I shall operationalize the Europeanization concept through some of the mentioned perspectives, more accurately, the first, the second, the fourth, the fifth and the seventh, given that the process that is subject of this analysis is the compliance of the political parties to the European inputs that they receive in terms of gender balanced participation.

Europeanization is seen as "a conceptual tool and of gauging patterns of domestic change"[3], as "a process of structural changes, variously affecting actors and institutions, ideas and interests"[4]. These dimensions of Europeanization set the framework for comparing the DLP's political behaviour in national and European elections, thus distinguishing any change between the two contexts.

Europeanization is conceptualized "as a basis of separation for social, cultural and religious identities and interests within the broad geographical area"[5], so the evolution of the gender component on the European party scene might lead to a shift of interests and identities from the national level to the European one, thus applying a pressure upon national parties to comply to the European practice in order to continue to attract the citizens' votes.

Given the fact that "the term Europeanization has been employed to describe new patterns of behaviour and decision making among political actors and institutions resulting from the impact of European integration"[6] and "the adjustment evident in the institutional setting - incorporating the norms, rules, identities and interests of actors within a structured set of relationships - at the level of member states, consequent on EU obligations"[7], we can measure the grade of Europeanization regarding the political parties' institution in Romania by analysing a) the way that the national political parties apply the same type of rules as their European political families in European level, but ignore them at the national level and b) if they act in accordance with their political ideology in the particular case of assuring an equitable gender representation among their candidates.

The European People's Party is the biggest group in the European Parliament, having 221 members of the European Parliament (MEPs), representing 29,43% of the seats. It is positioned on the right side of the classical ideological axis. This also influences the party's choice when nominating its candidates: Christian-democracy has a "limited emancipatory potential for women, due to strong preference for community values, patriarchal and traditional"[8].

When searching for elements that refer to the gender component in the EPP manifesto, the results are as expected from the previous paragraph: women are by no means mentioned[9]. There is no reference to any element referring neither to enhancing women's political participation nor to fighting physical, social and economic forms of violence against them.

In the EPP's Action Programme, equality between women and men is mentioned among the general principles such as "the separation of powers, democracy and the rule of law" and traditional terms as "family"[10]. Other references are made mainly in economical contexts of unused labour resource: "We aim to increase the employment of women, not only to give practical expression to the value we place on promoting equality between women and men, but also to contribute to general economic and social development", "we encourage the implementation of proactive measures that specifically target the full inclusion of young women into the labour market"[11].

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[2] Robert Harmsen, Thomas M. Wilson, *Approaches to Europeanization* in Robert Harmsen, Thomas M. Wilson, *Europeanization: Institution, Identities and Citizenship*, (Netherlands: Rodopi, 2000), p. 14-18

[3] Kevin Featherstone & George Kazamias *Introduction: Southern Europe and the Process of 'Europeanization'*, South European Society and Politics, 5:2, 1-24, DOI: 10.1080/13608740508539600, (2000), , p. 3

[4] Kevin Featherstone, *Introduction: In the Name of 'Europe*', in Kevin Featherstone and Claudio Radaelli, *The Politics of Europeanization*, (Oxford: Oxford University Press, 2003), p. 3

[5] Kevin Featherstone & George Kazamias *Introduction: Southern Europe and the Process of 'Europeanization'*, South European Society and Politics, 5:2, 1-24, DOI: 10.1080/13608740508539600, (2000), p. 3-4

[6] Thomas Poguntke; Nicholas Aylott; Robert Ladrech; Richard Kurt Luther, *The Europeanization of national party organizations. A conceptual analysis*, European Journal of Political Research, vol. 46, (2007), p. 748

[7] Kevin Featherstone & George Kazamias *Introduction: Southern Europe and the Process of 'Europeanization'*, South European Society and Politics, 5:2, 1-24, DOI: 10.1080/13608740508539600, (2000),, p. 6

[8] Alice Iancu, *Crestin-democratia* in Mihaela Miroiu, *Ideologii politice actuale* (Iasi: Polirom, 2012), p. 144

[9] European People's Party, EPP Manifesto, http://juncker.epp.eu/epp-manifesto?lang=en

[10] EPP Action programme, 2014, http://www.epp.eu/epp-action-programme-2014-2019, p. 3

[11] EPP Action programme, 2014, http://www.epp.eu/epp-action-programme-2014-2019, p. 9

Women's political participation remains a problem with no answers or instruments ment to solve it ("another important question that needs to be asked is how best to increase the number of women participating in the labour force and in decision-making positions") and gender violence is hardly present (in matters of human trafficking).

The EPP's internal organization includes EPP Women's official association that is dedicated to the "promotion of important women-related issues such as gender equality in the labour market and female entrepreneurship"[12]. As we can see, the economic stimulus for seeking gender equality is still present. What is new is the assumption that women can be engaged in externalizing policies outside the European space ("our focus also goes to the role of women in promoting liberty, justice, human rights and democracy not only in Europe, but also in regions experiencing tremendous change, such as the Middle East and North Africa"), a problematic though non surprizing element taking into consideration that right and centre-right parties have the tendency of expanding their experience and practice towards what they consider as in need for them.

On the other hand, the EPP involves in the EU's policy making and the gender component is present, given the fact that the 4 priorities that the EPP group follows are "women as a motor of an inclusive European economy", "equal representation of women and men", "ending all violence against women" and "defending gender equality in the world"[13].

The European elections in 2014 were a good moment for the parties to democratize their candidate selection process, given the fact that, for the first time in its history, the results of the European Parliament scrutiny would also influence the formation of the European Commission. The Lisbon Treaty provides that the European Parliament group that would win the European elections would also nominate the candidate for the presidency of the European Commission[14]. A very important aspect of this procedure is that the groups could announce their candidate for the Commission before the elections, thus using this element in their campaign. Hence, the candidates that each party would propose had to reflect as much as possible the party's vision and values in order to attract as many votes as possible, votes that indirectly would also back up the proposed President of the European Commission.

Thus, the DLP's candidate selection is very important for the analysis of the level of Europeanization of the political party practice. Hence, I shall compare it in the two defining situations: the national and the European elections. This way, we can observe if there is any change in the last one, when there is a pressure of the European group the DLP belongs to, the EPP or if the DLP has internalised gender balance aspects from the European level.

Romania's electoral law for the European Parliament is a list based model[15], so it is also important the positions of the candidate on the party's proposal because even if it might comprise a balanced number of women and men, their hierarchy may favour or not a certain part for being elected given the fact that only the first part of the list will obtain seats after the percentage calculations.

In this respect, the DLP's approximate threshold can be obtained by analysing the data from the National Institute of Statistics and the Romanian Central Electoral Office concerning the DLP's scores in the last 4 elections:

Thereby, the DLP's scores are: 7,50% in 2000: 7,03% for the Chamber of Deputies and 7,57% for the Senate), 31,50% in 2004 (in the Justice and Truth Alliance, together with the National Liberal Party): 31,32% for the Chamber of Deputies and 31,77% for the Senate, 32,96% in 2008: 32,36% for the Chamber of Deputies and 33,57% for the Senate and 16,6% in 2012 (in The Just Romania Alliance, together with the National Peasant Christian-Democratic Party and the Civic Force): 16,50% for the Chamber of Deputies and 16,70% for the Senate. The average is thus 22,14%, allowing a significant part of its candidates to qualify for the membership.

The comparative analysis takes into consideration the European elections that have been organised in Romania since its accession to the European Union[16] and the national elections[17] respectively.

At the 2004 national elections, the DLP proposed 50 candidates, from whom 11 were women (22%) and 39 men (78%). The differences between the Chamber of Deputies[18] (9 women and 26 men of a total of 35) and the Senate[19] list (2 women and 10 men of a total of 15) were significant, but both low: 26% women in the first and 13% in the second.

In the same way, at the 2007 European elections[20], the DLP proposed 44 candidates, from whom 11 were women (25%) and 33 men (75%). As

[12] EPP Women Association, http://www.epp-women.org/about-epp-women/about-epp-women/
[13] EPP group topic on Gender Equality, http://www.eppgroup.eu/topic/Gender-equality
[14] Article 9A of the Lisbon Treaty, Official Journal of the European Union, C306/2007, p. 17
[15] Permanent Electoral Authority, *Law no. 33 of 16 January 2007 Republished on the organization of European Parliament elections*
[16] European elections held in 2007, 2009, 2014.
[17] National elections held in 2004, 2008, 2012.
[18] Candidate list of the DLP for the 2004 parliamentary elections for the Chamber of Deputies of Romania, http://www4.pmb.ro/wwwt/wwwcs/electorale/DEPUTATI.htm
[19] Candidate list of the DLP for the 2004 parliamentary elections for the Senate of Romania, http://www4.pmb.ro/ wwwt/wwwcs/electorale/SENAT.htm
[20] Candidates list for the European Elections, 2007, http://www.alegeri.tv/europarlamentare-2007/partidul-democrat-pd

said before, the configuration on the list is also important, resulting in favouring women in the national elections with 35% over the eligible threshold and also in the European elections with 40% women in 4 out of the 10 eligible positions. Therefore, the list is closer to a gender balanced one in the European context, but also in the national one.

At the 2008 national elections[21], the DLP proposed 452 candidates, from whom 58 were women (13%) and 394 men (87%). The differences between the Chamber of Deputies (49 women and 266 men of a total of 315) and the Senate (9 women and 128 men of a total of 137) were not significant, given the fact that they were both very low: 16% women in the first and 7% in the second.

By contrast, at the 2009 European elections[22], the DLP proposed 43 candidates, from whom 10 were women (23%) and 33 men (77%). As said before, the configuration on the list or in eligible constituencies is also important, favouring them in the European elections with 20% in the eligible positions. The gender balance is higher in the European elections, with a difference of about 5%, but low percentage for both situations.

At the 2012 national elections[23], the DLP proposed 452 candidates, from whom 47 were women (10%) and 405 men (90%). The differences between the Chamber of Deputies (42 women and 273 men of a total of 315) and the Senate (5 women and 132 men of a total of 137) were not significant: 13% women in the first and 4% in the second, both being situated extremely low.

By contrast, at the 2014 European elections[24], the DLP proposed 42 candidates, from whom 10 were women (23%) and 32 men (76%). As said before, the configuration on the list or in eligible constituencies is also important, not favouring them in the European elections with only one woman, so 0,11% in the 9 eligible positions.

Thereby, the closest the DLP got to a gender balanced candidate proposal was in the 2004 and 2007 national and European elections, with a 35% to 40% eligible candidates. The next elections show a decrease instead of a consolidation of this practice, but this may actually be the non-contested tradition, the 2004/2007 situation being in fact an exception determined by the fact that Romania was in the pre-accession period and the party had to construct a certain image for the European political family on one hand and for the voters that were enthusiastic with the idea of participating at the first elections after the accession. The 2014 European elections candidate selection process ranks as the worst for women, while confirming though the practice observed at the 2012 national process.

Moreover, the DLP's affiliation is a Christian-Democratic one that is more reluctant to implementing affirmative measures which favourite women in the electoral process, so this element also works in that direction.

An important element for this analysis is the DLP's co-optation of the National Liberal Party (NLP) in the European People's Party immediately after the May 2014 elections. Afterwards, the DLP merged with the NLP, but it still brings together a core group of politicians that will probably exercise their influence within the leadership of the new NLP, thus continuing the political practice of the gone DLP.

3. Conclusions

This article meant to offer a new approach, blending electoral studies with ones regarding the Europeanization process and gender mainstreaming.

The results have shown that the influence of the European political family does not produce effects on the national party. Although Winn and Harris affirm that "changing policy choices, path-dependence, policy behaviours and national discourses have changed considerably with increased 'Europeanisation' since 1990"[25], this does not uniformly apply to all components, given the fact that there are other factors that maintain the resistance, as the ideology or the magnitude of the differences between the status quo and the ideal aim.

In conclusion, the DLP tended to comply with the European norm during the pre-accession period and at the European elections in the first year of membership. They still hold eligible women candidates under the threshold of 30% that women's political representation theories mark as necessary for coagulating a group that can overcome the patriarchal power relations in the legislative. Therefore, the gender component does not represent a benchmark of Europeanization for the Democratic-Liberal Party in Romania, all though it remains in a shared gap with the European People's Party and other political organizations that share the Christian-Democratic ideology.

The study's results can have an impact on the members of the political parties in Romania, which can take a decision regarding their future electoral strategies taking into consideration or not the European more or less targeted recommendations regarding women's participation in political activities.

[21] Central Electoral Office, Candidates for the Chamber of Deputies and the Senate of the Parliament according to the political parties and gender, http://www.becparlamentare2008.ro/statis/Defalcare%20candidati%20pe%20partide%20si%20sexe.pdf

[22] Candidates list for the European Elections, 2009, http://www.alegeri.tv/alegeri-europarlamentare-2009/partidul-democrat-liberal-pdl

[23] Central Electoral Office, Candidates for the Chamber of Deputies and the Senate of the Parliament http://www.becparlamentare 2012.ro/statistici%20rezultate%20finale.html

[24] Candidates list for the European Elections, 2014, http://www.europeanvoice.com/election-2014-candidates/

[25] Neil Winn and Erika Harris, *Introduction: 'Europeanisation': conceptual and empirical considerations*, Perspectives on European Politics and Society, 4:1, 1-11, DOI: 10.1080/15705850308438850, 2003, p. 7

Future research can either relate to other elements of Europeanization or continue to focus on the gender perspective of parties' way of doing politics at both national and European levels.

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- EPP group topic on Gender Equality, http://www.eppgroup.eu/topic/Gender-equality

THE EUROPEANIZATION OF THE NATIONAL POLITICAL PARTIES THROUGH THE GENDER COMPONENT. CASE-STUDY: THE SOCIAL DEMOCRATIC PARTY IN ROMANIA'S 2014 EUROPEAN ELECTIONS

Ioana Antoaneta DODI[*]

Abstract

The aim of this paper is to analyse if the national political parties experience an Europeanization process through the harmonization of their principles and practice with the ones of the European political groups they are part of. In this regard, I shall use the gender dimension as an Europeanization factor. I choose the Social Democratic Party as a case study because it is the biggest left party in Romania, because it is affiliated to the Group of the Progressive Alliance of Socialists & Democrats (the second biggest political group in the European Parliament) Parliament and because of the ideological premises that a left party would encourage the increase of women's political participation. The analytical approach will be focused on if and how the Social-Democratic Party's political behaviour regarding women's access to political participation changes when it interacts with the Group of the Progressive Alliance of Socialists & Democrats. More precisely, I shall correlate the ideological position of the Social-Democratic Party, its political behaviour when it comes to elections at the national level, on one hand, and European elections, on the other hand. The main elements of the case study will be the gender dimension of the selection process for the party's candidates for the elections and of the professionalization of the proposed candidates. The theoretical framework of the paper is represented by political representation theories and the ones regarding the Europeanization of political parties.

Keywords: *Europeanization, political parties, gender equality, political representation, women's political participation, elections.*

1. Introduction

The present paper covers a research area of political science, proposing an interdisciplinary analysis based on gender studies, electoral studies and the ones regarding Europeanization.

This study is important because it brings into the spotlight the political behaviour of the main political party in Romania, the Social Democratic Party, correlating it with the party's ideological benchmarks and the influence received by part of its European political family, the Party of European Socialists.

The hypothesis of this paper is that the gender component of the European political families' ideology contributes to the Europeanization of the national political parties in the member states of the European Union.

The methodology consists in document and data analysis. In order to test the hypothesis, I shall examine the relation between: a) the party's ideological attitude towards the gender dimension (that officially should be that of the social democracy), b) the party's affiliation to the European party family (the Group of the Progressive Alliance of Socialists & Democrats in the European Parliament).

This paper is divided into two main parts, a theoretical one, where I explain the concepts that I use in the paper, and a practical one, the case-study of the SDP-S&D. The latter is a gender comparative analysis of the S&D and SDP attitudes regarding the European elections and is also made up of two sections: the first one is based on the positions of the European political platform, the S&D, while the second one focuses on the practice of the national political platform, the SDP, consisting of a comparative analysis of the party's political behaviour regarding the correlation of the gender criteria with the eligible seats of the party list in two kinds of situations: a) when there has not been any external pressure (the national elections) and b) when there has been an external pressure (the European elections).

The theoretical framework of the paper is represented by the theories of Europeanization and of women's political representation. I shall also use elements of the social-democracy ideology in order to establish its role in promoting the equal representation of women in politics among the political parties.

This is an interdisciplinary approach between Europeanization studies and gender studies and also a new model of analysis for countries in Eastern Europe, since there is no other, especially regarding one the EU's most recent participants to the European elections: Romania (at its third European poll).

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2. Europeanization of national political parties. Case-study: SDP in Romania

Europeanization "cuts across the domestic and EU levels of politics, though its usage is intended to stress the interdependence of forces between the two"[1], marking a two-way relationship between the national and supranational level, that can result in top-down or bottom-up influence or even in a *sui generis* situation.

On the other hand, according to Töller, "changes in national policies due to specific, positive Community policies, mostly in form of a directive or a regulation, seem to be the most frequent cases of Europeanization"[2], while not the only one, since there is also the learning instrument, "which is not triggered by any policy measure that has been passed and that produces any duty to comply and adapt. Rather we can see that perceptions and persuasions were incrementally changed by way of learning, due to a policy discourse, in which the European Commission played a major role."[3] Featherstone and Kazamias also agree that "Europeanization via the structures of the EU entails more than a passive response to external pressures: the domestic and EU institutional settings are intermeshed, with actors engaged in both vertical and horizontal networks and institutional linkages"[4]. I support the two last perspectives, of a step by step change that can be caused by a non-coercive stimulus resulting from the interaction between the two levels and it will be used in this paper.

The Europeanization of political parties is important within the framework of the representative democracy discourse because it is presumed to reflect attitudes and practices not only of some institutional organizations, but of the citizens involved in the electoral process that the political parties organize.

While it may seem that "a certain level of Europeanization is inevitable given the need to compete in European Parliament (EP) elections"[5], this paper's aim is to discover to what degree this Europeanization affects the political practices outside contexts that are not supranational, such as the national parliamentary elections.

Given the fact that "the term Europeanization has been employed to describe new patterns of behaviour and decision making among political actors and institutions resulting from the impact of European integration"[6], we can measure the grade of Europeanization regarding the political parties' institutionalization of the gender dimension in Romania by analysing a) the way that the national political parties apply the same type of rules as their European political families at European level, but ignore them at the national level and b) if they act in accordance with their political ideology in the particular case of assuring an equitable gender representation among their candidates.

The SDP's candidate selection is very significant for the analysis of the level of Europeanization of the political party practice because it may highlight practice differences between the national parties and the European established norm. The later can be generated by the political group and other European bodies[7] and it can be both formal and informal, because even if there is no adopted quota regarding women's participation in the European Parliament, there are official documents that include this aspect and point out the necessity of equal participation. An example would be the proposal of a threshold of 40% for women members of the European Parliament in the Duff Report[8] or the recommendations of the European Institute for Gender Equality[9]. Moreover, in its Strategy for equality between women and men, the European Commission assumes responsibility for "supporting efforts to promote greater participation by women in European Parliament elections including as candidates"[10].

The Group of the Progressive Alliance of Socialists & Democrats in the European Parliament (S&D) is the second biggest political family of the European Parliament, with 191 members of the European Parliament (MEPs), that make up 25,43% of the 751 seats.

It represents the Party of European Socialists (PES) and is positioned on the left side of the classical ideological axis, both SDP and PES sharing a Social

[1] Kevin Featherstone & George Kazamias *Introduction: Southern Europe and the Process of 'Europeanization'*, South European Society and Politics, 5:2, 1-24, DOI: 10.1080/13608740508539600, (2000), p. 5

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[6] Thomas Poguntke; Nicholas Aylott; Robert Ladrech; Richard Kurt Luther, *The Europeanization of national party organizations. A conceptual analysis*, European Journal of Political Research, vol. 46, (2007), p. 748

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democratic ideology. This should produce effects on both the European group and the national party in terms of promoting gender equality, given the fact that a characteristic of Social democracy is the preoccupation for promoting equality between women and men and the focus on combating social inequalities seen as an interconnection of inequalities regarding economic aspects, power, status or freedoms[11].

As the EPP does not participate directly to the elections, I cannot take into consideration its electoral behaviour, but I shall use its discourse and actions in the domain of gender equality.

The gender dimension is an element of the S&D manifesto through its chapter: *A Union of equality and women's rights,* which tackles issues as the gender pay and pension gap, violence against women, reconciling professional and family life and promoting women's free choice and access to sexual and reproductive rights[12]. Also, the manifesto's introduction contains a call towards its citizens and it is illustrated by four women of different backgrounds, suggesting the need for encouraging women's participation to public life. Moreover, the PES's declaration of principles refers to promoting gender equality, "building on the achievements of the feminist movement"[13]. This is further translated into the PES Strategy for 2010-2014, as it stipulates that "gender inequalities are incompatible with our vision of a fair society" and that "our concrete objectives are to fight for a European Women's Rights Charter, the improvement of parental leave rights and child care, the promotion of women's reproductive rights and the eradication of human trafficking"[14].

Moreover, Martin Schulz's acceptance discourse at his nominating as candidate of the PES for the presidency of the European Commission before the 2014 European elections recognizes the gender bias in the European societies through remarks such as "women are hit hardest by the crisis", "we are closing the gender pay gap and more women are holding top jobs; because I want my daughter to have the same opportunities my son has" or "inequality between men and women is a scandal in Europe in the 21st century"[15].

Furthermore, after the 2014 elections, S&D launched its call for the future European Commission and one of the points of interest of the new commissioners was "strengthening efforts to combat discrimination on the grounds of gender, racial or ethnic origin, religion or belief, disability, age, sexual orientation, or identity", "closing the gender employment and pay gaps and combating all forms of violence against women"[16].

Likewise, S&D has contributions to a set of policies that comprise the gender component, such as backing the Maternity leave Directive, the Directive on Violence Against Women or supporting Spanish women in their protests for reproductive rights.

Furthermore, the PES develops three European campaigns: *Your future is my future - a European Youth Guarantee now![17]*, *Equal Pay, it's about Time![18], A Charter for European Women's rights[19]*, *Women and Pensions[20]*, *My Body, My Rights[21]* and *Financial Transaction Tax[22]*. The first one is gender mainstreamed through its component of *Gender dimension of youth unemployment[23]*, while the next four are entirely gender-focused, highlighting the activity of the PES Women organization within the party.

The S&D group is involved in organizing events that cover gendered issues as women's empowerment, sexual and reproductive rights or access to decision-making positions (*Women for Change, Change for Women[24]*, *All of us! Mobilizing for abortion rights[25]*, *Toward an EU directive on Violence against Women[26]*, *S&D Convention of Violence against Women[27]*,

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[11] Alice Iancu, *Social democratia*, in Mihaela Miroiu, *Ideologii politice actuale* (Iasi: Polirom, 2012), p. 101-102

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Prevention of Crime and Violence Against Women - Right to Life and Dignity[28], *Women on Boards*[29] etc).

Another important aspect is that the S&D is composed by 28 national delegations, led by a head of delegation, which are women in 15 cases, representing 53% of the total. Europeanization "is a process of power generation (…) among European institutions, the state and civil society"[30], but it can also be manifested within these structures, on their different levels, part of the multilevel governance functioning of the European Union.

The 2014 elections were a major opportunity for the political groups to shift their internal functioning towards an environment that resembled more and more one of a political party. These elections are the first to be held after the entry into force of the Lisbon Treaty that stipulates that the political group that wins the most seats in the European Parliament would also nominate the candidate for the European Commission[31]. Hence the importance of observing if the national component acts in accordance to its European family actions and directions.

In Romania, the scrutiny for the election of the members of the European Parliament is a list scrutiny, according to the principle of proportional representation, while persons who are not affiliated to political parties can run independently[32]. The national elections are organized in a single vote scrutiny since 2008[33]. Thus, for the comparison of eligible positioning I shall use the party threshold for all European elections and the 2004 national elections and the party eligible constituencies for the 2008 and 2012 national elections.

So, first of all, I need to set the eligibility threshold for the SDP's candidates on the electoral list proposed by the party. I shall take into consideration the data offered by the National Institute of Statistics and the Romanian Central Electoral Office.

It can be observed that the SDP's electoral scores have been: for the 2000 elections: the Chamber of Deputies – 155 seats, Senate – 65 seats; for the 2004 elections (in the National Alliance, together with the Romanian Humanist Party): the Chamber of Deputies – 132 seats, Senate – 57 seats ; for the 2008 elections (together with the Conservative Party): The Chamber of Deputies – 114 seats, Senate – 49 seats, for the 2012 elections (in the Social-Liberal Union, together with the National-Liberal Party and the Conservative Party): the Chamber of Deputies – 273 seats, Senate – 65 seats.

If we corroborate the number of seats obtained by the SDP and the total number of members of the Chamber of Deputies and the Senate, we see that the SDP's electoral score ranged around 47% in 2000: 47,40 % for the Chamber of Deputies and 46,42% for the Senate), 42% in 2004 (together with the Romanian Humanist Party): 42,03% for the Chamber of Deputies and 41,60% for the Senate, 35% in 2008 (together with the Conservative Party): 34,13% for the Chamber of Deputies and 35,76% for the Senate and 68% in 2012 (in the Social-Liberal Union, together with the National-Liberal Party and the Conservative Party): 66,26% for the Chamber of Deputies and 69,31% for the Senate.

Thus, the SDP had quite a high electoral score in 2014, around 48%, so the score obtained in the European elections would have allowed the elections of a satisfactory number of the candidates on the list for a position of social-democrat members of the European Parliament. Nonetheless, the SDP's electoral score has decreased from 2000 to 2008 and the 2012 result would have probably been around these same figures if the SDP wouldn't have made an alliance with the National-Liberal Party (NLP) and the Conservative Party (CP), forming the Social-Liberal Union. This is relevant especially since at the European elections, the SDP ran only besides the CP, separately from the NLP, expecting thus a slightly lower score.

The following comparative analysis will be based on the data of the last 3 national[34] and European[35] parliamentary elections in Romania.

At the 2004 national elections, the SDP proposed 50 candidates, from whom 20 were women (40%) and 30 men (60%). The differences between the Chamber of Deputies[36] (15 women and 20 men of a total of 35) and the Senate[37] list (5 women and 10 men of a total of 15) were significant: 43% women in the first and 33% in the second.

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[28] Group of the Progressive Alliance of Socialists & Democrats in the European Parliament, *Prevention of Crime and Violence Against Women - Right to Life and Dignity*, http://www.socialistsanddemocrats.eu/events/sd-group-conference-prevention-crime-and-violence-against-women-right-life-and-dignity

[29] Group of the Progressive Alliance of Socialists & Democrats in the European Parliament, *Women on Boards*, http://www.socialistsanddemocrats.eu/events/sd-conference-women-boards-wednesday-14-november-15h00-18h30-room-asp-3g-3-european

[30] Sabine Saurugger & Claudio M. Radaelli, *The Europeanization of Public Policies: Introduction*, Journal of Comparative Policy Analysis: Research and Practice, 10:3, 213-219, DOI: 10.1080/13876980802276847, (2008), p. 14

[31] Article 9A of the Lisbon Treaty, Official Journal of the European Union, C306/2007, p. 17

[32] Permanent Electoral Authority, *Law no. 33 of 16 January 2007 Republished on the organization of European Parliament elections*

[33] Permanent Electoral Authority, *Law no. 35 of 13 March 2008 for elections for the Chamber Deputies and the Senate*

[34] National elections held in 2004, 2008, 2012

[35] European elections held in 2007, 2009, 2014

[36] Candidate list of the SDP for the 2004 parliamentary elections for the Chamber of Deputies of Romania, http://www4.pmb.ro/wwwt/wwwcs/electorale/DEPUTATI.htm

[37] Candidate list of the SDP for the 2004 parliamentary elections for the Senate of Romania, http://www4.pmb.ro/wwwt/wwwcs/electorale/SENAT.htm

In the same way, at the 2007 European elections[38], the SDP proposed 45 candidates, from whom 16 were women (35%) and 29 men (65%). As said before, the configuration on the list is also important, resulting in favouring women in the national elections with 55% over the eligible threshold and also in the European elections with 38% women in eligible positions.

Therefore, there is no significant difference between the 2004 national elections and the 2007 European ones. This can be seen as an expected result, given the fact that 2004-2007 was a pre-accession period in which the SDP wanted to construct a European image both within Romania and the European Union.

At the 2008 national elections[39], the SDP proposed 452 candidates, from whom 58 were women (13%) and 394 men (87%). The differences between the Chamber of Deputies (49 women and 266 men of a total of 315) and the Senate (9 women and 128 men of a total of 137) were not significant, given the fact that they were both very low: 16% women in the first and 7% in the second.

By contrast, at the 2009 European elections[40], the SDP proposed 43 candidates, from whom 16 were women (37%) and 27 men (63%). As said before, the configuration on the list or in eligible constituencies is also important, favouring them in the European elections with 33% in the eligible positions.

Thus, this set of elections mark a bigger difference in terms of promoting a gender balanced candidate proposal.

At the 2012 national elections[41], the SDP proposed 452 candidates, from whom 47 were women (10%) and 405 men (90%). The differences between the Chamber of Deputies (37 women and 278 men of a total of 315) and the Senate (10 women and 127 men of a total of 137) were/not significant: 12% women in the first and 7% in the second.

By contrast, at the 2014 European elections[42], the SDP proposed 42 candidates, from whom 16 were women (38%) and 26 men (62%). As said before, the configuration on the list or in eligible constituencies is also important, favouring them in the European elections with 38% in the eligible positions.

Thereby, the SDP's electoral strategy was similar in both national and European elections in a Euro-optimistic period between 2004 and 2007. The differences were visible afterwards, since the SDP was preoccupied with building a gender balanced candidate proposal only in European elections, revealing a low degree of Europeanization for national contexts.

In conclusion, there is a significant difference between the behaviour of the SDP in the European contexts, when it complies to the European influence and in national elections, when there is a slightly lower degree of balancing the candidates in terms of gender equality.

3. Conclusions

I compared the political party's electoral behaviour in the two defining situations: the national and the European elections. The purpose was to observe if there is any change in the last one, when there is a pressure of the European group the SDP belongs to, the S&D. The results were clarifying with respect to the fact that the SDP has a moderate gender balanced candidate proposal for both national and European elections, but in the same time, the percentage grows when referring to the European contexts.

I think this analysis is needed in order to confront the political discourse and practice of the European political families with the ones of their national components for a better understanding of the level of Europeanization and implicitly, of the steps that further need to be taken in that respect.

Future research can focus on adding more variables to this model of analysis and identifying other factors that may influence the political conduct of national and supranational political entities.

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UNDERGRADUATE STUDENTS' ATTITUDES TOWARD FACEBOOK USE

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Abstract

Together the Internet and the Web have profoundly affected our life for the past decades. Today, we can use the Web for communication, education, business, entertainment and searching information. In recent years, the use of Facebook has become widespread worldwide, especially among young generations. The main aim of this paper is to investigate the attitudes of undergraduate students toward Facebook use. Research data were obtained by surveying the undergraduate students of the Department of Business Administration and the Department of Economics at a public university in Turkey. According to results of the study; the attitudes of those who don't use Facebook toward Facebook use are more negative than Facebook users. Some attitudes of female Facebook users toward Facebook use are more negative compared to male Facebook users.

Keywords: *Facebook, undergraduate students, attitudes.*

1. Introduction

Social networking sites (SNSs) play an important role in the communication and socialization of people in the Internet (Moore & McElroy, 2012). Web 1.0-based websites are the very first steps of the Internet with traditional features of the media allow its users to have unilateral communication. On the other hand, today's websites allow their users to share information and pictures, collaborate with each other, and create new services and applications, besides their static features (Laudon & Laudon, 2011: 272). According to Laudon and Laudon (2012: 272-273), Web 2.0 can be defined with four distinctive features as follows: Social participation, user-generated content, interaction with each other and real-time user control. Today, social media is one of the most popular applications of Web 2.0.

Today, there are many social networking sites like Facebook, Twitter and LinkedIn, which are used by millions of people to communicate with friends, family, and colleagues (Qi & Edgar-Nevill, 2011). Facebook is one of the most popular SNSs among all these sites with a user profile ranging from teenagers in their early ages to the elders (Taneja, Vitrano & Gengo, 2014). Facebook enables its users to create their own profiles, add some friends, post something either on their own profile pages or friends' pages, share pictures and files and expand their social circles in addition to giving them the opportunity of establishing virtual relationships in ways similar to the relationships established in the real world. These virtual relationships become part of virtual communities, which are created among Facebook users who share similar interests (Taneja, Vitrano & Gengo, 2014).

Facebook has become the most popular social networking site especially among college students (Cheung, Chiu & Lee, 2011). In the studies conducted, it has been determined that university students spend lots of time on Facebook (Ellison, Steinfield & Lampe, 2007, Milosevic-Dordevic & Zezelj, 2014; Pempek, Yermolayeva & Calvert, 2009).

Facebook use and the effects of Facebook on its users have been investigated in the previous studies. In these studies; Facebook and loneliness (Jin, 2013; Kross et al, 2013; Skues et al, 2012), Facebook and privacy (Bechmann, 2014; Dinev, Xu & Smith, 2009; Raynes-Goldie, 2010; Saeri et al, 2014; Stieger et al, 2012), the use of Facebook and personal characteristics of the users (Ljepava et al. 2013; Mehdizadeh, 2010; Moore & McElroy, 2012), Facebook and self-disclosure (Chen & Marcus, 2012; Kisekka, Bagchi-Sen & Rao, 2013), Facebook and addiction (Stieger et al., 2012; Hong et al., 2014) have been investigated.

According to the results of study conducted by Moody (2001), high levels of Internet use are associated with high levels of emotional loneliness and low levels of social loneliness (Moody, 2001). A similar situation applies to the use of SNSs as well. In this regard, although the use of Facebook drops peer-related loneliness down by making new friends in the short run, it results in increased peer-related loneliness over time (Teppers et al., 2014).

According to Morahan-Martina and Schumacher (2003) loneliness has been associated with increased Internet use. Lonely people may be drawn online because of the changed social interaction patterns online, the increased potential for companionship and as a way to modulate negative moods associated with loneliness (Morahan-Martina & Schumacher, 2003).

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Social networking sites may lead their users to be addicted. One of the most important psychological characteristics that increase the addiction is low self-esteem (Milosevic-Dordevic & Zezelj, 2014). According to Tazgnihi and Siedlecki (2013), there is a negative relationship between self-esteem and engagement with negative activities along with getting connected with others through Facebook (Tazghini and Siedlecki, 2013).

Along with benefits of social networking sites for their users, there are also some privacy problems caused by these online social technologies. Social networking sites are targeted by many groups since they store private information of hundreds of millions of people using these sites, therefore, these social sites work to make their privacy settings more powerful and strengthen their security tools (Qi & Edgar-Nevill, 2011). In this regard, social networking sites such as Facebook, Twitter and LinkedIn etc. limit privacy as part of their default settings and the users of these websites are able to edit their privacy options by going into settings (Qi & Edgar-Nevill, 2011). Facebook allows its users to hide some private information such as email address, phone number, marriage status, employment and birthdate from others (Qi & Edgar-Nevill, 2011).

Although social networking sites are spending many efforts to strengthen their privacy settings, there are some concerns arising associated with privacy of the information given by their users. These concerns form the basis of this study, in which the attitudes of university students toward Facebook use were investigated.

2. Methodology

In this study, convenience sampling method, one of the non-random sampling methods, was used. A questionnaire was applied on the students attended courses in the Department of Business Administration and the Department of Economics in the spring term of 2013-2014 academic years at Bilecik Şeyh Edebali University. The participation was voluntary and confidentiality was ensured. 789 of the responses have been evaluated. In the questionnaire form, students were asked to answer 21 questions, prepared by Kokoç and Çiçek (2011), about their attitudes toward Facebook use.

2.1. Analysis of Data

2.1.1. Demographic Characteristics

Demographic characteristics of the participants in the study are presented in Table 1. 69.58% of the students participated in the study were females, while 30.42% of them were males. 75% of the participants were in the range of 20-23 years old. 52.6% of the participants were juniors and seniors.

Table 1. Demographic Characteristics of the Participants Included in the Study

	n	%
Gender		
Female	549	69.58
Male	240	30.42
Age		
18	18	2.28
19	72	9.13
20	122	15.46
21	170	21.55
22	178	22.56
23	122	15.46
24-30	55	6.97
N/A	52	6.59
Year in School		
1th year (Freshman)	170	21.55
2nd year (Sophomore)	203	25.73
3rd year (Junior)	198	25.10
4th year (Senior)	217	27.50
N/A	1	0.13

2.1.2. Facebook Use of the Participants

Facebook membership status of the participants was asked and responses are given in Table 2.

Table 2. FacebookMembership Status of the Participants

	n	%
Facebook membership status		
I have an account (Active User)	696	88.21
I freeze my membership	64	8.11
I have not been a member before	16	2.03
I have no idea about Facebook	1	0.13
N/A	12	1.52

According to the results, 88.21% of the students are still active users of Facebook, whereas 16 students stated that they never become a member. 12 participants didn't answer this question.

Table 3. Facebook Use Characteristics of Participants

	n	%
Duration of membership of Facebook	29	4.17
Less than 1 year	91	13.07
1-3 year(s)	255	36.64
3-5 years	292	41.95
5 years or more	29	4.17
N/A		
How often do you use Facebook?	266	38.22
When I find the chance	139	19.97
4 times or more in a day	99	14.22

3 times in a day	110	15.80
Once in a day	49	7.04
Few times in a week	22	3.16
Once in a week	4	0.57
Few times in a month	5	0.72
Once in a month	1	0.14
Few times in a year	1	0.14
N/A		
How much time do you spend on Facebook per day?	189	27.16
Less than 30 minutes	238	34.20
30 Minutes - 1 hour	122	17.53
1-2 hour(s)	63	9.05
2-3 hours	83	11.93
3 hours or more	1	0.14
N/A		
How many friends do you have on your Facebook profile?	27	3.88
Less than 50 people	45	6.47
50-99 people	152	21.84
100-199 people	197	28.30
200-299 people	242	34.77
300 or more	33	4.74
N/A		

Those who are still active users were asked some questions regarding the use of Facebook. Their responses to these questions are presented in Table 3. It has been determined that most of the Facebook users (547 people, 78.6% of Facebook users) are a member to Facebook for at least 3 years. 266 people (38.22% of Facebook users) stated that they login to Facebook whenever they find a chance, whereas 139 people (19.97% of Facebook users) stated that they login to Facebook at least 4 times in a day. The majority of Facebook users (427 people) spend up to one hour per day on Facebook, while 83 people stated that they spend at least 3 hours on Facebook. The majority of Facebook users (439 people, 63.07% of Facebook users), who are still active users, stated that they have at least 200 friends on Facebook.

The mean and standard deviations for each answer given by participants to a five point Likert-type scale (1 = strongly disagree, ..., 5 = strongly agree) with 21 items are presented in Table 4. When items were put in an order based on their mean values, the items with the top three highest mean score are as follows: “I do not want to deal people that I do not know”, “I think Facebook causes addiction” and “Virus can be transmitted to my computer through applications on Facebook”. The last three items with the lowest mean values are determined as follows: “I think I can be misguided on Facebook without my will”, “I think my Facebook membership could negatively affect future business opportunities” and “I do not like technology-based communication”.

Table 4. Attitude toward Facebook Use

	Mean	St. Dev.
1) I think Facebook is a waste of time.	3.313	1.168
2) I have concerns about the security of my personal information on Facebook.	3.400	1.144
3) I do not like technology-based communication.	2.418	1.106
4) I think Facebook causes addiction.	3.718	1.238
5) I think Facebook damages the social skills.	3.441	1.250
6) I think using Facebook is unnecessary.	2.862	1.186
7) Virus can be transmitted to my computer through applications on Facebook.	3.698	1.116
8) I think Facebook negatively affect the academic achievement.	3.056	1.166
9) I think Facebook eliminates the privacy (security) of personal information.	3.351	1.148
10) I am uncomfortable with my private life brought out.	3.175	1.225
11) I am influenced by the negative news about Facebook.	2.876	1.204
12) There is no reason for me to use Facebook.	2.804	1.230
13) I do not want to deal people that I do not know.	3.778	1.158
14) I think my Facebook membership could negatively affect future business opportunities.	2.540	1.150
15) I do not want other people to see my private information.	3.661	1.119
16) I believe that Facebook is not a good channel to make a new friend.	3.231	1.261
17) I think I can be misguided on Facebook against my will.	2.803	1.199
18) I think Facebook weakens the relationships that I have established with my friends in the real life.	3.017	1.285
19) I do not find relationships realistic on Facebook.	3.631	1.176
20) I do not find Facebook useful.	3.129	1.134
21) I do not want to interact with too many people.	3.090	1.192

T-test was performed in order to determine whether there is a statistically significant difference between attitudes of Facebook users and Non Facebook users toward Facebook use. T-test results are presented in Table 5. Based on the results, Facebook users have more positive attitudes toward Facebook use compared to those who don't use Facebook, as expected.

Table 5. Attitudes of Facebook Users and Non Facebook Users toward Facebook Use

	Non Facebook User		Facebook User		
	Mean	St. Dev.	Mean	St. Dev.	p
1) I think Facebook is a waste of time.	4.41	0.74	3.17	1.14	0.000**
2) I have concerns about the security of my personal information on Facebook.	4.04	1.03	3.31	1.13	0.000**
3) I do not like technology-based communication.	2.97	1.30	2.35	1.06	0.000**
4) I think Facebook causes addiction.	4.29	0.93	3.64	1.25	0.000**
5) I think Facebook damages the social skills.	4.10	1.09	3.35	1.24	0.000**
6) I think using Facebook is unnecessary.	4.19	0.98	2.69	1.10	0.000**
7) Virus can be transmitted to my computer through applications on Facebook.	3.92	0.96	3.67	1.13	0.000**
8) I think Facebook negatively affect the academic achievement.	3.53	1.18	2.99	1.15	0.000**
9) I think Facebook eliminates the privacy (security) of personal information.	4.12	0.90	3.25	1.14	0.000**
10) I am uncomfortable with my private life brought out.	4.20	0.10	3.04	1.19	0.000**
11) I am influenced by the negative news about Facebook.	3.11	1.35	2.85	1.18	0.077*
12) There is no reason for me to use Facebook.	4.16	0.95	2.62	1.15	0.000**
13) I do not want to deal people that I do not know.	4.13	1.02	3.73	1.17	0.001**
14) I think my Facebook membership could negatively affect future business opportunities.	3.17	1.27	2.46	1.11	0.000**
15) I do not want other people to see my private information.	4.17	0.90	3.59	1.13	0.000**
16) I believe that Facebook is not a good channel to make a new friend.	3.97	1.11	3.13	1.25	0.000**
17) I think I can be misguided on Facebook against my will.	3.34	1.30	2.73	1.17	0.000**
18) I think Facebook weakens the relationships that I have established with my friends in the real life.	3.82	1.18	2.91	1.26	0.000**
19) I do not find relationships realistic on Facebook.	4.17	0.97	3.56	1.18	0.000**
20) I do not find Facebook useful.	4.19	0.99	2.99	1.08	0.000**
21) I do not want to interact with too many people.	3.60	1.24	3.02	1.17	0.000**

**: $p<0.05$, *: $p<0.1$

Table 6. Attitudes of Female and Male Participants toward Facebook Use

	Female		Male		
	Mean	St. Dev.	Mean	St. Dev.	p
1) I think Facebook is a waste of time.	3.29	1.15	3.38	1.22	0.320
2) I have concerns about the security of my personal information on Facebook.	3.38	1.12	3.45	1.20	0.430
3) I do not like technology-based communication.	2.42	1.06	2.42	1.21	0.937
4) I think Facebook causes addiction.	3.80	1.19	3.53	1.33	0.010**
5) I think Facebook damages the social skills.	3.42	1.23	3.50	1.29	0.403
6) I think using Facebook is unnecessary.	2.83	1.15	2.94	1.27	0.236
7) Virus can be transmitted to my computer through applications on Facebook.	3.67	1.09	3.77	1.18	0.259

8) I think Facebook negatively affect the academic achievement.	3.04	1.14	3.10	1.22	0.521
9) I think Facebook eliminates the privacy (security) of personal information.	3.33	1.14	3.39	1.18	0.524
10) I am uncomfortable with my private life brought out.	3.14	1.18	3.26	1.32	0.198
11) I am influenced by the negative news about Facebook.	2.99	1.17	2.62	1.24	0.000**
12) There is no reason for me to use Facebook.	2.78	1.19	2.85	1.33	0.478
13) I do not want to deal people that I do not know.	3.97	1.06	3.34	1.26	0.000**
14) I think my Facebook membership could negatively affect future business opportunities.	2.53	1.10	2.56	1.27	0.729
15) I do not want other people to see my private information.	3.74	1.07	3.48	1.20	0.004**
16) I believe that Facebook is not a good channel to make a new friend.	3.27	1.25	3.14	1.27	0.200
17) I think I can be misguided on Facebook against my will.	2.76	1.13	2.91	1.34	0.129
18) I think Facebook weakens the relationships that I have established with my friends in the real life.	2.99	1.26	3.07	1.34	0.468
19) I do not find relationships realistic on Facebook.	3.67	1.14	3.55	1.25	0.206
20) I do not find Facebook useful.	3.14	1.12	3.11	1.17	0.690
21) I do not want to interact with too many people.	3.13	1.16	3.01	1.26	0.210

**: $p<0.05$

T-test was performed in order to determine whether there is a statistically significant difference between attitudes of male and female students toward Facebook use. T-test results are presented in Table 6. Although there is no significant difference found between male and female students' attitudes in general, we have determined statistically significant differences in four items ("I think Facebook causes addiction", "I am influenced by the negative news about Facebook", "I do not want to deal people that I do not know" and "I do not want other people to see my private information"). For these four items, the attitudes of female students toward Facebook use are more negative than the attitudes of male students toward Facebook use.

3. Conclusions

This study was conducted with students in the Department of Business Administration and the Department of Economics at Bilecik Şeyh Edebali University. It has been determined that the majority of the students who participated in the study were active Facebook users, using Facebook intensively.

A statistically significant difference was found between attitudes of Facebook users and nonusers toward Facebook use. The students using Facebook have more positive attitudes toward Facebook use compared to those who don't use Facebook. There were four items, in which statistically significant difference was determined between male and female student, as follows: "I think Facebook causes addiction", "I am influenced by the negative news about Facebook", "I do not want to deal people that I do not know" and "I do not want other people to see my private information". Female students agree more on these items compared to male students.

Facebook is a social networking site, which becomes increasingly prevalent and widely used among young people, offering many advantages. However, the use of Facebook also brings some risks. This has been noticed by some young people and they have taken various precautions. Some of these precautions are reducing the time spent on Facebook or sometimes even deleting the account. Young people should be aware of the situations that may lead to ethical, social or legal consequences in the Internet, especially in the social networking sites. For this purpose, it would be quite useful to inform university students about using Facebook, consciously.

There are some limitations of our study. In this study, using the convenience sampling method is one of our limitations. Another limitation is conducting the study with students in the Department of Business Administration and the Department of Economics at Bilecik Şeyh Edebali University only. Therefore, the results obtained from this study cannot be generalized. In this study, the attitudes of university students toward Facebook use have been investigated. The future studies can be conducted with students of different universities and they can also investigate the effects of attitudes of students on their behaviors in addition to investigating the attitudes of Facebook users toward the use of Facebook.

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BUSINESS INITIATIVE FOR CREATING COMPETITIVE ADVANTAGE THROUGH INFORMATION TECHNOLOGY

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Abstract

To achieve economic and social development, as well as high standards of living should be paid special attention to the development of information society and spreading the use of information technology.

Countries around the world are moving from industrial economy to knowledge economy in which economic growth of a country is dependent on the ability to create, accumulate and disseminate knowledge. Computer and Internet are the catalyst for economic growth of knowledge by enabling people to codify knowledge in a digital form easily transmitted anywhere in the world.

Increasing the pressure of competition forces businesses to fight for new research, new products and new markets, these businesses can only afford having support from a quality information system. This support should enable higher quality solution for the governance of resources that businesses possess.

Contemporary Management is increasingly dependent on information technology, because without a perfect technology and available data, the software may not have adequate information to be managers in making decisions.

Keywords: *competitive advantage, management information system, business, database, competitive surroundings, decisions etc.*

1. Introduction

Information system is a dynamic field monitors changes, perhaps the most important driving force that is driven by the development of computers, is a system that works and has to do with the information,by Mustafa Muhamet (1995).

Through better organization of the MIS come by qualitative decision making at all levels of management from the high level to the lowest. As computer technology over the organization better and optimal database offers great opportunities to be able to serve for a quick and qualitative manipulation to raise the quality of preparation of decisions. So rapid development of information technology coupled with the development of telecommunications technology has streamline every area of life and human activity.

Current processes of business development in global scale clearly show that sustainable economic development in the time in which we live is derived from their ability to be innovative in business processes to gain competitive edge, to be involved in the management and Conditions success and prosperity in a much longer period of time. Computers are being used in all areas, it is especially expressed mostly in business. Those who learn to use this powerful tool to gain competitive advantage and provide information that you needed them for careers, successful business, regardless of the profit which field are oriented in finance, marketing, management or in any other field business, and for those who do not absorb this powerful tool will be far from the future.

The business itself changes all the time and with his growth and development of information needs to ask businesses will vary. At the same time computing systems have a need for support, growth, change and development.

BUSINESS INITIATIVE FOR CREATING COMPETITIVE ADVANTAGE THROUGH INFORMATION TECHNOLOGY

Many businesses began to realize that the information system is a tool with which to create advantage against competition. They used the information system to support management for planning and control to make operations more effective and efficient. However expression system using information as a competitive advantage is new, so the rapid development of information are managers creates opportunities to support their business decisions on a rational action that ensures business. This development has made the need to align business activities in relation to internal competition and external. The rapid development and competitive pressure compels businesses to fight for new markets, new products and new channels of distribution.

New technologies and their use allows to overcome borders between countries by promoting business cooperation between companies in different countries, because computer networks provide a 24 hour service by accepting and transferring customer requirements from one place to another with a very high speed. These nets at the same time enable enterprises to cooperate to achieve economy of volume. Many authors, especially in managerial literature agree that knowledge and technology are the main business resource and the basis for achieving

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competitive advantage for an enterprise (Dierkes et all, (2001); wedge, 2002, Strict, 2004). In the developed world companies that have the knowledge base are leaders in the industry.

It would not be exaggeration to say that the importance and role of ICT in economic growth and productivity growth trend in the first decade of the 21st century, they observed may suggest that ICT will be the navigator of economic growth in the the near future.

Economic growth means increasing the ability of goods, products and services of a country (Miles, 2001). The use of ICT also facilitates the production of goods in a short time with the help of computerized information systems, and services are fast and effective according to Miles (2001).

Today, the new model of the enterprise requires a new shape and form of business organization which made the economic value created in the business not only by the use of new technology but also of teamwork, where most of the value created stems immaterial factors: information and knowledge.

Computerization of the economy expressed by the level of use of computers in business activities and financial processes banking, marketing, etc., through the use of internet, web-pages possession, etc. Increased productivity and reduced costs in developed countries rely on computer manufacturing leadership in production robotization and computerization of administrative work (Muhamet Mustafa, 1995).

Therefore, with the right research and various scientists put out that ICT will become the assistant principal business activities in the modern world (Tapscoot we Casto, 1993; Mandel, 1994; Gill, 1996).

Information Technology is used as a strategic tool for companies to enhance their competitive advantages in a time when insecurity is growing (WR King, V. Grove, and EH Hufnagel, 1989). The idea that information technology can contribute to the optimization of enterprise resources, strengthen, enable and enhance business performance, is accepted and supported by many empirical studies (V. Seth and W.R. King, 1994),(Chan, S.L. Huff, D.W. Barclay, 1997), (A.M. Croteau and F. Bergeron,2001).

Advances in information technology are vital components of an honor for business success. ICT constantly being studied and used for more business is helping to expand and compete with competitors. Businesses are using ICT to improve the efficiency and effectiveness of business processes and decision support for group collaboration. A successful cases of companies that are using this technology are: American Airlines and Baxter Company that created an entirely new business and competitive advantage precisely because the use of this technology.

Authors Leonard-Barton, 1988 consider that the implementation of new technology is a kind of innovation, and this implementation should be seen as a mutual adaptation of technology in the enterprise's internal organization, and the adaptation of new technology enterprise.

Today, many companies have realized the great effects that brings the application of new technology and how it can create the basis for sustainable growth and competitive advantage (Michael E. Porter and Victor E. Millar).

Since the business environment is constantly changing and evolving, the business itself changes all the time and with his growth and development of information needs to ask businesses will vary. At the same time computing system needs to support growing, changing and developing. (Vakola and Wilson 2004).

The findings of the authors mentioned above clearly indicate that businesses invest in computing technology, because they believe this technology will enable them to be more competitive (Ross A. Malaga, 2001).

Businesses usually have a need for the application of information technology to help the business to work with computerized processes that case comes to spending cuts, increased productivity and in this case also comes to higher sales and profit growth. Also, information technology helps companies enter a new market or spend the new branch. To create competitive difference condition seen by the authors (Robert Urwiler and Mark N. Frolick, 2008) are innovations in information technology because information technology is an integral part of organizational strategy and planning processes and not just opportunities.

Application of information technology should be based strategy (Moon-Koo Kim and Kyoung-yong Jee, 2007), which enables the company repositions the configuration of competition within the market, or to overcome the unfavorable competitive situations (Seth V. and WR King, 2004). Using information technology companies have the opportunity to improve the efficiency of their operations and performance in insurance and asset management, and enable them to enhance competitive advantages in certain areas, making competitive moves and consolidating resources and opportunities (V. Sethi and WR King, Chan, SL Huff, DW Barclay, and DC Copeland, 1994).

MANAGEMENT INFORMATION SYSTEM AND COMPETITIVE ADVANTAGE

By the mid 80's many companies began to use information technology as a tool to gain competitive advantage, to support management in planning and control, to make business operations more effective and efficient, and to change the structure of business activities.

Although the use of informatization expression to create new competitive advantage is, most enterprises have created a significant competitive advantage precisely through the use of information technology in order to increase competitiveness. Such

are eg American Airlines, United Airlines SABRE system, the Apollo system etc, by Hicks, Jr, O.James (2003). Information system is entirely related elements among themselves which operate together to the purpose of collecting, processing and distribution of information.

Author James O.Hicks (2003) defines information system as formalized system that collects, stores, processes and reports data from various sources to provide information needed to manage the process of making decisions. J.W.Wilkinson (1997) talking about computer operating systems mentioned five tasks or activities:

1. Data collection;
2. The processing of data;
3. Data Management;
4. Control and obtaining data and
5 Generation of information.

Through these activities by J.W.Wilkinson (1997) the data from various sources through a process called data processing is converted into information necessary for the user. While management information systems comprise components of his own physical hardware, software, databases, procedures and personnel.

An information system is formalized system where collected and sorted out by several processes, reports, data from various sources to provide information necessary and important to obtain important management decisions Although it is difficult to understand the strategic importance of information technology, can to say that this technology has transformed the nature of the products, business processes, companies, industry and competition. While most recent information technology managers have treated as a support service, each company has today understand the effects of things application of new technology and sustainable competitive advantages.

Authors Rackoff, Wiseman, and Ullrich have identified several factors that ensure computerization of competitive advantage for enterprises. They are:

- Modification, differentiation or changes that make the company stand out with its products and services or weaken competition and reduce the competitive advantages;
- Adapting and adjusting supply cutting costs, reducing consumer spending and increasing competition expenses;
- Company being introduced innovative products or services that result in changes in the way business is passed then in the industry;
- Improving growth and development by increasing volume, expanding geographically and being harmonized with suppliers and customers;
- Forms of mergers and alliances through various agreements in marketing etc.

Some other authors (Urwiller and Florick) noted that to create competitive difference as a result of computerization first condition are innovations in information technology, which today have become an integral part of organizational strategy and planning processes. Information Technology is not only possible, but is streamlined entity and the way to create competitive edge. To achieve competitive difference information technology and its use in business processes results in a new way of doing business (e-business) as well as providing products and services electronically.

One such service 24 hours / 7 days a week and enable computer networks by transferring customer requirements from time zone to another. These networks create preconditions that small firms collaborate without limitations of time and space. Therefore, it is not surprising that today the whole world is connected to the Internet and the Internet is the most powerful medium of modern communication.

INFORMATION TECHNOLOGY AND REENGINEERING OF BUSINESS PROCESSES

Using information and communication technology (ICT) contributes significantly to the growth and development, because it raises productivity and work efficiency by enabling creativity and stimulate innovation, and most importantly helps the penetration and the existence in global markets. ICT enables the participation of all stakeholders in the programs and projects regardless of their location and physical distance, if available and have access to the network infrastructure of ICT.

Enterprises are often motivated to apply IT in business processes, if it is necessary in internal business processes for better quality information or even the impact on competition. Business processes are a series of activities that transform inputs into outputs, goods, and services.

Enterprises are required to improve business processes to stay competitive in today's market. During the last 10-15 years, companies have been forced to improve their business processes, because we, as clients are demanding products and services better. And if we do not get what we want from a supplier, we have many to choose from other business competitors. Therefore, many companies begin the process of improving business performance with a continuous improvement model. This model made efforts to understand and measure the actual business process and its performance accordingly. This method for improving business processes is effective. However, during the last 10 years, several factors have accelerated the need to improve business processes with the most appropriate method. Internet technology and its use of which has rapidly increased competition, the opening of global markets and creating opportunities for free trade has extended enterprises make changes in performance and speed of introduction in the market with products and services.

Because the rate of change has reached everyone, few businesses can afford a slow process of change. An approach to rapid change and dramatic

improvement in business is definitely reengineering process of business process (Business Process Reengineering (BPR)),by (www.isixsigma.com, www.prosci.com). That is to say that in terms of the new economy to compete in global markets and in step with the achievements in IT, enterprises are forced to make reengineering of their business processes, aiming at improvements in business processes by increasing efficiency and effectiveness of the process business.

Rreengineering of business processes (BPR) is the process of redesigning the business process which means the business transformation or change management process, by (wikipedia.org/wiki/Business_process_ reengineering). Rreengineering is a radical reconstruction of business processes to achieve improvements in cost, quality, speed, and services. BPR combines a strategy for business innovation with a strategy to make major improvements in business processes so that a company is very strong competitive and successful in the market (Jimmy, W.2010).

CONCLUSION

Information Technology is used in business processes due to the pressure of competition and the need for companies to be more effective and efiqiente and building their competitive position. Great importance has also inter alia reaction time, decision to become more effective and profitable business. Information Technology is considered one of the assets which build prosperity and survival in the global economy because the value of information is too large.

Countries in the world are moving from the industrial economy to knowledge economy, and the growth of a country is dependent on the ability to create, accumulate and disseminate knowledge. Computer and internet are a catalyst for economic growth of knowledge by enabling people to codify knowledge in a digital form easily, and transmitted throughout the world.

Advancements in information technology are a vital component of success among business. ICT has been constantly studied and used because it helps many businesses to expand and compete with competitors. Using ICT to enhance the impact and effectiveness processes to support business decisions and cooperation in the group. A successful case is that companies use this technology are creating entirely new business and advantage.

So, competition is what pushes businesses to apply information technology in their business processes. Typically they create their business processes with an emphasis on internal and local efficiency. The problem becomes more acute when they decide to work with external partners. In this case, data systems and incompatible information technology make it difficult to harmonize all activities of production and distribution. Another area of concern is the lack of detailed documentation. Therefore to be competitive in the domestic and foreign businesses must meet the following basic conditions:

- To achieve the highest quality of products and services offered;
- Use modern technology and efficient;
- Introduce scheme more effective management and network working;
- The individual earned good skills and managerial staff;
- To have access, and easy access to comprehensive information involvement in the economic systems of new products and services etc.

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COLLABORATIVE E-PLATFORM FOR SUSTAINABLE ENTERPRISE INTEROPERABILITY

Adina-Georgeta CREȚAN*

Abstract

The pursuit for better competitiveness has driven companies to develop dedicated business areas to handle the seeking for new partnerships, with its inherent need for interoperation. Current Enterprise Interoperability is sensible to the entropy associated to external factors, making it easy to break loose. In order to accommodate the changes that are needed, constant periodic adaptations must be performed. If this adaption imposes new concepts that conflict with the existing ones, this may implicate loss of interoperability with other partners or a massive change on all partners. This paper proposes a collaborative platform to support negotiations of the interoperability entities towards interoperability of organisations acting in the same industrial market, using a model-driven, cloud-based infrastructure and services.

Keywords: *ePlatform, Sustainable Enterprise Interoperability, Negotiation, Services, Network Enterprises, SME, Virtual Enterprise.*

1. Introduction

Enterprises are developing business areas dedicated to the purpose of finding and complying with the best set of partners and suppliers for solutions that are aligned with the enterprise's strategy. In a world where new solutions, platforms, trends, standards and regulations keep evolving, this task needs to be continuous, together with constant update of each enterprise's solutions, interfaces, methods and quality.

To be able to perform, enterprises need to exchange information, whether this exchange is internal (among departments of the enterprise), external (between the enterprise or part of it and an external party), or both. Enterprise Interoperability (EI) is thus defined as the ability of an enterprise to seamlessly exchange information in all the above cases, ensuring the understanding of the exchanged information in the same way by all the involved parties[1]. Large enterprises accomplish this by setting market standards and leading their supply chain to comply with these standards. Small and Medium Enterprises (SMEs) usually don't have the empowerment to do so, and are therefore more sensible to the oscillations of the environment that involves them, which leads them to the need to constantly change to interoperate with their surrounding ecosystem. Sustainable EI (SEI) is thus defined as the ability of maintaining and enduring interoperability along the enterprise systems and applications' life cycle. Achieving a SEI in this context requires a continuous maintenance and iterative effort to adapt to new conditions and partners, and a constant check of the status and maintaining existing interoperability[2].

Recent advances in the information technology have made possible the development of a new type of organization, the virtual organization. The concept of "Virtual Enterprise (VE)" or "Network of Enterprises" has emerged to identify the situation when several independent companies decided to collaborate and establish a virtual organization with the goal of increasing their profits. Camarinha-Matos[3] defines the concept of VE as follows: "A *Virtual Enterprise (VE)* is a temporary alliance of enterprises that come together to share skills and resources in order to better respond to business opportunities and whose cooperation is supported by computer networks".

Given this general context, the objective of the present paper is to develop a conceptual framework and the associated informational infrastructure that are necessary to facilitate the collaboration activities and, in particular, the negotiations among independent organizations that participate in a Network Enterprises.

The negotiation process was exemplified by scenarios tight together by a virtual alliance of the autonomous gas stations. Typically, these are competing companies. However, to satisfy the demands that go beyond the vicinity of a single gas station and to better accommodate the market requirements, they must enter in an alliance and must cooperate to achieve common tasks. The manager of a gas station wants to have a complete decision-making power over the administration of his contracts, resources, budget and clients. At the same time, the manager attempts to cooperate with other gas stations to accomplish the global task at hand only through a

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[1] M.-S. Li, R. Cabral, G. Doumeingts, and K. Popplewell, "Enterprise Interoperability Research Roadmap," no. July. European Commision - CORDIS, p. 45, 2006.

[2] R. Jardim-Goncalves, A. Grilo, C. Agostinho, F. Lampathaki, and Y. Charalabidis, "Systematisation of Interoperability Body of Knowledge: the foundation for Enterprise Interoperability as a science," Enterprise Information Systems, vol. 6, no. 3, pp. 1-26, 2012.

[3] Camarinha-Matos L.M. and Afsarmanesh H.,(2004), *Collaborative Networked Organizations,* Kluwer Academic Publisher Boston

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.

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[4].

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.

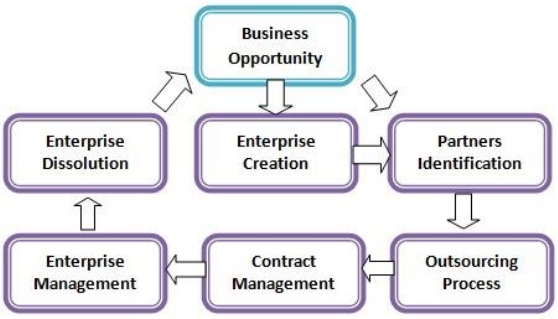
We are starting with a presentation in Section 2 of a VE life cycle model. In Section 3 we emphasize the importance of the Service-Oriented Architectures (SOA). Then, we are briefly describing in Section 4 the architecture of the collaboration system in which the interactions take place[5].

The main objective of this paper is to propose a collaboration framework in a dynamical system with autonomous organizations. In Section 5 we define the Coordination Components that manage different negotiations which may take place simultaneously. In Sections 6 and 7 we present the model of the negotiation process that can be used by describing a particular case of negotiation, and the negotiation algorithm. Section 8 describes the Infrastructure for Sustainable Interoperability and, finally, Section 9 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:

Figure 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 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

[4] 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

[5] 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

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. Services over Cloud-based Systems

In the last decade, Service-Oriented Architectures have contributed to an extraordinary improvement towards interoperability. Web Services have reshaped the existing concepts of solution deployment and provisioning, and paved the way for other important concepts using the same paradigm, like functional discovery and subscription in common repositories, orchestration and composition of services into more complex ones (Papazoglou et al, 2008).

More recently, another important concept is rocking the standards and reshaping the face of the digital world. Cloud-based solutions or Cloud Computing is not actually a new concept or major breakthrough in terms of technology but rather a business concept towards the idea of distributed computing existing for ages. Cloud-based solutions may be roughly split into the concepts of on-demand storage and server availability (Infrastructure as a Service or IaaS), on-demand platform integration (Platform as a Service or PaaS) and on-demand processing availability (Service as a Service or SaaS) (Bui et al, 2003); this concept also boosted interoperability, with a special favouring for SMEs (Jeffery et al, 2010). Solutions can now be developed in small, inexpensive proof-of-concepts, and if proven correct, rapidly be scaled into large solutions, reducing dramatically time-to-market and allowing companies to be able to plan peak workloads without the burden of keeping infrastructures on lower workloads thus enhancing agility and flexibility for businesses. Interoperability using services in a cloud-based environment ensures flexibility towards changes due to e.g. new requirements, semantic heterogeneity, thus contributes to sustainable interoperability.

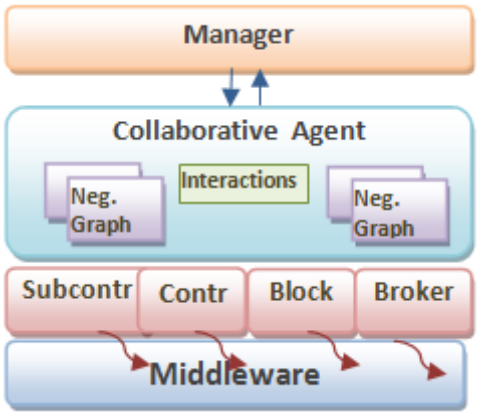
4. The Collaborative Infrastructure

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 2 shows the architecture of the collaborative system:

Figure 2. The architecture of the collaborative system



This infrastructure is structured in ***four*** main ***layers***: Manager, Collaborative Agent, Coordination Components and Middleware. A first layer is dedicated to the Manager of each organization of the alliance. A second layer is dedicated to the Collaborative Agent who assists its gas station manager at a global level (negotiations with different participants on different jobs) and at a specific level (negotiation on the same job with different participants) by coordinating itself with the Collaborative Agents of the other partners through the fourth layer, Middleware[6]. 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[7]. The initialization step allows

[6] 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

[7] Sycara K., *Problem restructuring in negotiation*, in Management Science, 37(10), 1991

to define what has to be negotiated (Negotiation Object) and how (Negotiation Framework)[8]. A selection of negotiation participants can be made using history on passed negotiation, available locally or provided by the negotiation infrastructure (Zhang and Lesser, 2002). In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints (Barbuceanu and Wai-Kau, 2003). The manager may participate in the definition and evolution of negotiation frameworks and objects (Keeny and Raiffa, 1976). Decisions are taken by the manager, assisted by his Collaborative Agent (Bui and Kowalczyk, 2003). For each negotiation, a Collaborative Agent manages one or more negotiation objects, one framework and the negotiation status. A manager can specify some global parameters: duration; maximum number of messages to be exchanged; maximum number of candidates to be considered in the negotiation and involved in the contract; tactics; protocols for the Collaborative Agent interactions with the manager and with the other Collaborative Agents (Faratin, 2000).

5. Coordination Components

In order to handle the complex types of negotiation scenarios, we propose different components[9]:

- *Subcontracting* (resp. *Contracting*) for subcontracting jobs by exchanging proposals among participants known from the beginning;
- *Block* component for assuring that a task is entirely subcontracted by the single partner;
- *Broker*: a component automating the process of selection of possible partners to start the negotiation;

These components are able to evaluate the received proposals and, further, if these are valid, the components will be able to reply with new proposals constructed based on their particular coordination constraints[10].

From our point of view the coordination problems managing the constraints between several negotiations can be divided into two distinct classes of components:

- Coordination components in closed environment**:** components that build their images on the negotiation in progress and manage the coordination constraints according to information extracted only from their current negotiation graph (*Subcontracting, Contracting, Block)*;

- Coordination components in opened environment: components that also build their images on the negotiation in progress but they manage the coordination constraints according to available information in data structures representing certain characteristics of other negotiations currently ongoing into the system (*Broker)*.

Following the descriptions of these components we can state that unlike the components in closed environment (*Subcontracting, Contracting, Block)* that manage the coordination constraints of a single negotiation at a time, the components in opened environment (*Broker)* allow the coordination of constraints among several different negotiations in parallel[11].

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 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.

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[8] Smith R., and Davis R., *Framework for cooperation in distributed problem solving*. IEEE Transactions on Systems, Man and Cybernetics, SMC-11, 1981.

[9] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., *A Framework for Sustainable Interoperability of Negotiation Processes.* In INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing, 2011

[10] Vercouter, L., *A distributed approach to design open multi-agent system*. In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), 2000

[11] Muller H., *Negotiation principles.* Foundations of Distributed Artificial Intelligence, 1996.

6. The Negotiation Coordination Model

This section proposes a formal model to settle and manage the coordination rules of one or more negotiations which can take place in parallel, by describing the basic concepts underlying the model, and the negotiation model using the metaphor of Interaction Abstract Machines (IAMs). The Program Formula is described to define the methods used to manage the parallel evolution of multiple negotiations.

Basic concepts

In this setup, at a local level, the model requires a formal description of the rules of coordination that manage the behavior of the agent in a negotiation; at a global level, the model must provide a global coordination of all negotiations of an agent.

The fundamentals of the negotiation model are given by the following basic concepts:

A *Negotiation Model* is defined as a quintuple M = <T, P, N, R, O> where:

- T denotes the *time of the system*, assumed to be discrete, linear, and uniform[12];
- P denotes the *set of participants* in the negotiation framework. The participants may be involved in one or many negotiations;
- N denotes the *set of negotiations* that take place within the negotiation framework;
- R denotes the *set of policies of coordination* of the negotiations that take place within the negotiation framework;
- O denotes the *common ontology* that consists of the set of definitions of the attributes that are used in a negotiation.

A *negotiation* is described at a time instance through a set of negotiation sequences.

Let Sq = {si | i $\in \mathbb{N}$} denote the set of *negotiation sequences*, such that $\forall$si ,sj $\in$ Sq, i $\neq$ j implies si $\neq$ sj. A *negotiation sequence* si $\in$ Sq such that si $\in$ N(t) is a succession of negotiation graphs that describe the negotiation N from the moment of its initiation and up to the time instance *t*. The negotiation graph created at a given time instance is an oriented graph in which the nodes describe the negotiation phases that are present at that time instance (i.e., the negotiation proposals sent up to that moment in terms of status and of attributes negotiated) and the edges express the precedence relationship between the negotiation phases.

The *negotiation phase* (*ph*) indicates a particular stage of the negotiation under consideration.

The *Status* is the possible state of a negotiation. This state takes one of the following values (*Status* $\in${*initiated, undefined, success, failure*}):

- initiated – the negotiation, described in a sequence, has just been initiated;
- undefined – the negotiation process for the sequence under consideration is ongoing;
- success – in the negotiation process, modeled through the sequence under consideration, an agreement has been reached;
- failure – the negotiation process, modeled through the sequence under consideration, resulted in a denial.

Issues is the set of attributes with associated values that describe the proposals made in a negotiation phase.

Snapshot is the set of combinations between a negotiation aspect (*Status*) and the information that is negotiated (*Issues*).

The functions *status* and *issues* return, respectively, the state (status) of a negotiation instance and the set of the attributes negotiated (issues) within a negotiation instance.

7. Negotiation Algorithm

In the proposed scenario, a conflict occurs in a network of enterprises, threatening to jeopardize the interoperability of the entire system. The first step consists in identifying the Enterprise Interoperability issue. The following steps refer to analyse the problem, evaluate possible solutions and select the optimal solution. The proposed solution for conflict resolution is reaching a mutual agreement through negotiation. The benefit of this approach is the possibility to reach a much more stable solution, unanimously accepted, in a shorter period of time.

The design and coordination of the negotiation process must take into consideration:

- Timing (the time for the negotiation process will be pre-set);
- The set of participants to the negotiation process (which can be involved simultaneous in one or more bilateral negotiations);
- The set of simultaneous negotiations on the same negotiation object, which must follow a set of coordination policies/ rules;
- The set of coordination policies established by a certain participant and focused on a series of bilateral negotiations[13];
- Strategy/decision algorithm responsible for proposals creation;
- The common ontology, consisting of a set of definitions of the attributes used in negotiation.

The negotiation process begins when one of the enterprises initiate a negotiation proposal towards another enterprise, on a chosen negotiation object. We name this enterprise the Initiating Enterprise (E1). This enterprise also selects the negotiation partners and sets the negotiation conditions (for example sets the timing for the negotiation) (Schumacher, 2001).

[12] Hurwitz, S.M., *Interoperable Infrastructures for Distributed Electronic Commerce.* 1998, http://www.atp.nist.gov/atp/98wpecc.htm

[13] Ossowski S., *Coordination in Artificial Agent Societies*. Social Structure and its Implications for Autonomus Problem-Solving Agents, No. 1202, LNAI, Springer Verlag, 1999.

The negotiation partners are represented by all enterprises on which the proposed change has an impact. We assume this information is available to E1 (if not, the first step would consist in a simple negotiation in which all enterprises are invited to participate at the negotiation of the identified solution. The enterprises which are impacted will accept the negotiation) (Kraus, 2001).

After the selection of invited enterprises (E2 … En), E1 starts bilateral negotiations with each guest enterprise by sending of a first proposal. For all these bilateral negotiations, E1 sets a series of coordination policies/rules (setting the conditions for the mechanism of creation and acceptance of proposals) and a negotiation object/framework (NO/NF), setting the limits of solutions acceptable for E1. Similarly, invited enterprises set their own series of coordination policies and a negotiation object/framework for the ongoing negotiation.

After the first offer sent by E1, each invited enterprise has the possibility to accept, reject or send a counter offer. On each offer sent, participating enterprises, from E1 to E2 ... En follow the same algorithm:

Algorithm: Pseudocode representation of the negotiation process

Inputs: Enterprises *E1...En; NO(Negotiation Object); NF(Negotiation Framework)*

Outputs: The possible state of a negotiation: *success, failure*

```
BEGIN
on receive start from E1{
    send initial offer to partner;
}
on receive offer from partner{
    evaluate offer;
    if(conditions set by the NO/NF are not met){
        offer is rejected;
        if(time allows it){
            send new offer to partner;
        }else{
            failure;
        }end if;
    }else{
        send offer to another partner;
    }end if;
    if(receive an accepted offer){
        if(offer is accepted in all bilateral negotiations){
            success;
        }else{
            if(time allows it){
                send new offer to partner;
            }else{
                failure;
            }end if;
        }end if;
    if(receive a rejected offer){
        if(offer is active in other bilateral negotiations){
            failure in all negotiations;
        }end if;
    }end if;
}
END
```

8. Infrastructure for Sustainable Interoperability

The framework that implements the underlying negotiation model shall rely on principles that allow interoperability to become reinforced, such as knowing as detailed as possible the interoperability model.

The first step is to model the basic foundations (services and infrastructure) of the framework in a MDA CIM which shall define the negotiation concepts (e.g. the IAM states), then transform it to a PIM (Grilo et al, 2006) to achieve a higher independence of external factors and to have a clear model of the negotiation partners' model; this PIM may afterwards be transformed for each negotiation partner into its platform-specific PSM set of services.

Another problem which is one of the most importantly blamed for loss of interoperability is about differences in other aspects e.g. business models, semantics, concepts, meanings and behavior. By using Model-Driven Interoperability (MDI), a CIM model shall be created consisting on shared understanding regarding concepts, business models, semantic reasoning, and related aspects of the negotiating parties (e.g. agreed term meanings, negotiation behaviours), which then is transformed into a corresponding PIM where semantic ontologies (Sarraipa et al, 2010) are defined, and furthermore, to each negotiation partner's specific PSM databases and services. This way, any interoperability change should be reflected in the corresponding model and thus be able to be assimilated by the other parties.

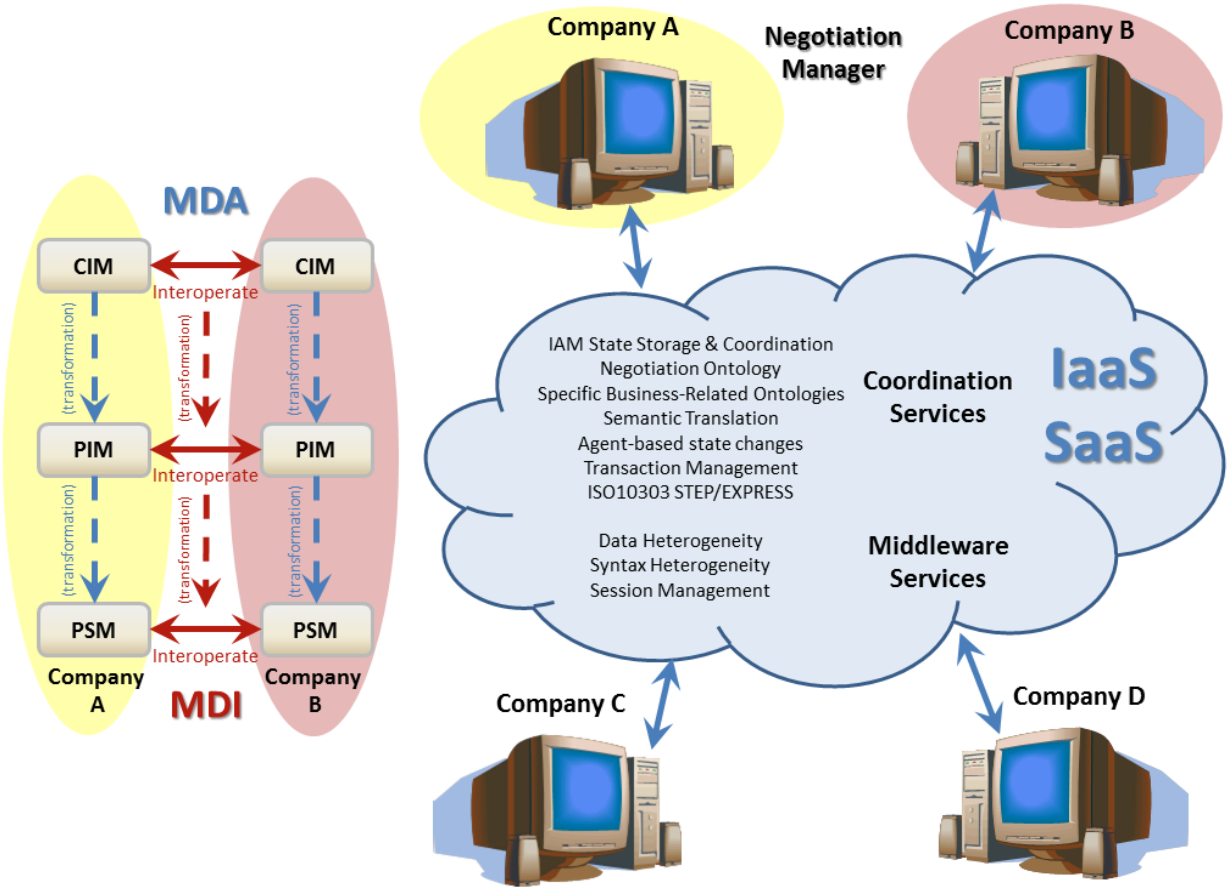
Regarding the information exchange, behaviour and other aspects of the interoperability itself, the negotiation framework shall be built using the popular, simple, flexible and robust Services and SOA (Papazoglou et al, 2008). In order to manage the issues regarding size and scalability, the SOA platform for the framework shall be implemented on top of a Cloud-based system (Jardim-Goncalves et al, 2010). The resulting infrastructure shall then be hosted by a SaaS business paradigm (Bui et al, 2003), ensuring the handling of all heterogeneity issues (e.g. communications, syntax, session, data) of the basic Middleware layer of the framework, on top of which a richer set of services (Coordination Services layer) shall be built. These services shall perform more complex activities like Transaction Management, the definition and management of the negotiation data model, storage and management of the negotiation data and business states which will implement the model rules.

The negotiation IAM states change accordingly to the defined logic; to implement this logic, the authors propose an agent-based environment where agents are programmed to be responsible in the monitoring and management of all changes in the environment that may lead to a state change.

Actually, data access, its models and data exchange can also be a problem for interoperability.

Negotiation parameters, Ontologies and other entities rely on data modeling, specification and consistency and therefore the best way to define the data models and the data exchange is to use a standard (Ciucu et al, 2013). In this case the selected solution is to model the data for databases and data access using the ISO10303 STEP (Jardim-Goncalves et al, 2006) and EXPRESS language specification. The database infrastructure itself, as well as the whole model-driven framework infrastructure shall also be implemented over Cloud, using an IaaS platform (Jeffery et al, 2010). Figure 3 shows the architecture of the Framework for Sustainable Interoperability.

Figure 3.The architecture of the Framework for Sustainable Interoperability



9. Conclusions

This paper proposes a collaborative e-platform for sustainable interoperability by modeling and managing of parallel and concurrent negotiations, which aims to open the market to broader discovery of opportunities and partnerships, to allow formalization and negotiation knowledge to be passed to future negotiations and to properly document negotiation decisions and responsibilities. The negotiation activities typically fail because they are often based on tacit knowledge and these activities are poorly described and modeled. Also as negotiations occur in a closed environment, many external potential interested parties are not aware of them and do not subscribe them. This makes negotiations reach poorer results or fail by disagreement or exhaustion. The integration of formal procedures for modeling, storing and documenting the negotiation activities allows an optimized analysis of the alternative solutions and by adding the analysis of lessons-learned on past activities leads to maximized negotiation results, stronger negotiation capabilities and relationships.

Currently, interoperability among the involved parties in a negotiation is often not reached or maintained due to failure in adapting to new requirements, parties or conditions. The use of an adaptive platform as proposed will result in a seamless, sustainable interoperability which favours its maintenance across time; the ability to reach and interoperate with more parties leads to more business opportunities and to stronger and healthier interactions.

The sequence of this research will comprise the completion of this negotiation framework with the contract management process and a possible renegotiation mechanism.

With respect to the framework middleware, future research shall include handling issues regarding the security and resilience of the stored negotiation data in the cloud, and managing privacy aspects as the negotiating parties should be able to seamlessly interoperate but still to maintain their data free from

prying eyes; also several issues need to be solved from non-disclosure of participating parties to secure access to the negotiation process.

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SOFTWARE SOLUTIONS FOR ARDL MODELS

Nicolae-Marius JULA*

Abstract

VAR type models can be used only for stationary time series. Causality analyses through econometric models need that series to have the same integrated order. Usually, when constraining the series to comply these restrictions (e.g. by differentiating), economic interpretation of the outcomes may become difficult.

Recent solution for mitigating these problems is the use of ARDL (autoregressive distributed lag) models. We present implementation in E-Views of these models and we test the impact of exchange rate on consumer price index.

Keywords: *ARDL models, Autoregressive distributed lag model, Cointegration, E-Views, software econometrics, economic policies, CPI.*

1. Introduction

ARDL is the achronim for "Autoregressive-Distributed Lag". Econometric analysis of long-run relations has been the effort of much theoretical and empirical research in different economic subjects. In the case where the variables of interest are trend stationary, the general run-through has been to extract the trend of the series and to model the de-trended series as stationary distributed lag or autoregressive distributed lag (ARDL) models.

The use of ARDL models has a long history, starting with distributed lag models form early '60 (Koyck, 1954), being adapted and constantly improved by economists (Almon, 1965; van Oest, 2004).

In today analyses, the use of computer software ease the simulation of different scenarious and the best solution can be found. The increasing datasets are analysed extensively using econometric software like E-Views.

We explain the use of E-Views for analyzing the relation between exchange rate EUR/RON and the CPI, expecting to find that the exchange rate influence the CPI.

2. Content (Times New Roman, Bold, 10, justify)

A standard ARDL regression model is:

$y_t = \beta_0 + \beta_1 y_{t-1} + ... + \beta_p y + \alpha_0 x_t + \alpha_1 x_{t-1} + \alpha_2 x_{t-2} + ... + \alpha_q x_{t-q} + \varepsilon_t$

Autoregression derives from the fact that explanatory variable is explained, partly, by lagged values of itself. The "distributed lag" component is because of the successive "lags" of the explanatory X variable. The standard notation for the above-mentioned model is ARDL(p,q).

The regular approach of this equations exclude the use of OLS (ordinary least squares) because the presence of lagged values suggest that the results would include biased estimators. Also, usually the autocorrelation in the disturbance term (ε_t) would result in inconsistent estimators, thus difficult to use the results.

When this model should be used? Is we suppose that we have a set of time-series variables and we need to represent the relationship between them, not ignoring the unit root and the cointegration.

If the series are I(0) – stationary, we can use basig OLS for estimation. If we know the order of integration for the series, and it is the same for all, but they are not cointegrated, we estimate each series independently. If the series are integrated of the same order and are cointegrated, the theory suggest that we estimate, according to Dave Giles "(i) An OLS regression model using the levels of the data. This will provide the long-run equilibrating relationship between the variables. (ii) An error-correction model (ECM), estimated by OLS. This model will represent the short-run dynamics of the relationship between the variables."

The problem is when just some of the variables may be stationary, some may be I(1) and there is a possibility of cointegration among the I(1) variables.

The stepts to analyse a model like this is presented by Dave Giles in "ARDL Bound test"

(http://davegiles.blogspot.ca/2013/03/ardl-models-part-i.html)

We want to observe if the exchange rate EUR/RON has an effect on CPI. From the theory, we expect that the CPI is influenced by the exchange rate. The analyzed data series present exactly the aspects we mentioned before, we do not know the exact cointegration between the 2.

We use the data from www.insse.ro and www.bnr.ro for CPI and average exghange rate. The series have 195 entries (from Jan.1999 to Jan. 2015).

First step is to test if the series are I(2). We use ADF and the results are that there are not I(2):

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Null Hypothesis: D(CURS,2) has a unit root
Exogenous: Constant
Lag Length: 5 (Automatic - based on SIC, maxlag=14)

		t-Statistic	Prob.*
Augmented Dickey-Fuller test statistic		-9.744308	0.0000
Test critical values:	1% level	-3.465780	
	5% level	-2.877012	
	10% level	-2.575097	

*MacKinnon (1996) one-sided p-values.

Augmented Dickey-Fuller Test Equation
Dependent Variable: D(CURS,3)
Method: Least Squares
Date: 03/22/15 Time: 19:02
Sample (adjusted): 9 193
Included observations: 185 after adjustments

Variable	Coefficient	Std. Error	t-Statistic	Prob.
D(CURS(-1),2)	-3.087796	0.316882	-9.744308	0.0000
D(CURS(-1),3)	1.571859	0.281034	5.593123	0.0000
D(CURS(-2),3)	1.173686	0.235507	4.983657	0.0000
D(CURS(-3),3)	0.776085	0.182806	4.245405	0.0000
D(CURS(-4),3)	0.507179	0.128429	3.949111	0.0001
D(CURS(-5),3)	0.228636	0.072163	3.168313	0.0018
C	-0.000551	0.004463	-0.123366	0.9020

R-squared	0.721042	Mean dependent var	-0.000260
Adjusted R-squared	0.711639	S.D. dependent var	0.113031
S.E. of regression	0.060697	Akaike info criterion	-2.728752
Sum squared resid	0.655768	Schwarz criterion	-2.606901
Log likelihood	259.4096	Hannan-Quinn criter.	-2.679369
F-statistic	76.68134	Durbin-Watson stat	2.049758
Prob(F-statistic)	0.000000		

Eviews output, author's calculations

Also, the KPSS test indicates that the series are not level 2 stationary:

Null Hypothesis: D(CURS,2) is stationary
Exogenous: Constant
Bandwidth: 37 (Newey-West automatic) using Bartlett kernel

		LM-Stat.
Kwiatkowski-Phillips-Schmidt-Shin test statistic		0.109348
Asymptotic critical values*:	1% level	0.739000
	5% level	0.463000
	10% level	0.347000

*Kwiatkowski-Phillips-Schmidt-Shin (1992, Table 1)	
Residual variance (no correction)	0.004747
HAC corrected variance (Bartlett kernel)	0.000210

KPSS Test Equation
Dependent Variable: D(CURS,2)
Method: Least Squares
Date: 03/22/15 Time: 19:04
Sample (adjusted): 3 193
Included observations: 191 after adjustments

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	-0.000147	0.004998	-0.029472	0.9765

R-squared	0.000000	Mean dependent var	-0.000147
Adjusted R-squared	0.000000	S.D. dependent var	0.069076
S.E. of regression	0.069076	Akaike info criterion	-2.501997
Sum squared resid	0.906584	Schwarz criterion	-2.484969
Log likelihood	239.9407	Hannan-Quinn criter.	-2.495100
Durbin-Watson stat	2.647966		

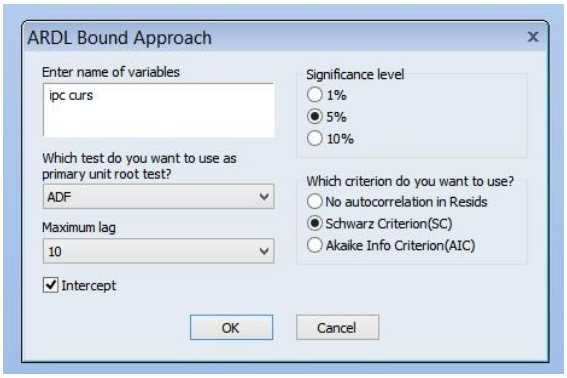
Eviews output, author's calculations

Both tests are passed, no I(2) integration rank for both series and both series are stationary.

Next step is to create a Error Correcting Model (ECM), like:

$$\Delta CPI_t = \beta_0 + \Sigma\beta_i \Delta CPI_{t-i} + \Sigma\gamma_j \Delta CURS_{t-j} + \theta_0 CPI_{t-1} + \theta_1 CURS_{t-1} + e_t$$

We use the ARDLbound add-in for EViews to estimate the ECM:



We select the dependant variable (IPC) and the explanatory variable (CURS), we select ADF for unit root test, we allow 10 maximum lags to be performed, at a 5% level of significance and Schwartz Criterion.

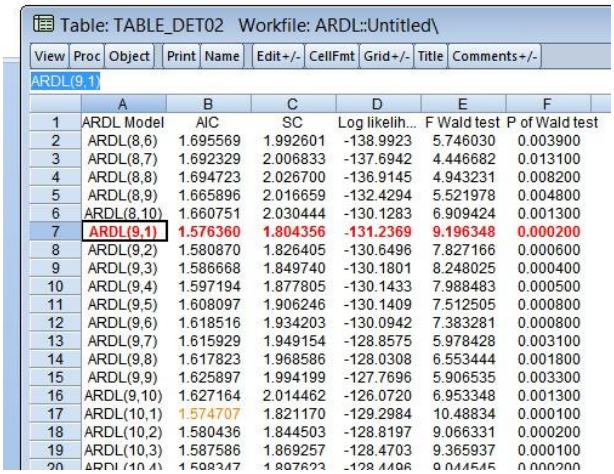


Table: TABLE_DET02 Workfile: ARDL::Untitled\

View | Proc | Object | Print | Name | Edit+/- | CellFmt | Grid+/- | Title | Comments+/-

ARDL(9,1)

	A	B	C	D	E	F
1	ARDL Model	AIC	SC	Log likelih...	F Wald test	P of Wald test
2	ARDL(8,6)	1.695569	1.992601	-138.9923	5.746030	0.003900
3	ARDL(8,7)	1.692329	2.006833	-137.6942	4.446682	0.013100
4	ARDL(8,8)	1.694723	2.026700	-136.9145	4.943231	0.008200
5	ARDL(8,9)	1.665896	2.016659	-132.4294	5.521978	0.004800
6	ARDL(8,10)	1.660751	2.030444	-130.1283	6.909424	0.001300
7	ARDL(9,1)	1.576360	1.804356	-131.2369	9.196348	0.000200
8	ARDL(9,2)	1.580870	1.826405	-130.6496	7.827166	0.000600
9	ARDL(9,3)	1.586668	1.849740	-130.1801	8.248025	0.000400
10	ARDL(9,4)	1.597194	1.877805	-130.1433	7.988483	0.000500
11	ARDL(9,5)	1.608097	1.906246	-130.1409	7.512505	0.000800
12	ARDL(9,6)	1.618516	1.934203	-130.0942	7.383281	0.000800
13	ARDL(9,7)	1.615929	1.949154	-128.8575	5.978428	0.003100
14	ARDL(9,8)	1.617823	1.968586	-128.0308	6.553444	0.001800
15	ARDL(9,9)	1.625897	1.994199	-127.7696	5.906535	0.003300
16	ARDL(9,10)	1.627164	2.014462	-126.0720	6.953348	0.001300
17	ARDL(10,1)	1.574707	1.821170	-129.2984	10.48834	0.000100
18	ARDL(10,2)	1.580436	1.844503	-128.8197	9.066331	0.000200
19	ARDL(10,3)	1.587586	1.869257	-128.4703	9.365937	0.000100
20	ARDL(10,4)	1.598347	1.897623	-128.4496	9.044545	0.000200

The result indicates an ARDL(9,1).

This means that the preffered model should be like:

Dependent Variable: D(IPC)
Method: Least Squares
Date: 03/19/15 Time: 16:39
Sample (adjusted): 11 193
Included observations: 183 after adjustments

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	36.03298	10.32689	3.489239	0.0006
D(IPC(-1))	-0.519534	0.108609	-4.783515	0.0000

D(IPC(-2))	-0.420500	0.113504	-3.704717	0.0003
D(IPC(-3))	-0.228819	0.114481	-1.998756	0.0472
D(IPC(-4))	-0.435719	0.107424	-4.056056	0.0001
D(IPC(-5))	-0.424513	0.100170	-4.237929	0.0000
D(IPC(-6))	-0.215106	0.091502	-2.350836	0.0199
D(IPC(-7))	-0.162366	0.086356	-1.880203	0.0618
D(IPC(-8))	-0.209656	0.075204	-2.787837	0.0059
D(IPC(-9))	-0.204095	0.061556	-3.315575	0.0011
D(CURS(-1))	1.284576	0.648895	1.979636	0.0494
IPC(-1)	-0.349305	0.098460	-3.547698	0.0005
CURS(-1)	-0.242985	0.118885	-2.043858	0.0425

R-squared	0.539363	Mean dependent var	-0.020601
Adjusted R-squared	0.506848	S.D. dependent var	0.732359
S.E. of regression	0.514298	Akaike info criterion	1.576360
Sum squared resid	44.96535	Schwarz criterion	1.804356
Log likelihood	-131.2369	Hannan-Quinn criter.	1.668778
F-statistic	16.58786	Durbin-Watson stat	2.022467
Prob(F-statistic)	0.000000		

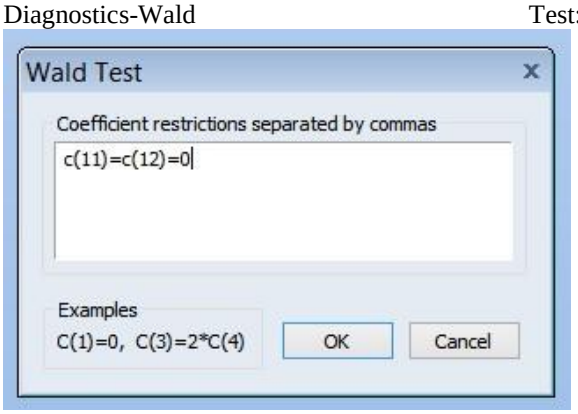
Eviews output, author's calculations

Next step implies to check if the errors are serially independent. We use from the Menu, View, Residual Diagnostics, Serial Correlation Lm Test:

For 1 lag included - probability: 0.43
For 2 lags included - probability: 0.73
For 3 lags included - probability: 0.18
For 4 lags included - probability: 0.25
For 5 lags included - probability: 0.37
For 6 lags included - probability: 0.11
For 7 lags included - probability: 0.17
For 8 lags included - probability: 0.21
For 9 lags included - probability: 0.28
So, there is no serial correlation.

Next, we test the bound itself. The test implies that coefficients for both variables to be not null.

The Wald test can be called: View-Coefficient Diagnostics-Wald Test:



And the output is:

Wald Test:
Equation: EQ02

Test Statistic	Value	df	Probability
F-statistic	7.155299	(2, 170)	0.0010
Chi-square	14.31060	2	0.0008

Null Hypothesis: C(11)=C(12)=0
Null Hypothesis Summary:

Normalized Restriction (= 0)	Value	Std. Err.
C(11)	1.284576	0.648895
C(12)	-0.349305	0.098460

Restrictions are linear in coefficients.
Eviews output, author's calculations

The values of D-statistics is 7.155, in the model there are (k+1)=2 variables and we search in the Bound Test tables of critical values, for k=1.

For interpretation, we use Giles suggestions, to use Table CI (iii) on p.300 of Pesaran et al. (2001). The model does not constrain the intercept, and there is no linear trend term included in the ECM.

The lower and upper limits for the F-test statistic at the 10%, 5%, and 1% significance levels are [4.04, 4.78], [4.94, 5.73], and [6.84, 7.84] respectively.

As the value of our F-statistic exceeds the upper bound at the 1% significance level, we can conclude that there is evidence of a long-run relationship between the two time-series (at this level of significance or greater).

In addition, the t-statistic on IPC(-1) is -3.5476. Using the Table CII (iii) on p.303 of Pesaran et al. (2001), we find that the I(0) and I(1) limits for the t-statistic at the 10%, 5%, and 1% significance levels are [-2.57, -2.91], [-2.86, -3.22], and [-3.43, -3.82] respectively. So, with a confidence exceeding 99%, this result reinforces our conclusion that there is a long-run relationship between CPI and exchange rate.

Using these results, we can conclude that the long-run relationship between EUR/RON exchange rate and the Consumer Price Index is 0.24985/0.349305=0.6956. So, on the long run, an increase with 1% in the exchange rate should lead to an increase of aprox. 0.7% in the CPI rate.

3. Conclusions

When analyzing the relationship between time-series variables, the researcher usually has to deal with situations like some of the variables are stationary, some may be I(1) and there is a possibility of cointegration among the I(1) variables. The solution is to use this ARDL approach, to find the bound between the variables and to identify the econometrically correct relationship.

In this particular situation, we found that the relation between exchange rate Eur/Ron and the CPI is: an increase with 1% in the exchange rate should lead to an increase of aprox. 0.7% in the CPI rate.

Further development of this research should include other explanatory variables and an interesting approach should be to test this correlation during electoral moments. If the estimators show a change during the pre-election periods, we may suspect a political intervention on macroeconomic variables.

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LINEAR REGRESSION WITH R AND HADOOP

Bogdan OANCEA*

Abstract

In this paper we present a way to solve the linear regression model with R and Hadoop using the Rhadoop library. We show how the linear regression model can be solved even for very large models that require special technologies. For storing the data we used Hadoop and for computation we used R. The interface between R and Hadoop is the open source library RHadoop. We present the main features of the Hadoop and R software systems and the way of interconnecting them. We then show how the least squares solution for the linear regression problem could be expressed in terms of map-reduce programming paradigm and how could be implemented using the Rhadoop library.

Keywords: *R, Hadoop, Rhadoop, big data, linear regression.*

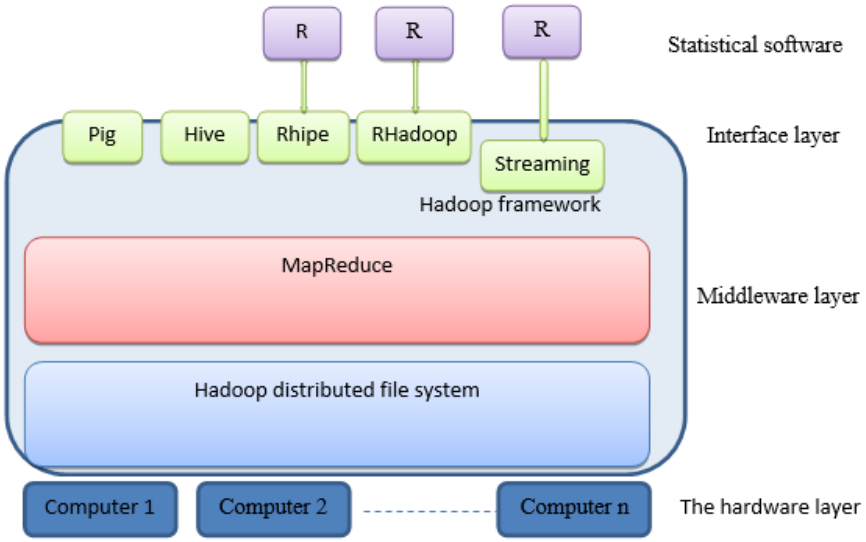
1. Introduction

Hadoop is an open source software whose main purpose is distributed processing of large data sets using computer clusters (White, 2012). Hadoop is developed in Java programming language and is a middleware platform that runs on a cluster of workstations. Applications using Hadoop platform can be developed in Java and in other languages such as R, Ruby or Python. Hadoop can be downloaded from http://hadoop.apache.org. The Hadoop platform users include companies like Yahoo! (Network 2014) or Facebook (Vagata and Wilfong, 2014). Hadoop system consists essentially of:

- Hadoop Distributed File System (HDFS) - a high performance distributed file system;
- Hadoop YARN - a subsystem whose role is scheduling jobs and computer cluster resource management;
- Hadoop Map-Reduce - a system of parallel processing for very large data sets that implements the distributed Map Reduce programming model (Dean, 2004).

Briefly described, Hadoop is a software system that provides its users with a highly reliable distributed file system and a system of analysis and data processing. Hadoop can be installed and run on both clusters with several computers or on clusters with thousands of computers, with a high fault tolerance degree. Currently, Hadoop is a de-facto standard in storing and processing large volumes of data and is used by all major actors in software industry. Hadoop system structure can be observed in Figure 1.

Figure 1. Hadoop and data analysis tools



HDFS file system is based on a client-server architecture. It is a file system with high tolerance to errors and is designed to be run on computers with limited resources. HDFS provides high speed data access, making it ideal for applications that work with large volumes of data, hundreds of GB or TB. HDFS

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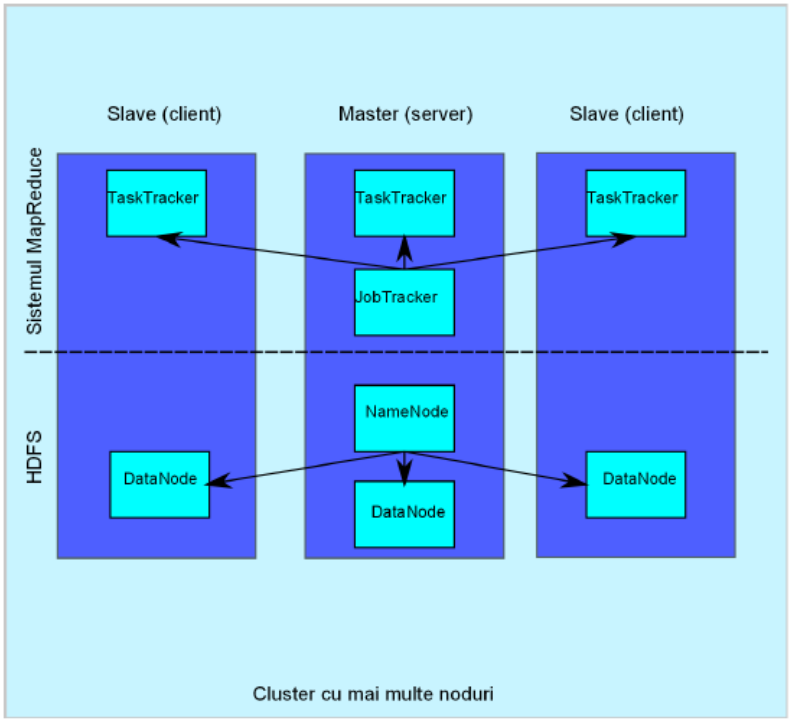
file system is a "append only" system i.e. a file that was created, populated with data and then closed cannot be changed afterwards. This feature simplifies the way to ensure consistency of data files. HDFS provides facilities for bringing processing applications where data is stored as it is more effective to migrate data processing instructions than data. This reduces the data traffic through the computer network interconnection applications thus increasing efficiency

HDFS has a node acting as a server, called NameNode that is run on a master server and one or more DataNode type nodes (acting as clients) managing data storage drives attached to these nodes (computers) from the network (Ryan, 2012). The NameNode aims to manage namespace of the HDFS file system and perform operations of opening, closing or rename files. Files that are saved by HDFS are divided into several blocks of data that are stored by one or more DataNode, responsible for carrying out effective operations of read / write data. Mapping data blocks on nodes is achieved by NameNode. Both NameNode and DataNode application are written in Java and can run on virtually any computer that supports Java.

Hardware fault tolerance is achieved by replicating data blocks on multiple computers. All files are divided into equal-sized data blocks that are then distributed to DataNode. A data block is copied to multiple nodes, so if a node can not operate because of a hardware failure, copies of data are available for other nodes in the network. Over the HDFS distributed file system runs a kernel that that implements the Map Reduce programming model. It consists in a process called JobTracker receiving from clients Map Reduce jobs and schedule them for execution. The JobTracker send processing (jobs) to processes running on the TaskTracker nodes in the computer cluster, trying to keep as close to the data processing that must be processed. If a TaskTracker process does not respond within a certain predetermined time or end with error JobTracker will reschedule the respective processing. Each TaskTracker process starts a Java virtual machine for each job in part to avoid the TaskTracker himself to finish its execution if the job to be executed will lead to termination of the Java virtual machine in case of error. JobTracker and TaskTracker communicate periodically for system status update. Hadoop system structure can be seen in Figure 2.

Figure 2. Software structure of the Hadoop system



R is a free software package for statistics and data visualization (R Core Team, 2013). It is available for several operating systems like UNIX, Windows and MacOS platforms and is the result of the work of many programmers from around the world. R contains facilities for data handling, provides high performance procedures for matrix computations, a large collection of tools for data analysis, graphical functions for data visualization and a straightforward programming language. R comes with about 25 standard packages and many more packages available for download through the CRAN family of Internet sites (http://CRAN.R-project.org). R is used as a computational platform for regular statistics production in many official statistics agencies (Todorov, 2010), (Todorov, 2012). Besides official statistics, it is used in many other sectors like finance, retail, manufacturing, academic research etc., making it a popular tool among statisticians and researchers.

2. Integration between R and Hadoop to process large volumes of data

There is now a large number of R packages or scripts for processing and data analysis. Their use with Hadoop normally would require rewriting them in Java, the natural language for Hadoop, but rewriting activity can lead to many errors. Therefore it is more effective to interface Hadoop ssytem with R so that we they can work with scripts written in R and stored data with Hadoop (Holmes, 2012). Another reason to build an interface between R and Hadoop is that R loads data into memory for processing which can be a serious limitation in terms of the volume of the data.

There are several approaches to integrate R and Hadoop: R and Streaming, Rhipe and RHadoop but in this paper we will present only RHadoop.

RHadoop is an open source project developed by Revolution Analytics (http://www.revolutionanalytics.com/) that provides a client-side integration between R and Hadoop. This allows running Map Reduce jobs within R and consists of a collection of several packages:

- plyrmr - provides plyr like processing functions for structured data type, having capabilities of handling large data sets stored with Hadoop;
- rmr - contains a collection of functions that provide Map Reduce model implementation in R;
- rdfs - is an interface between R and HDFS, providing file management operations in R for data stored in HDFS;
- rhbase - is an interface between R and Hbase, and provides management functions in R for Hbase databases;

RHadoop Installation is very simple, although it depends on other packages. In order to work with R and RHadoop one have to install all depending packages on each DataNode of the Hadoop cluster:

```
> install.packages("RJSONIO")
> install.packages("itertools")
> install.packages("digest")
> install.packages("rJava")
> install.packages("Rcpp")
> install.packages("functional")
> install.packages("reshape2")
> install.packages("plyr")
> install.packages("caTools")
```

rmr package has to be installed from the the archive that contains the source code:

```
>
install.packages("rmr2_3.1.1.tar.gz",repo=NULL,type
="source")
```

The other packages that make up RHadoop rdfs, plyrmr, rhbase, are installed in a similar way.

3. Solving a linear regression using RHadoop

We will illustrate a method of using R with Hadoop to estimate a linear regression model using ordinary least squares method. There are other ways to estimate linear regression models with R and Hadoop, it all depends on the problem to be solved and imagination of the analyst who solve the problem in terms of translating to Map Reduce paradigm which is typical Hadoop (Prajapati, 2013).

A linear regression model takes the following form:

$$y_i = \beta_1 x_{i1} + \cdots + \beta_p x_{ip} + \varepsilon_i = \mathbf{x}_i^{\mathrm{T}}\boldsymbol{\beta} + \varepsilon_i, \qquad i = 1, \ldots, n,$$

where y_i is the dependent variable and x_i a vector (of dimension p) of regressors that are taken into account (the explanatory variables are independent), and ranges from 1 to n. The n equations can be put in a matrix form:

$$\mathbf{y} = \begin{pmatrix} y_1 \\ y_2 \\ \vdots \\ y_n \end{pmatrix}, \quad \mathbf{X} = \begin{pmatrix} \mathbf{x}_1^{\mathrm{T}} \\ \mathbf{x}_2^{\mathrm{T}} \\ \vdots \\ \mathbf{x}_n^{\mathrm{T}} \end{pmatrix} = \begin{pmatrix} x_{11} & \cdots & x_{1p} \\ x_{21} & \cdots & x_{2p} \\ \vdots & \ddots & \vdots \\ x_{n1} & \cdots & x_{np} \end{pmatrix}, \quad \boldsymbol{\beta} = \begin{pmatrix} \beta_1 \\ \beta_2 \\ \vdots \\ \beta_p \end{pmatrix}, \quad \boldsymbol{\varepsilon} = \begin{pmatrix} \varepsilon_1 \\ \varepsilon_2 \\ \vdots \\ \varepsilon_n \end{pmatrix}.$$

Or, more simple, like that:

$\mathbf{y} = \mathbf{X}\boldsymbol{\beta} + \boldsymbol{\varepsilon}$,

where β vector is the vector of parameters to be estimated.

The ordinary least squares minimizes the sum of squared residues. The calculation formula for estimating vector β is Gujarati (1995) :

$$\hat{\boldsymbol{\beta}} = (\mathbf{X}^{\mathrm{T}}\mathbf{X})^{-1}\mathbf{X}^{\mathrm{T}}\mathbf{y} = \left(\tfrac{1}{n}\textstyle\sum \mathbf{x}_i\mathbf{x}_i^{\mathrm{T}}\right)^{-1}\left(\tfrac{1}{n}\textstyle\sum \mathbf{x}_i y_i\right).$$

We have to compute a matrix matrix product $X^T X$, than to compute the inverse of the result, $(X^T X)^{-1}$. Next we compute the matrix vector product $X^T y$ and this is multiplied by the intermediate result $(X^T X)^{-1}$. These computations are equivalent with solving a linear system of equations:

$X^T X \beta = X^T y$

where $X^T X$ is the matrix of the linear system, $X^T y$ is the free term and β is the unknown variable. Solving this system is equivalent to the following matrix operation:

$\beta = (X^T X)^{-1} X^T y$

In R there is a predefined function for such problems (solving linear systems):

solve(a, b, ...).

This function takes two parameters: the matrix of the system and free term. In our case we call this function like this:

solve($X^T X$, $X^T y$)

All you have to do is to calculate the transposed matrix X and multiply it by X, then y.

Imagine that we solve the a problem with 20,000 observations (n = 20000) and 15 independent variables

(x_i). In this case the matrix X will have dimensions (20000, 15) and y is the vector of size 20000. Assume that a matrix A (20000, 15) can not be stored in the memory of a single computer and the calculation of transposition and multiplication can't also be performed by a single computer. Instead, the call of :

solve(X^TX, X^Ty)

can be executed easily by one computer. Why? If we try to calculate the dimension of the matrix X^TX we see that we have made a product between two matrices of the following dimensions: (15, 20000) x (20000, 15) = (15, 15). That result is a matrix of size (15,15) and is perfectly feasible that this result will be stored and processed on a single computer. The size of the mltiplication X^Ty is (15, 20000) x (20000, 1) = (15,1). So, and it can be easily stored and processed on a single computer.

What we propose is to use Hadoop to store input data and to perform the two multiplications. The final call solve (X^TX, X^Ty) will be performed classically, on a single computer.

We define the matrix X with random values (following the normal distribution). The number of elements of the matrix is 20000 x 15 = 300,000

```
X <- matrix( rnorm(300000), ncol=15 )
```

We add a new column to the matrix X which will contain the values 1, 2, 3 ... 20000 (number of rows of the matrix X). We will see why we need this new column.

```
X1 <- cbind(1:nrow(X), X)
```

Cbind function performs a column concatenation of the two arguments. The result will be a matrix of size (20000, 16) where the first column contains the values 1, 2, 3, ... nrow (X).

We write the result in the HDFS distributed file system :

```
X1 <- to.dfs(X1)
```

We define now the vector y (the elements of y are all normally distributed random numbers):

```
y <- as.matrix( rnorm( 20000 ))
```

So far we have defined the input data. In a real application they come from files already stored in HDFS.

We define the first map-reduce job in order to calculate X^TX product. First we write first the function map:

```
mapper = function (., Xr) {
Xr = Xr[,-1]
#print(dim(Xr))
keyval(1, list(t(Xr) %*% Xr))
}
```

Here Xr [-1] means all rows and columns of the matrix Xr less column 1. If you remember, column 1 contains the values 1, 2, 3, ... nrow (X).

The map function receives as input data blocks consisting of whole rows of the matrix X. We note such blocks with Xr. If during execution one wants to see the Xr matrix dimmnesions uncomment the line

```
#print (dim (Xr)).
```

On the computer where we tested the script, mapper is called 3 times with the first 7810 rows of the matrix X1, then the next 7811 rows and finally the last 4379 lines.

In this case we are not interested in the key that the mapper receives. The operator %*% achieved multiplication of two matrices. This function will perform smaller submatrix products and will pass the results to the reduce function that will add them up. The function t(X) calculates the transposed of the matrix X. If you analyze the classical algorithm for multiplication of two matrices to calculate X^TX you will find tha onet can form smaller matrix (m rows of the original matrix, with m <n, where n is the total number rows) that you multiply and then assemble the partial results. Therefore, the reducer function will be responsible to collect the partial results issued by the mapper:

```
reducer = function(., Y) {
    keyval(1, list(Reduce('+', Y))
}
```

For details on the function *Reduce* typie help (Reduce) in an R console. This function is similar wtih its counterparts from the LISP language.

So we will have:

```
XtX <- values(
            from.dfs(
mapreduce(
input = X1,
map = mapper,
reduce = reducer,
combine = T
)
)
)[[1]]
```

The *mapreduce* function will write the result as a pair (key, value) in HDFS where it is accessed via from.dfs (...). Function values (...) extracts only the values of pairs (key, value).

We will compute X^Ty in a similar manner:

```
mapper2 = function (., Xr) {
    yr = y[Xr[,1],]
Xr = Xr[,-1]
keyval(1, list(t(Xr) %*% yr))
}
```

yr = y[Xr[,1],] retains from the vector y only the corresponding elements of the lines of matrix Xr. Hadoop will call the mapper with blocks of rows of the original matrix X and we need to select the same rows from y. For this we have introduced new column in X (see instructions X1 <- cbind (1: nrow (X), X)).

```
Xty <- values(
            from.dfs(
```

```
mapreduce(
input = X1,
map = mapper2,
reduce = reducer,
combine = T
)
)
)[[1]]
```

We used the parameter combine = T to combine all pairs (key, value) because mapper emits a single key (1).

Finally we call solve:

```
solve(XtX, Xty)
```

The whole R script tha solves the linear regression problem is given in figure 3.

Figure 3. An R script that solves the linear regresion model using Rhadoop

```
#!/usr/bin/Rscript
library(rmr2)
X <- matrix(rnorm(300000), ncol=15)
X1 <- cbind(1:nrow(X), X)
X1 <- to.dfs(X1)
y <- as.matrix(rnorm(20000))

mapper = function (., Xr) {
   Xr <- Xr[,-1]
   #print(dim(Xr))
   keyval(1, list(t(Xr) %*% Xr))
}

reducer = function(., A) {
   keyval(1, list(Reduce('+', A)))
}

mapper2 = function (., Xr) {
   yr <- y[Xr[,1],]
   Xr <- Xr[,-1]
   keyval(1, list(t(Xr) %*% yr))
}

XtX <- values(
   from.dfs(
    mapreduce(
       input = X1,
       map = mapper,
       reduce = reducer,
       combine = T
    )
   )
)[[1]]

Xty <- values(
   from.dfs(
    mapreduce(
       input = X1,
       map = mapper2,
       reduce = reducer,
       combine = T
    )
   )
)[[1]]

beta <- solve(XtX, Xty)
beta
```

4. Conclusions

One of the software tools successfully used for storage and processing of big data sets on clusters of commodity hardware is Hadoop that have become a de-facto standard in big data storage. On the other hand, R is currently used on a large scale for data processing. Interfacing Hadoop and R seems to be the future of big data processing. In this paper we showed how we can solve a linear regression probem using Hadoop and R for very large problems. The algorithm for solving the problem of linear regression has been transformed so that it can use the map-reduce programming model which is psecific to Hadoop.

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